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A PRICELESS INHERITANCE

Family Law, Open Justice and the Rule of Law.

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[1] All instances of bold emphasis have been applied by me.

A PRICELESS INHERITANCE

Family Law, Open Justice and the Rule of Law.

"The traditional law, that English justice must be administered openly in the face of all men, is an almost priceless inheritance" Earl Loreburn in *Scott v Scott* [1913] AC 417

PART I: INTRODUCTION

What does the **open administration of justice** entail? The great case of *Scott v Scott* establishes that it has two distinct aspects. First, subject to limited exceptions, it requires that proceedings are heard in open court to which the press and public are admitted. Second, it stipulates that normally both the press and the public can "publish"[2] anything said to or by the court during the hearing, including the court's judgment.

In this lecture I will trace the history of the development of the open justice principle up to *Scott v Scott* and its treatment thereafter.

I will look carefully at the exceptions to the principle. I will examine the power of the court to prohibit a party to the proceedings, and the world generally, from publishing, after the case is over, things said to or by the court during the hearing.

I will show that where no exception applies, details of proceedings heard in private, including the identities of the parties, witnesses, businesses, and properties, may be "published" (i.e. revealed to third parties including friends, relatives and journalists) without fear of contempt or criminal liability. The freedom of a litigant to speak about their case is an important aspect of the principle of open justice: *Griffiths v Tickle & Ors* [2021] EWCA Civ 1882 at [30] – [33] per Sharp PQBD).

I will look carefully at the development and treatment of the principle in family law proceedings, which under the Family Procedure Rules are generally to be heard "in private."

I will examine the scope of the power of the Family Procedure Rule Committee to make rules, and of the President of the Family Division to issue Practice Directions, modifying the present exceptions to the open justice principle.

I will ask whether the present practice in the Family Court of publishing anonymously almost all judgments in those cases which do not fall into one of the exceptions is lawful.

I will ask whether the present nationwide financial remedy "pilot scheme" providing for a strict reporting restriction order to be presumptively made in every case where a journalist attends, is lawful.

[2] "To publish" for these purposes means to reveal matters to third parties, including friends, relatives and journalists.

I hasten to express at the outset my huge gratitude to Sir James Munby for the assistance he has given me in preparing this speech. Errors and omissions are, naturally, my responsibility alone.

PART II: SOME HISTORY

Before the passage of that great reforming statute, the Matrimonial Causes Act 1857, family law cases fell to be decided in a variety of courts, all of which held their proceedings in the full glare of publicity.

The Ecclesiastical Court had primary jurisdiction over marriage. It heard nullity suits, suits for judicial separation, suits for restitution of conjugal rights, and suits for jactitation of marriage (a suit seeking an injunction of perpetual silence against a person who falsely claimed to be married to the petitioner). If a decree of separation was ordered alimony could be awarded.

But it could not order the dissolution of a marriage. That could only be achieved by a private Act of Parliament.

The procedure in such cases had its origin in pre-reformation canon law which in turn derived from Roman Law. The parties were required to engage specialist lawyers, known as proctors, licensed to practice in that court, who were members of the legal society known as Doctors' Commons (dissolved in 1865).

Evidence was given by deposition to commissioners and tested by interrogatories. There was no oral testimony. The hearing would then take place in public, where the proctors spoke for their clients. The judge would then deliver the sentence in open court and from 1752 would give his reasons orally.

Fletcher Moulton LJ in the Court of Appeal in *Scott* explained that there was no attempt to preserve ultimate secrecy in the ecclesiastical courts. The depositions were in the hands of both sides, and they were free to make what use of them they chose. The court dealt with evidence of a sensitive personal nature in a pragmatic way. It did not go behind closed doors. The report of the Gorell Royal Commission in 1912 explained that as all the evidence was in writing, the judge and the proctors would simply agree that those passages of a personal sensitive nature would not be read aloud during the hearing. Thus, Lord Shaw in *Scott* was satisfied that the Ecclesiastical Courts, from the moment when they sat to open the depositions of the witnesses, and throughout the whole course of the trial thereafter, were open Courts of the realm.

There were no "official" law reports. From the early days the reported decisions of the court were given fully, without any attempt of anonymisation. But from the mid-19th century some were anonymised at the behest of overly prudish law reporters: for example, *D - e v. A - g (falsely calling herself D - e)* (1845) 1 Rob Ecc 279, per Dr Lushington. The fully reported decisions do not spare any blushes: consider *Otway v. Otway* (1813) 2 Phillim 109 on alimony (Sir John Nicholl) and *Evans v Evans* (1790) 1 Hag Con 35 on cruelty (Sir William Scott, later Lord Stowell).

There was no policy of anonymisation.

Then there was what Lawrence Stone called "legal imperialism by the common law judges." Possessing what Lord Mansfield described in 1763 as the "superintendence of

offences *contra bonos mores*" the common law courts were active in inventing new causes of action to remedy what they saw as the impotence of the ecclesiastical courts. Foremost was the action known as Criminal Conversation (crim con) which emerged in the 1620s and saw vast sums of damages awarded in favour of husbands against men who committed adultery with their wives. Consider the crim con suit brought by George Norton against the prime minister Lord Melbourne in 1836, which in fact failed. These proceedings were heard in open court with no reporting restrictions whatever. The action was abolished in 1857 and replaced by a statutory measure to the same end, which was not abolished until 1970.

Other common law "marital" actions included suits for breach of promise to marry, satirised by Gilbert and Sullivan in Trial by Jury, which also survived until 1970, as did the suit for seduction of a daughter.

Proceedings in these actions were heard in open court subject to the full glare of publicity.

Finally, there were proceedings about children in wardship.

It is worth reflecting that prior to the Custody of Infants Act 1839 a married father's rights were absolute. In the infamous case of *de Manneville v de Manneville* (1804) 2 Ves. Jun. Supp. 201 the married father had actually forcibly plucked his tiny 11-month-old daughter from her mother's breast when she was feeding. Lord Eldon LC was "much struck" when the case came before him on a petition in wardship but had to find that it was within the father's rights to do so.

The 1839 Act allowed the judges in equity to grant the mother custody of children under 7 and access at any age.

So far as I can tell from my fairly extensive research those proceedings were heard openly, unless all parties agreed that they should be heard in the judge's room. And even that step would not necessarily prevent revelation of what had happened in the hearing: see the analysis of Kirby P in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 of Lord Eldon's treatment of the lunacy proceedings concerning Lord Portsmouth. I have not been able to discover when or why the practice, treated in *Scott* as axiomatic, of hearing such cases behind closed doors, took root.

So, prior to 1857, almost all family proceedings were heard openly, and cases about wards and lunatics apart, there were no restrictions on what a party could tell anybody about the proceedings.

The Matrimonial Causes Act 1857 abolished the jurisdiction of the ecclesiastical court and the action for crim con. It created judicial divorce. A new court was created: the Court for Divorce and Matrimonial Causes, headed by the Judge Ordinary – the first was Sir Cresswell Cresswell – with the power to dissolve a marriage on the ground of adultery (if the husband was petitioner) or aggravated adultery (if the wife was petitioner) (ss 27 and 31); to annul a marriage (s 2); to order restitution of conjugal rights (s 6, 17); to order a

judicial separation (ss 7 and 16); to determine a suit for jactitation of marriage (s 6); to award alimony (s 24); to settle property (s 45); to award damages against co-respondents for adultery (s 33); and to make orders for custody of children (s 35). To this list there was added in 1859 the power to vary nuptial settlements.

As for procedure, sec 22 provided that "In all Suits and Proceedings, **other than Proceedings to dissolve any Marriage,** the said Court shall proceed and act and give relief on principles and rules which "in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief."

The specific exclusion from the ambit of sec 22 of proceedings for dissolution of marriage reflected the fact that the ecclesiastical courts had had no jurisdiction to grant a divorce. So, sec 22 applied to proceedings for nullity, judicial separation and restitution of conjugal rights, all of which had been within their jurisdiction.

But the deposition/interrogatory procedure in the ecclesiastical court was not replicated in the new court. Instead, sec 46 provided that t**he witnesses in all proceedings before the Court shall be sworn and examined orally in open Court.** The parties could verify their cases by affidavit but were to be **subject to be cross-examined by or on behalf of the opposite Party orally in open Court.**

Further, sec 53 provided that the court could "make such rules and regulations concerning the practice and procedure under this act as it may from time to time consider expedient." During the passage of the Bill through Parliament it was proposed to amend what became sec 53 by adding the words "including any rules and regulations for enabling the said Court to hear any proceedings under this Act in private", but the amendment was rejected.

Sec 48 provided that the rules of evidence observed in the superior courts of common law at Westminster shall be applicable to and observed in the trial of all questions of fact in the court. Rule 33 of the Rules and Regulations made pursuant to sec 53 provided that "the hearing of the cause shall be conducted in court, and the counsel shall address the Court, subject to the same rules and regulations as now obtain in the courts of common law."

Thus, in divorce cases evidence in chief by a party had to be given orally in open court or by affidavit; and it was to be subjected to cross-examination in open court. All other evidence had to be given orally in open court. **There was no power to hear such evidence behind closed doors in any type of case**.

The Matrimonial Causes Act 1858 provided that the Judge Ordinary of the Court could sit in chambers and have and exercise the same power and jurisdiction in respect of the business to be brought before him as if sitting in open court.

During the passage of what became the Matrimonial Causes Act 1859 the House of Lords considered a clause proposed by the Judge Ordinary Sir Cresswell Cresswell that "the

Court, when for the sake of public decency it shall so think fit, may hold its sittings with closed doors." Although such a clause was passed, it was struck out of the Bill in the Commons, without a division. It will be recalled that a similar clause was rejected during the passage of the 1857 Bill.

It should therefore have been perfectly clear that whatever the cause of action, it had to be heard in open court. And a hearing in open court could be fully reported by anybody.

But backsliding began almost immediately. At least two cases were heard in private. In *H(C) v C* (1859) 1 Sw & Tr 605 (later identified as the marriage of *Fanny and George Castleden*) the full court considered a wife's suit for nullity on the ground of the husband's impotence.

Counsel for the wife asked that the evidence be heard in camera "in accordance with the practice of the Ecclesiastical Courts in similar cases." His application was refused, the court holding unanimously that it had no power to exclude the public during the hearing of a cause. Bramwell B gave a judgment which later underpinned the decision in *Scott:*

> "I also should have thought it perfectly clear that this being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its proceedings should be conducted in public"

The view of the full court was that the Court had no power to sit otherwise than with open doors.

That should have been the end of it. But it was not, and there commenced a sustained campaign to water down to oblivion the absolute rule of open justice for such cases. Thus in *M(H) v H* (1864) 3 Sw & Tr 517 Sir J Wilde JO (later Lord Penzance) heard a wife's petition for nullity on the ground of the husband's impotence and considered the evidence was of such an offensive character that he signified a desire that "for the future they should be tried *in camera,* and with the consent of counsel ordered that they should be so."

In *C v C* (1869) LR 1 P&D 640, the same judge held that suits for nullity of marriage, but not divorce, may be heard *in camera,* the Court following, he said, the practice of the ecclesiastical courts, which, he said, it is expressly empowered to do by [sec 22 of the 1857 Act]. He seems to have overlooked not only the lack of actual power of the ecclesiastical court to do so, but more importantly the imperative language of sec 46 forbidding such a course in all proceedings in the new court, and not merely in divorce cases.

In *A v A* (1875) LR 3 P&D 230 Sir James Hannen JO took the same line, ordering that a wife's suit for restitution of conjugal rights where her husband claimed a judicial separation, alleging that she had been guilty of cruelty in accusing him of "unnatural practices" should be heard in camera. In *D v D, D v D and G* [1903] P 144, Sir Francis Jeune P held:

> "In the present case I am prepared to … hold that this Court has power in suits for dissolution to hear the evidence in camera. If justice cannot properly be done by hearing a suit in public, the Court is justified and has power to hear it in camera. … Wherever it is reasonably clear that justice cannot be done unless the case is heard in camera – it may be a patent case or a matter in Chancery relating to a ward of court, or for the very reason that the investigation is practically impossible if the case is heard in public – then the Court, by reason of its inherent jurisdiction, has power to order that it be heard in private."

In *De Lisle v De Lisle* (1904) Times 15 March, on a wife's petition for divorce on the grounds of cruelty and adultery, Jeune P held that in his opinion it would be impossible that justice could be done, if the petitioner were examined on the points that had been opened, unless such examination took place in camera; he was therefore prepared to say that "her evidence should be so heard, and all persons who were not engaged in the suit must leave the Court."

The first edition of *Rayden on Divorce,* later to acquire canonical status in the field of divorce, was published in 1910. Its statement of the "practice and law" reflected these heresies. It said:

> "8 Power to sit in camera is inherited from the Ecclesiastical Courts which, however, so far as reported, appear to have only so acted in cases of nullity of marriage, for incapacity.
> 9 In cases where the ends of justice might be defeated, owing to the difficulty of obtaining the necessary evidence from witnesses in open Court, the Judges sometimes exercise their inherent jurisdiction, and exclude the public from the Court during the whole, or part, of the hearing.
> 10 Occasionally, when the details of the case are very unpleasant, the Judge clears the Court of women and children."

The absolute prohibition in sec 46 was thereby progressively watered down by the judges. Nullity petitions were routinely ordered by Registrars to be heard in camera. In *Lawrence v Ambery* (1891) 91 LT Jo 230 Sir Francis Jeune P held that publication by a party of things said when the court was sitting in a nullity case in camera was a contempt.

In1873 the Divorce Court was subsumed into the new High Court of Justice pursuant to the great reforms wrought by the Judicature Acts 1873 – 1875. Sec 76 of the 1873 Act provided that Acts relating to former courts whose jurisdiction was transferred to the new High Court were to be read as if they applied to the new Court. This included sec 46.

Sec 46 was unquestionably fully in force in 1913 on the hearing of the appeal to the House of Lords in *Scott*. It survived the repeal of various other sections of the 1857 Act by the Supreme Court of Judicature (Consolidation) Act 1925 but was included in Section 99(i)(f) and (g) of, and Schedule 1 to, that Act as a provision in respect of which later rules could vary or (surprisingly) repeal.

Rule 82 of the Matrimonial Causes Rules 1937 duly repealed sec 46[3].

Rule 25(1)provided that:

> "Subject to the provisions of the principal Act and this Rule, the witnesses at the trial or hearing of any matrimonial cause shall be examined viva voce and in open Court:
> Provided that a Judge may on application made to him
> (a) subject to the provisions of paragraph (2) of this Rule order that any particular facts to be specified in the order may be proved by affidavit;
> (b) order that the affidavit of any witness may be read at the trial or hearing on such conditions as the Judge may think reasonable;
> (c) order that evidence of any particular facts to be specified in the order shall be given at the trial or hearing by statement on oath of information and belief or by production of documents or entries in books or by copies of documents or entries or otherwise as the Judge may direct; and
> (d) order that not more than a specified number of expert witnesses may be called."

These rules do not allow a Judge to order a hearing to be held behind closed doors, although Lord Haldane's common law exception would have been available.

The current rules specify in relation to divorce, nullity and judicial separation proceedings that "the general rule is that a hearing to which this Part applies is to be in public": FPR 7.30(1).

FPR 22.2(1)(a) provides that the general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at the final hearing, by their oral evidence.

There is thus an unbroken thread in favour of open justice in divorce cases stretching from 1857 to the present day.

This takes us to *Scott* itself. A pithy summary of the proceedings was given in the Court of Appeal by Sir Herbert Cozens-Hardy MR:

> " This is an action instituted by a wife for a decree of nullity of marriage. The usual order was made that the cause should be heard in camera. It was so heard and a decree of nullity was granted. The wife and her solicitor obtained copies of the shorthand notes of all that took place at the hearing and sent copies so obtained to certain persons. A motion was made by the husband to commit them for contempt. Bargrave Deane J. held that they had been guilty of contempt, but accepted an apology from them. He made no other order than that they should pay the costs of the motion. From this order there is an appeal"

[3] The curiosity of a rule repealing part of a statute is presumably the reason why the Administration of Justice Act 1965, sec 34 and Schedule 2 put its demise beyond doubt by declaring it to be obsolete and that it shall "cease to have effect."

Bargarve Deane J had held:

> "It is gross contempt of Court for people to go spreading about the country particulars of that which is done in camera. It is gross contempt of Court to report anything heard in camera. It is the same even in regard to reporting summonses heard in chambers, or in Court as in chambers, which is, in effect, the same thing, unless by special leave of the judge."

That first appeal was dismissed in 1912 , but there was a powerful dissenting judgment by Fletcher Moulton LJ, later (in 1913) Lord Moulton) . He held that the language of the order provided only for privacy at the hearing. It had nothing to do with secrecy as to the facts of the case. He considered that the court did not have power to make the order in question. He cited *Nagle-Gillman v Christopher* [1876] 4 Ch D 173 where Sir George Jessel MR laid down that the Court had no power to hear cases in private even with the consent of the parties, except in cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action, or in those cases where the practice of the old Ecclesiastical Courts in this respect was continued. Fletcher Moulton LJ did not consider, for the reasons given above, that Sir George's third category was well-founded.

Thus, he was of the opinion that the only permissible derogations from the open justice principle were cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action.

The appeal to the House of Lords was allowed in 1913. The Law Lords expressly endorsed Fletcher Moulton LJ. The decision is arguably the most important family law decision ever given, because its principles are not confined to the family law silo. Rather, they apply universally to all cases in all fields whether they are heard in the court room or, for convenience, in the judges' chambers. Remarkably, *Scott v Scott* in the House of Lords has been cited in later House of Lords or Supreme Court cases 23 times.

A list of those cases is in Annex 1

Extracts from the opinions are set out in Annex II.

PART III: THE OPEN JUSTICE PRINCIPLE

The open justice principle has been recognised for centuries as one of the most important elements in our constitution. It is a core element of the Rule of Law.

In the second edition of the State Trials published in 1730, the editor Sollom Emlyn included an extensive preface in which he examined the state of English law. He remarked, "the Courts of justice [in Europe] are held in secret; with us publicly and in open view."

In the *Constitutional History of England* (1827) the historian Henry Hallam wrote:

> "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

In *Scott* itself Lord Shaw saw the principle as a constitutional rule "by which courts of justice must stand." In *Re F (A Minor) (Publication of Information)* [1977] Fam 58, CA, Scarman LJ regarded the principle as our counterpart to the First Amendment of the US Constitution. In *Re K (Infants)* [1965] AC 201, HL(E) Lord Devlin ranked it as having status equal to the rules of natural justice. In *R(C) v Justice Secretary* [2016] 1 WLR 44 Baroness Hale said that the principle is "one of the most precious in our law."

In *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, Kirby P traced the history of the practice of open justice in English Courts back to Anglo-Saxon times. In a characteristically erudite judgment he cited the record of the trial for high treason of the heroic Lieutenant-Colonel John Lilburne ((1649) 4 How St Tr 1269 at 1273) which contained Lilburne's protest:

> "That by the laws of this land all courts of justice always ought to be free and open for all sorts of ... people to see, behold and hear, and have free access unto; and no man whatsoever ought to be tried in holes or corners, or in any place, where the gates are shut and barred, and guarded with armed men: and yet, Sir, as I came in, I found the gates shut and guarded, which is contrary both to law and justice.

Kirby P records that the presiding judge, Richard Keble, Lord Commissioner, satisfied Lilburne that the doors stood open, by inference accepting that this was necessary. After a two-day trial, Lilburne (also known as "Freeborn John" whose works inspired the Bill of Rights and the rights in the US Constitution) was found not guilty.

Jeremy Bentham, writing in 1789 (An Introduction to the Principles of Morals and Legislation) famously explained why full unanonymised justice is so important. He maintained:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice."
>
> "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."
>
> "The security of securities is publicity."

In *Home Office v Harman* [1983] 1 AC 280 at 303 Lord Diplock described the second aphorism as a useful quotation which explained the general rule of open justice.

In *Scott* Lord Atkinson said:

> "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.2

In *Khuja v Times Newspapers Ltd* [2019] AC 161, SC(E) at [13] Lord Sumption observed:

> "The justification for the principle of open justice was given by Lord Atkinson in this passage, and has been repeated by many judges since, namely the value of public scrutiny as a guarantor of the quality of justice. This is also the rationale of the right to a public hearing protected by the European Convention on Human Rights. It is a "means whereby confidence in the courts can be maintained": *B and P v United Kingdom* [2001] 2 FLR 261, para 36. Its significance has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions."

Why it is not in the public interest for the protagonists to be anonymous.

In disputes about the application of the open justice principle to financial remedy proceedings the advocates in favour of confidentiality almost always ask rhetorically: "why is it in the public interest that the parties should be named?"

In *Gallagher v Gallagher* [2022] 1 WLR 4370 at [36] I suggested that this was the wrong question. The right one is: "why is it in the public interest that the parties should be not be named?"

Thus framed, it is hard to think of an answer that meets Bentham's imperative that anonymisation negates the publicity without which there is no justice.

In addition, there are two powerful reasons for naming names.

First, naming names should keep litigants straight, or at least straighter.

Second, it keeps the public interested in the judicial process, which is essential in a democratic society.

The first reason has a number of beneficial sequelae. Publicity does not merely deter future wrong-doing. It allows wrong-doers to be called out and for the virtuous to be publicly vindicated. Naming names not only ensures that justice is done, but that it is seen to be done.

This argument was well-expressed by Sir John Bigham P (later Lord Mersey) in his evidence to the Royal Commission on Divorce and Matrimonial Causes chaired by Lord Gorell on 4 March 1910:

> "I have a very strong opinion that it would be undesirable to suppress the [newspaper] reports, and I say so because of the anxiety that I know exists amongst the litigants themselves to keep the cases out of the paper. That very anxiety convinces me that the fear of publicity helps to keep people straight, and I would not take the fear of publicity away from them."

Jeremy Bentham had earlier put it this way in 1798:

> "Environed as [the witness] sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of detection, from whence the truth he is struggling to suppress may, through some unsuspected connexion, burst forth to his confusion"

The arguments in favour of naming names were very well put in the memoirs of Henry Edwin Fenn, a newspaper reporter who worked in the divorce court for decades in the latter part of the 19th and early part of the 20th centuries (*Thirty-Five Years in the Divorce Court* (T Werner Laurie, 1910)):

> "Publicity is part and parcel of the system of English law. It is one of the chief deterrents to evil-doing; and one of the severest punishments that evil-doers have to face ...
>
> Nowadays we seem to be getting away rapidly from the principle, or, worse still, modifying the principle in the most invidious way by using alphabetical letters to conceal the identity of witnesses. The motives which govern the Courts in allowing names to be suppressed are always sympathetic. But sympathy requires to be exercised with great circumspection when the interests of justice are at stake.
>
> The custom is a direct incentive to the evil-doer to embrace temptation and let severity take the consequences.

> There are instances in which the Court grants an indulgence in regard to suppression of names, but there is no reason why it should degenerate into a common practice, especially in the Divorce Court where one might not like it to take root. The practice, if extended, tends to deprive testimony of the great incentive to truth — publicity, and if one shamefaced witness may remain anonymous to the world, why not all?"

Public vindication

An ancillary advantage was identified by Justice Peter Applegarth AM in a speech given in Queensland on 24 May 2024. He explained that full open justice also benefits litigants to achieve public vindication. Consider Mrs Melissa Miller. Her tenacious campaign to receive a just settlement received full public vindication in the Court of Appeal (*Miller v Miller* [2006] 1 FLR 151), and in the House of Lords ([*Miller v Miller* [2006] 2 AC 618). Yet her victory at trial was hidden under an impenetrable cloak of anonymous secrecy: see *M v M (Short Marriage: Clean Break)* [2005] 2 FLR 533. The judgment bore a rubric which stated:

> "This judgment is being handed down in private on 5 April 2005. It consists of 73 paragraphs and has been signed and dated by the judge. The judge hereby gives leave for it to be reported and suggests that in that event it is cited as *M v M (Short Marriage: Clean Break)*. The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location."

In that judgment Mr Miller was found to have unfairly painted Mrs Miller as "a woman who threw herself enthusiastically into an idle lifestyle of shopping and self-indulgent social pursuits". In contrast Mrs Miller was found to have "performed diligently what she saw as her role as companion and homemaker" and that she did not seek to end the marriage nor did she give Mr Miller "any remotely sufficient reason for him to do so." Yet Mrs Miller was prevented by Singer J from telling her story and gaining public vindication. It is true that no-one asked for the case to be openly reported because back in 2005 it was very likely that any such application would have been refused. Had the open justice principle been correctly applied Mrs Miller would have received public vindication at first instance, to which she was surely entitled.

The second reason was memorably expressed by Lord Rodger in *Guardian News and Media Group* [2010] 2 AC 697 at [67] where he said: "What's in a name? "A lot", the press would answer."

In *Re PP (A Child)* [2023] EWHC 330 (Fam) I endeavoured to explain why at [54]:

> "The open justice principle exists so that the people can see how cases are conducted. Everyone knows that the core constitutional responsibility of the judiciary is to uphold and implement the rule of law. This requires the judiciary to try disputes in court fairly, justly and impartially, whether they are private law cases between individuals, or public law cases between individuals and the state.

> It is one of the main pillars supporting a functioning democracy. That pillar will collapse if the people cannot observe cases being tried, or cannot understand from the judgments how they have been tried. It is for this latter reason that Lord Devlin stated in his book The Judge (OUP 1979):
>
> "The judicial function is not just to render a decision. It is also to explain it ...in words which will carry the conviction of its rightness to the reasonable man".
>
> In order to do this a judgment has to tell a story which is readable, or at least not unreadable. Anonymising a judgment almost invariably destroys the quality of the story and renders it largely unreadable. Imagine trying to read an anonymised version of Great Expectations. You wouldn't get very far.
> ...
> I fully accept that sometimes anonymity is unavoidable, as it is in this case. As a result I would think that most reasonable readers would struggle to get through the first 24 paragraphs I have written above. But once all judgments are like that it can safely be said that a key constitutional function of the judiciary will have been sterilised."

An analogous issue arose in *R (Secretary of State for the Home Department & Anor) v IAB & Others* [2024] WLR 1916, where the government's disclosure in judicial review proceedings had redacted the names of junior civil servants. JUSTICE intervened in the proceedings and argued that this practice represented a new derogation from the open justice principle, unauthorised by statute. The Court of Appeal agreed. Bean LJ cited with approval the words of Fordham J in *R (Sneddon) v Secretary of State for Justice* [2023] EWHC 3303 (Admin) at [50], refusing an application to anonymise the identities of the civil servants named in a judgment:

> "I was unpersuaded that there is a legitimate reason to replace names with pretend names, job descriptions or letters... I have seen no reasoned consideration of its legitimacy. Well-being matters, for everyone in every decision-making. I have no evidence of what engendered an understanding and expectation; nor why civil servants are so different from others (in this case, prison psychiatrist and offender managers). I wrote my judgment giving a natural narrative. Naming people who are part of the story is benign. Open justice is promoted. There is no special treatment. Judges should not write a judgment asking: 'is there a necessity for giving this name?' The question has to be whether there is a necessity for protecting someone's identity."

Bean LJ concluded his judgment saying "the practice is inimical to open government and unsupported by authority. If Parliament takes the view that members of the Civil Service have a general right to anonymity in judicial review litigation then it should enact a primary statute to that effect."

Financial remedy proceedings are not uniquely personal

It is sometimes argued that anonymisation should be routinely ordered in financial remedy proceedings because they are uniquely personal and private. For example, in

para 12.34 of the Final Report of the Financial Remedies Sub-Group of the Transparency Implementation Group of April 2023 it is stated:

> "We have not been able to identify any … individual set of proceedings (and do not see specific examples of any in the various writings on the subject) which alone and in isolation from any other different proceedings, require in and of themselves, the same width and depth of information and details that are to be given in the same place at the same time, as in FR proceedings."

This led to the Sub-Group recommending at para 12.120 that there should be a "a starting point of general anonymisation of reporting."

This reasoning fails to recognise or give effect to Lord Atkinson's precept as mentioned above, which Lord Sumption has pointed out is the most common rationale given for rejecting an exception based on the distress that would be caused to a litigant by having the case heard in open court. But even if it had any traction the argument founders when consideration is given to the fact that any appeal is heard in the full glare of publicity. Moreover, it is not clear why other forms of litigation about intensely personal matters, such as alleged discrimination in the workplace, are not routinely heard in private. As Mr Justice Holman said in *Luckwell v Limata* [2014] EWHC 502 (Fam) at [5]:

> "It is curious, to say the least, that precisely the same financial case may be conducted under full public gaze on appeal and yet in private at first instance. It is true that it is normally only at first instance that witnesses have to give oral evidence, but as witnesses have to give evidence publicly in most other situations, including often in intimate detail as to their sexual lives or their financial affairs, it is not obvious why they should be treated with greater protection in a financial remedy case."

It should not be forgotten that in *Scott* itself the subject matter could not have been more excruciatingly personal and private – whether the husband was incapable of consummating the marriage. Yet, the order that the suit should be heard in camera was set aside by the House of Lords in 1913. It was not until 1935 that Parliament intervened to decree that such suits could be heard in camera.

Summary of reasons in favour of open justice

Lord Woolf in 1999 *R -v- Legal Aid Board, ex parte Kaim Todner (A Firm)* [1999] QB 966 summarised the reasons in favour of open justice pithily:

> "… it is …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."

Thus far and no farther

In *Re S* [2005] 1 AC 593 at [20] Lord Steyn stated with the concurrence of the rest of the Appellate Committee:

> "Given the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice."

This is of the utmost importance. Unless authorised by primary legislation, it is not lawful for the judiciary to analogise further exceptions to the principle.

PART IV: EXCEPTIONS

There are limited exceptions to the principle, categorised below. The juridical origin and context of an exception will determine its application to the specific facts. The mere fact that a matter has been heard "in chambers" or "in private" does not of itself give rise to an exception. For an exception to arise the facts must fall into one of the four categories below:

> **Exception 1:** a common-law almost-automatic exception where certain types of proceedings are almost invariably heard behind closed doors or anonymised;
> **Exception 2** a common-law discretionary exception where a court has an inherent power either to hold proceedings behind closed doors or to make an anonymity order, which the court has exercised.
> **Exception 3**: a statutory automatic exception where legislation requires certain types of proceedings to be heard behind closed doors or anonymised; and
> **Exception 4:** a statutory discretionary exception where in certain types of proceedings the legislature has given the court the power either to hold proceedings behind closed doors or to make an anonymity order, which the court has exercised;

Exception 1

This concerns the court's jurisdiction in what was traditionally described as wardship and lunacy, but which today would more appropriately be described as the court's jurisdiction over children and incapacitated or mentally unwell adults[4]. The House of Lords affirmed that the court would in such a case usually, but not invariably, exercise a common law power to hear the proceedings behind closed doors.

It will be a rare case nowadays concerning children that falls within Exception 1 but not Exception 3. Almost invariably proceedings concerning children will be listed to be heard in private pursuant to FPR 27.10, but which the press, as the eyes and ears of the public will be entitled to attend, pursuant to FPR 27.11.

An order is not necessary for such a case to be listed and heard in private.

Any report of the proceedings must be anonymised. Parties are permitted to "publish" details of the proceedings to advisers and others as listed in FPR PD 12G.

Time and space do not permit exposition of the Exceptions in cases falling under the Mental Capacity Act 2005, or under the Mental Health Act 1983

Exception 2

The Law Lords in *Scott* unanimously agreed that, away from wardship and lunacy, in any other type of proceedings there will be very rare situations where the court has the lawful inherent power either to order that the proceedings be held behind closed doors, or that

[4] Today this Exception applies to cases where the proceedings relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; are brought under the Children Act 1989 or the Adoption and Children Act 2002; otherwise relate wholly or mainly to the maintenance or upbringing of a minor; or are brought under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983.

the case be anonymised. But they were unanimous that the power did not extend to the sensitive personal nature of Mrs Scott's claim.

It is this Exception which is most commonly invoked. It is burdened by a substantial body of complex, and not always consistent, jurisprudence.

Viscount Haldane LC stated at 437 – 438:

> "...the chief object of Courts of justice must be to secure that justice is done ... But **unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties**. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. **But he must make out his case strictly, and bring it up to the standard which the underlying principle requires.** He may be able to shew that the evidence can be effectively brought before the Court in no other fashion. **He may even be able to establish that subsequent publication must be prohibited for a time or altogether.** But this further conclusion he will find more difficult in a matrimonial case than in the case of the secret process, where the objection to publication is not confined to the mere difficulty of giving testimony in open Court. In either case **he must satisfy the Court that by nothing short of the exclusion of the public can justice be done.** The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal Court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors."

It is from these pronouncements that the common law exception originated.

The Earl of Halsbury accepted that a limited exception of this nature existed but was concerned that the Lord Chancellor's language set the bounds too wide. He said at 442 – 443:

> "The difficulty I have in accepting this as a sufficient exposition of the law is that the words in which your Lordship has laid down the rule are of such wide application that individual judges may apply them in a way that, in my opinion, the law does not warrant.
>
> I am not venturing to criticize your Lordship's language, which, as your Lordship understands it, and as I venture to say I myself understand it, is probably enough to secure the observance of the rule of public hearing, but what I venture to point out is that it is not so definite in its application but that an individual judge might think that, in his view, the paramount object could not be attained without a secret hearing. Although I am very far from saying that such a case may not arise, I hesitate to accede to the width of the language, which, as I say, might be applied to what, in my view, would be an unlawful extension."

Earl Loreburn, in contrast, felt that the Lord Chancellor's test did not go far enough. He would formulate the test much more liberally. He said at 445-446:

> "Again, **the Court may be closed or cleared if such a precaution is necessary for the administration of justice**. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence by hearing the evidence of others. Or, to use the language of Fletcher Moulton L.J., in very exceptional cases, ..., where a judge finds that a portion of the trial is rendered impracticable by the presence of the public, he may exclude them so far as to enable the trial to proceed. It would be impossible to enumerate or anticipate all possible contingencies,...**in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.**"

We will see that Earl Loreburn's latter reason ("the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court") is in direct conflict with Lord Atkinson's reasoning ("the hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses..."). It has since been rejected by the High Court, which rejection has been recognised by Parliament.

Lord Atkinson's stance was that the power to hear a case behind closed doors should be restricted to a case which if heard openly would render property valueless or cause the destruction of the whole matter of dispute (see page 451).

Lord Shaw of Dunfermline was of a similar view at page 483. The only type of case where the court could exercise it inherent power to sit behind closed doors was:

> "where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention – trade secrets – is of the essence of the cause. ... [that] case – that of secret processes, inventions, documents, or the like -- depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the excuse of a report of proceedings in a Court of law, would be to destroy that very protection which the subject seeks at the Court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secret which the Court may judicially determine to be of patrimonial value and to maintain."

All the Law Lords accepted that an obvious example of Exception 2 would be the trial of an issue about a trade secret. If it were not held in camera the very subject-matter of the action, namely the secret, would be destroyed by publication. A trial about a trade secret is not an additional Exception but is the paradigm example of the type of case that would fall into Exception 2.

An example of this Exception is given in *R v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] QB 227, CA where a challenge was made to the Chief Registrar's orders effectively shutting down the society. The Court of Appeal accepted that were the proceedings making that challenge to be made public, the loss of public confidence in the society would be such that whether or not the orders were quashed, the society would be forced to close. Therefore, the exception applied, and the proceedings and the appeal were heard in camera.

In *Khuja v Times Newspapers Ltd* [2019] AC 161 Lord Sumption summarised the common law exception at [14] in these terms:

> "More generally, the courts have an inherent power to sit in private where it is necessary for the proper administration of justice: *Scott v Scott* [1913] AC 417. Traditionally, the power was exercised mainly in cases where open justice would have been no justice at all, for example because the dispute related to trade secrets or some other subject matter which would have been destroyed by a public hearing, or where the physical or other risks to a party or a witness might make it impossible for the proceedings to be held at all."

Exception 3
Occasionally the legislature has provided that certain types of proceedings must be heard behind closed doors or anonymised. In *Scott* the House of Lords identified the Punishment of Incest Act 1908 which required in sec 5 that proceedings under the Act were to be heard in camera. It was repealed in 1922. My research has not revealed the existence of any statute currently in force that requires the proceedings under that statute to be heard in camera.

At the present time it is a crime to publish anything that is likely to identify a child (including the child's address or school) as being involved in proceedings in the Family Court or the High Court under the Children Act 1989 or the Adoption and Children Act 2002 (see sec 97 of the 1989 Act) or in criminal proceedings in the youth court (see sec 49 of the Children and Young Persons Act 1933). The court has power to relax the prohibitions in both types of proceedings.

Therefore, any report of such proceedings must be anonymised.

There are other statutes which impose automatic reporting restrictions, for example in favour of those complaining of sexual offences under section 1 of the Sexual Offences (Amendment) Act 1992 .

Exception 4
There are a number of statutes where the Court has been given explicit power to hold proceedings behind closed doors or to make an anonymity order. The House of Lords identified the Children Act 1908. This provided in sec 114 that:

> "…in addition and without prejudice to any powers of the court may possess to hear proceedings in camera the court may, where a person who, in the opinion of

> the court, is a child or young person[5] is called as a witness in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality, direct that all or any persons, not being members or officers of the court or parties to the case, that counsel all solicitors, or persons otherwise directly concerned in the case, be excluded from the court during the taking of the evidence of the child or young person: provided that nothing in this section shall authorise the exclusion of bone fide representatives of a newspaper or news agency "

Another example from that era was the Defence of the Realm (Amendment) Act of 16 March 1915, sec 1(3) of which provided that:

> "In addition to and without prejudice to any powers which a court may possess to order the exclusion of the public from any proceedings . . . if . . . application is made by the prosecution, in the interests of national safety, that all or any portion of the public should be excluded during any part of the hearing, the court may make an order to that effect, but the passing of the sentence shall in any case take place in public."

Pursuant to this provision, hearings in closed court became commonplace in espionage cases.

Equivalently, under the Official Secrets Act 1920, sec 8(2), the court was empowered to make an order "that all or any portion of the public shall be excluded during any part of the hearing" provided that "the passing of sentence shall in any case take place in public."

That has been replaced by sec 81(3) of the National Security Act 2023 which provides:

> "If it is necessary in the interests of national security, a court may exclude the public from any part of proceedings for an offence under this Part, except for the passing of sentence."

The Special Immigration Appeals Commission ("'SIAC"), is a superior court of record in England and Wales, established under the eponymous Act of 1997. This operates under conditions of extreme secrecy arising from its jurisdiction to hear challenges to immigration-related decisions where the Home Secretary has certified that the decision was made based on 'closed' (i.e. classified) information and/or evidence that ought not be made public, and which could not be heard in open court, typically because the issues relate to national security. Where a person challenges a such decision in the SIAC, they will not be shown, and will not be able to respond to, all the evidence and allegations upon which the decision was based. In closed material procedures, secret evidence can only be seen by the judge and security-vetted lawyers appointed to represent the interests of the applicant who will have been excluded from the proceedings. It is beyond the scope of this work to examine the workings of SIAC. Suffice to say that its panoply of secrecy is explicitly authorised by the 1997 statute and by rules made thereunder.

[5] A child is a person under 14; a young person is aged 14 or 15.

Under the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, sec 2(2), on an application for a declaration of legitimacy the court "may direct that the whole or any part of the proceedings shall be heard in camera, and an application for a direction under this sub-section shall be heard in camera unless the court otherwise directs." This has been repealed and re-enacted as sec 60(4) of the Family Law Act 1986 in virtually identical language. This allows the court to hear an application for a declaration of status in camera, and requires any application for such a direction to be heard in camera. This specific statutory power applies where an application is made for a declaration as to marital status, parentage, legitimacy, legitimation and overseas adoptions. FPR 8.1 requires the Part 19 procedure to be used for such applications. Part 19 applications are to be heard in private pursuant to FPR 27.10. We know that the mere fact that a case is heard in private does not of itself impose secrecy on the case.

My research indicates that, SIAC aside, sec 60(4) of the Family Law Act 1986 and sec 81(3) of the National Security Act 2023 are the only statutory provisions in force which expressly authorise the court to hear all or part of a case behind closed doors.

An interesting question is whether it would be a contempt of court – an interference with the administration of justice – for a party to disclose to other persons things said by or to a court which is sitting behind closed doors pursuant to an order made pursuant to these provisions. An order under sec 81(3) of the National Security Act 2023 requiring the exclusion of the public will fall squarely within sec 12(1)(c) of the Administration of Justice Act 1960 being an order made for reasons of national security. Therefore, the publication of information relating to such proceedings may "of itself" be a contempt of court, subject to proof of *mens rea*.

However, an order made under sec 60(4) of the Family Law Act 1986 does not fall within sec 12(1)(a) – (d) and so breach of it does not "of itself" amount to a conte1mpt of court. Therefore, in order to give such an order teeth, it should go on to provide pursuant to section 11 of the Contempt of Court Act 1981 that subsequent publication by anyone of anything said during the part of the proceedings held in camera is prohibited. Such an order ought to be limited in time.

A different approach has been provided under s. 39 Children and Young Persons Act 1933, which remains in force. There, in any proceedings (but since 2015 excluding criminal proceedings), the court is empowered to direct in relation to any proceedings in any court that no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child [under 18] concerned in the proceedings and/or no picture shall be published in any newspaper as being or including a picture of such a child. Breach of any such direction is a criminal offence.

In *Scott* a number of other possible exceptions to the principle were discussed and rejected:

- Positive indecency. Lord Shaw accepted that Rules and regulations could have been framed under s. 53 by the judges to deal with gross and highly exceptional cases of positive indecency, but they were not.

- As seen, Viscount Haldane and Lord Atkinson accepted that 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, they said, is tolerated and endured, because it is felt that in a 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.
- As seen, Earl Loreburn considered that an exception should be made where publicity would in the circumstances reasonably deter a party from seeking redress, or would interfere with the effective trial of the cause. But this ground was not followed in *Greenway v. Attorney-General* (1927) 44 T.L.R. 124 or in *B (orse P) v Attorney-General* [1967] P 119, where Wrangham J held that to do so would conflict with Lord Shaw's speech and where the exception was not adopted by the other Law Lords. That decision led to the passage of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, which allowed a petition for a declaration of legitimacy to be heard in camera.

Viscount Haldane's standard (Exception 2) is an exacting test. In 1963 in *Re K (Infants)* Lord Devlin stated that the test is not easy to pass. It is not enough, he said, to show that dispensation would be convenient. It must be shown that it is a matter of necessity in order to avoid the subordination of the ends of justice to the means.

In 2014 in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, at [2[Lord Neuberger introduced the obvious requirement that where a derogation from the principle is granted its degree must be kept to "an absolute minimum".

In *R v Sarker* [2018] EWCA Crim 1341 Lord Burnett LCJ stated at [29(vii)] that any derogation from open justice must be established by "clear and cogent evidence."

PART V: THE AFTERMATH

There have been many cases citing *Scott*. The ICLR lists 332, of which 65 were family cases and 267 were civil cases. To put the significance of the decision in context, the ICLR lists 259 cases which cite *Donoghue v Stevenson* [1932] AC 562. It is possible that *Scott* is the most cited case of all time.

Backsliding soon restarts

In July 2013 a mere two months after *Scott* was decided, *Moosbrugger v Moosbrugger and Martin* (1913) 29 TLR 658 was heard. The wife alleged adultery and cruelty. Sir Samuel Evans P ordered the case to be heard in camera on the ground that the allegations were so "horrible" that the wife was "hampered a little", according to her counsel, in the giving of her evidence.

Similarly, four months later in November 2013 C*leland v Cleland and McLeod* (1913) 109 LT 744 was heard. The wife alleged adultery and cruelty; the husband cross-petitioned alleging adultery. Bargrave Deane J ordered the case to be heard in camera stating it was "about as horrible a case as I ever came across in my somewhat long experience" , and for that reason "I could not hope to do real justice in the case if the evidence had to be given in open court."

It was as if *Scott* had not been decided.

A particularly egregious piece of backsliding was *R v Governor of Lewes Prison ex parte Doyle* [1917] 2 KB 254 which arose out of the Irish Easter Rising. Gerald Doyle had been tried in camera by field general court martial on 5 May 1916, found guilty and sentenced to be shot. That sentence was commuted, and he was transferred to England to serve his sentence of three years' penal servitude. He made an application for habeas corpus, one ground being 'The conviction was bad because the field general court martial heard the case in camera.' The case was heard by a Divisional Court of all the talents comprising Viscount Reading LCJ, Darling J, Avery J, Atkin J and three other High Court judges. Doyle was represented by FE Smith KC. His claim was dismissed. Viscount Reading LCJ cherry-picked a single sentence from the opinion of Earl Loreburn, wrongly attributed it to Viscount Haldane also, and stated:

> "it is in my judgment plain that inherent jurisdiction exists in any Court which enables it to exclude the public where it becomes necessary in order to administer justice. That is the true meaning of the language used by Earl Loreburn and by Viscount Haldane L.C. in *Scott v. Scott* The general principle enunciated in those judgments is stated in a sentence by Earl Loreburn, who said that, **"the Court may be closed or cleared if such a precaution is necessary for the administration of justice."** His Lordship went on to state that it was impossible to enumerate all the possible contingencies, but that where the administration of justice would be rendered impracticable by the presence of the public, whether because the case could not be effectively tried or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court, the Court has the power to exclude the public

Darling J shamelessly mischaracterised Earl Loreburn's speech, stating:

> "The trial took place in barracks when the rebellion in Ireland was still going on. The ruins in Dublin were still hot cinders, and the whole place was in the condition in which it is described by the fact that certain military precautions were taken, and the General in command of His Majesty's forces [Sir John Maxwell] came to the conclusion that it would not be possible to administer justice if the public of Dublin were to be invited to attend at an open trial of persons with whom, no doubt, a great many of them sympathized. It seems to me that the passages referred to by my Lord from the judgments in *Scott v. Scott* are not exhaustive. Earl Loreburn says distinctly that he does not profess to set forth a code of exactly what must be proved before a Court can exercise its inherent right to sit in camera. This must surely be a stronger case than any of those mentioned in *Scott v. Scott* that the court-martial which sat to judge the applicant sat when an open rebellion was going on around the court, and at a time when the district — in fact the whole country — in which the trial took place was under martial law; which is equivalent to the suspension of law. It would be grotesque, in circumstances such as those — martial law having been proclaimed — to do what would be equivalent to inviting the public to come and hear witnesses give evidence against rebels with whom a great many of that same public sympathised. It was perfectly notorious that any persons who were recognized as having given evidence might very shortly afterwards have been made to suffer for having assisted to restore law and order. In my judgment the General exercised powers which he was perfectly entitled to exercise."

Fortunately, this wide, loose and judicially-subjective test did not put down roots. Indeed, we have seen that Earl Loreburn's wider test was later rejected, and that the rejection was approved by Parliament.

Another example of egregious backsliding was *McPherson v McPherson* [1936] AC 177, PC. the husband was the Minister of Public Works for the Province of Alberta. He petitioned for divorce alleging the wife's adultery. The petition was not defended. The suit was not announced in a published daily cause list. The suit was heard during the luncheon interval in the judge's library at the courthouse in Edmonton behind a door marked "Private". Neither the judge nor counsel was robed. The judge was attended by the assistant-clerk of the Court and by an official shorthand writer, and before taking his seat he announced that he was sitting in open court. The only other persons present throughout the proceedings were the petitioner and his two witnesses. Lord Blanesborough was unimpressed, stating that the inroad upon the rule of publicity made in this instance was "one not to be justified, and now that it has been disclosed, as one that must be condemned so that it shall not again be permitted."

In my opinion, the Final Report of the Financial Remedies Sub-Group of The Transparency Implementation Group (April 2023) and the Financial Remedy Transparency Pilot Guidance initiated in January 2024 (see for both, *below*) are further egregious examples of backsliding.

PART VI: PROHIBITING PUBLICATION

A critical question before the House of Lords was whether publication of material deriving from a case heard behind closed doors was, or could be, prohibited. This was not answered by the Law Lords either consistently or conclusively. An equivalent question concerns material deriving from a case that had been made the subject of an anonymity order.

As stated above, it is tolerably clear that publication was prohibited of material deriving from wardship or lunacy proceedings, or from proceedings under either of the 1908 statutes (i.e. Exceptions 1 and 3). Breach of the prohibition would likely have been treated as a contempt of court, although under Exception 1 proof of knowledge of the existence of the proceedings by the discloser would need to be furnished.

See Part IV for the consequences of a breach of an order which falls within Exception 4.

As regards Exception 1 it is not necessary for me to get into the weeds of the possible ambiguities in the opinions of the Law Lords as subsequent developments have largely clarified the position. There are some continuing problems, such as the duration of the secrecy that envelops the details of a wardship case. On one view the secrecy continues in perpetuity. That particular problem can be solved by a rule change (see *below*).

Scott v Scott was a family law case where a pro forma order had been made by a Registrar on the papers that the wife's nullity petition alleging the husband's impotence was to be heard "in camera". One can speculate that the intention of the order was that proceedings would be held in secret and there would be a prohibition on any participant publishing what occurred during the hearing.

The core ratio of *Scott* is that its facts did not take the case anywhere near the threshold where the court could validly make an order for a hearing behind closed doors. Therefore, the order that was made was invalid and the assumed prohibition on publishing details of the hearing held behind closed doors did not apply. Alternatively, if the order was technically valid, that did not carry with it any penal consequences were a publication to be made.

Hence the very carefully expressed specific holdings stated in the headnote:

> *"Held*, (1.) that the order to hear in camera was made without jurisdiction; (2.) that the order, assuming that there was jurisdiction to make it, did not prevent the subsequent publication of the proceedings."

On the facts of the case the court did not have power to make the order that it did. There being no valid prohibitory order against Mrs Scott, she was at liberty to publish details of the hearing to third parties, namely her father, her sister and a friend.

But where an order was correctly made for a case to be heard in camera, the court could, according to Viscount Haldane, make a further order prohibiting a party from publishing

things said during the hearing, although no such order was made in *Scott* itself. As seen, he said at 438:

> "[The applicant] may even be able to establish that subsequent publication must be prohibited for a time or altogether"

Indeed, it would be very surprising if the court could not so order. It is implicit in the reasoning of all the other members of the Law Lords that if the court was satisfied that the case had to be heard behind closed doors because the evidence if given publicly would destroy the subject matter of the dispute, or otherwise make it impossible for the proceedings to be held at all, then it plainly has to have the ancillary power to prohibit revelation of such evidence thereafter. If it did not, then the court would be toothless to enforce its primary order. Earl Loreburn put this point strongly:

> "Yet nothing can be more clear than that an order for a hearing in camera of a trial involving a secret process might be utterly illusory if the evidence could be published afterwards with impunity. There must be some power to prevent that, or the undoubted assertion by the very highest authorities of a right to close the Court in such cases would be reduced to an idle mockery."

Earl Loreburn does not tell us what "power" he had in mind. Certainly, in 1913 the Court had the equitable power to grant an injunction, which power was confirmed in sec 25(8) of the Supreme Court of Judicature Act 1873 (now sec 37 Senior Courts Act 1981):

> "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made; and any such Order may be made either unconditionally or upon such terms and conditions as the Court shall think just…"

A prohibitory *contra mundum* injunction was however unknown in 1913. But what came to be known as the *Spycatcher* doctrine had come into being. That doctrine allowed an injunction to bind a non-party who been notified of it. In *Re Martindale* (1894) 3 Ch 193 North J held that it would be a contempt if:

> "a party concerned, **or any person**, to proceed forthwith to make known to the world the very matter which the Court had deliberately, in the exercise of its discretion, decided ought not to be published."

Equivalently in *Seaward v. Paterson* [1897] 1 Ch 545 Lindley LJ upheld a finding of contempt against a non-party, saying:

> "he has [not] technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice."

The doctrine was upheld by the House of Lords in *Attorney General v Times Newspapers Ltd* (No 3) 1992] 1 AC 191.

The jurisprudence on making *contra mundum* injunctions has recently been comprehensively analysed, and the principles re-stated, by the Supreme Court in *Wolverhampton City Council and others v London Gypsies and Travellers and others* [2024] AC 983. The power of the court to bind non-parties is long-standing. At [28] the Supreme Court cited *Adair v The New River Co* (1805) 11 Ves 429, 445, a decision of Lord Eldon LC who held that an injunction can be granted against a whole class of defendants, named and unnamed, and the unnamed defendants will be bound in equity by any order made. That decision in turn referred to earlier decisions to the same end such as *Ex parte O'Reily* (1790) 1 Ves. Jun. 113, a decision of Lord Thurlow LC, who held that it was "impractical to bring all the persons interested before the Court", which itself referred to yet earlier cases where jurisdiction was maintained against persons who it was "impossible or very difficult" to bring before the court (see *Pearson v Belchier* 4 Ves Jun 628)[6].

Seeking an order for a case to be held in camera is now almost obsolete in civil proceedings (although one can imagine it being sought in a case about a secret process). In almost every case where secrecy is sought the applicant will seek an order for anonymity backed up by a Reporting Restriction Order ("RRO"). For this purpose, as discussed below, the court will first exercise its inherent common law power to determine whether anonymisation or redaction shall take place.

Such a withholding order, if made, would only formally bind the parties before the court, although, as explained above, it could have a wider reach under the *Spycatcher* principle

So, although such a withholding order is not made against the public at large, under the *Spycatcher* principle it exposes someone who knows about it and who decides to flout it to the risk of being found to be in contempt. The contempt in question is interference with the administration of justice rather than being in breach of an order of the court and thus requires *mens rea*.

This approach allowed the making of a blanket prohibition on disclosure of the name of a witness, but did it extend to specific pieces of evidence?

That question was resolved by s 11 of the Contempt of Court Act 1981, which remains in force and provides:

> 'In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give

[6] In *Trump v Casa* (27 June 2025) the US Supeme Court held that when Congress passed the USA Judiciary Act of 1789 endowing federal courts with jurisdiction over "all suits . . . in equity" the powers were limited to those exercised by the English High Court of Chancery in that year which did not then extend to the grant of a "universal injunction" nor any analogous form of relief. This does not appear to be correct. A formal *contra mundum* or universal injunction was unknown in 1789 but, as the cases show, analogous orders were made against non-parties who could not practically be brought before the court.

such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.'

This allows the court to make a *contra mundum* reporting restriction order where the court had either cleared the courtroom, or had allowed a party or witness to have their identity obscured, or where the court wished to prevent disclosure of a particular matter. In *A v BBC (Secretary of State for the Home Department intervening)* [2015] AC 588 Lord Reed at [61] explained that this provision was not limited to the situation where members of the public were actually present when the withholding order were made – it could attach, for example, to an order which directed that the judgment was to be anonymised. Such an order would have the effect of withholding the names of the parties from the public thereby engaging section 11.

However, in *R v Arundel Justices, Ex parte Westminster Press Ltd* [1985] 1 WLR 708, the Divisional Court decided that there was no jurisdiction under sec 11 if the court had already allowed a name or a particular matter to be referred to in public.

In *Khuja v Times Newspapers Ltd* [2019] AC 161 Lord Sumption stated at [18] that any power to impose reporting restrictions on what happens in open court must be found in legislation. Given that Exception 2, backed up by the threat of contempt proceedings if the secrecy were breached, is entirely judge-made, Lord Sumption must mean that any **new** basis for imposing a RRO must be granted by statute. That interpretation is reinforced by his remarks at [18]:

> "The dependence of this area of law on statute and the extent of statutory intervention mean that it is fair to speak of a statutory scheme occupying the ground to the exclusion of discretions arising from the common law or the court's inherent powers."

So, the question arises: if for whatever reason the Court cannot make a *contra mundum* RRO under s 11 of the Contempt of Court Act 1981, does it have power to make a personal injunction against the parties prohibiting them from disclosing their identities, which order could be served on newspapers with a statement that the *Spycatcher* principle was being relied on? I would argue, yes, provided that Viscount Haldane's exacting test is met. While none of this is grounded in statute, such an approach is entirely consistent with Viscount Haldane's exception, and with the decision of the House of Lords in *Attorney-General v Leveller Magazine Ltd*.[7]

[7] In contrast, in *Raybos Australia Pty Ltd v Jones,* Kirby P offered a different interpretation of the speeches in *Attorney-General v Leveller Magazine Ltd* which led him to doubt that any such power existed at common law.

PART VII: SECTION 12, ADMINISTRATION OF JUSTICE ACT 1960

In 1960 Parliament passed sec 12. In *Re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 Scarman LJ explained that the purpose of sec 12 was plain - "to clarify the law, which had been extremely obscure, governing the right to publish information relating to the proceedings and order of a court sitting in private".

Sec 12, as enacted, provided:

(1) The publication of information relating to proceedings before any court **sitting in private** shall **not of itself be contempt of court except in the following cases**, that is to say

(a) where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant;

(b) where the proceedings are brought under Part VIII of the Mental Health Act, 1959, or under any provision of that Act authorising an application or reference to be made to a Mental Health Review Tribunal or to a county court;

(c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;

(d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;

(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing sub-section, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

(3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section.

This was amended in 1989 to refer to proceedings under the Children Act 1989, in 2002 to refer to proceedings under the Adoption and Children Act 2002 and in 2005 to refer to proceedings under the Mental Capacity Act 2005. Sub-section (4) was amended by the Children Act 2004 to refer to make clear that publication pursuant to rules of court could not amount to a contempt.

Section 12 was not well drafted.

Scarman LJ explained that all five instances in sec 12(1) were known to the common law: in each one it would have been a contempt to publish information relating to the proceedings if the court was sitting in private. However, while secs 12(1)(a) and (b), being the old "wardship and lunacy" exception do not need an order for the case to be heard behind closed doors, cases under sec 12(1)(c) and (d) would need such an order, which is provided for by sec 12(1)(e). So, one has to wonder why secs 12(1)(c) and (d) are there.

In *Re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58, Lord Denning MR stated:

> ...the effect of section 12 (1) of the Act of 1960 is that a newspaper may publish information about proceedings in chambers in a civil action, and about the pleadings, affidavits, and reports therein, without any fear of being thereby in contempt of court.'

"Civil action" can only mean an action not listed in section 12(1)(a) - (d).

Similarly, in *Pickering v Liverpool Daily Post and Echo Newspapers Plc and others* [1991] 2 AC 370 Lord Bridge stated at 416:

> "There are undoubted difficulties in construing this section, but certain effects of the section are clear. The **general rule** which the section declares is that it is not a contempt to publish information relating to proceedings in court merely because the proceedings are heard in private. But the exceptions to that rule expressed in paragraphs (a) to (d) of subsection (1) must indicate that it is, at least prima facie, a contempt to publish information relating to the proceedings in the cases indicated. To some extent at least both the **general rule** and the exceptions reflect the common law principles as stated by Viscount Haldane LC in *Scott v Scott*"

See also Lord Steyn's references to the ordinary or general rule in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, *below*.

Time and space do not permit an extensive exposition of the jurisprudence on what can and cannot be published in respect of a case which is covered by sec 12, or on what has to be proved in order to find a person guilty of contempt of court for publishing something ostensibly covered by sec 12.[8]

However, it is crucial to note that the Court of Appeal held in *Re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 that the meaning of the obscurely worded subsection (4) was that no-one could be found guilty of contempt pursuant to sec 12 who could not be found guilty of contempt under the pre-existing common law rules.

[8] This requires a very careful reading of *In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 which establishes that mens rea is required to be proved before a journalist can be found guilty. It also requires an equally careful reading of the challenging decision in *M v F & Anor* [2025] EWHC 801 (Fam).

PART VIII: THE HUMAN RIGHTS ACT 1998

The incorporation of the European Convention on Human Rights into domestic law by the Human Rights Act 1998 was always likely to have an impact on this jurisprudence. This was because Article 8 supplied a right to respect for a private and family life and sec 6(1) provided that it was unlawful for a public authority to act in a way which is incompatible with a Convention right. The court is a public authority for these purposes (sec 6(3)). Thus, at any rate in theory, the court could make a *contra mundum* injunction under sec 37 of the Senior Courts Act 1981 to protect a party's Article 8 Convention rights to a private and family life.

Article 6

Article 6 provides that In the determination of their civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

It further provides that judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial

- in the interest of morals, public order or national security in a democratic society, or
- where the interests of juveniles or the protection of the private life of the parties so require, or
- to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The "fundamental principle" of the need for hearings to be held in public emphasised by the Strasbourg authorities mirrors the approach of the common law, as Hale LJ pointed out in the Court of Appeal in *Re S* [2004] Fam 43. Notably, Article 6 enshrines a personal right. It does not seek to promulgate a general principle of open justice, let alone dictate how such a principle should be given effect. It is not considered that Article 6 alters, for better or for worse, the content of the open justice principle as defined by the common law.

Anonymity orders

In *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, HL(E) the issue was whether for the trial of the applicant child's mother for the murder of the child's brother, a *contra mundum* anonymity order could be made by the High Court preventing identification of the child. Lord Steyn, speaking for a unanimous committee, held at [23]:

> "The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of the inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from Convention rights under the ECHR. This is the simple and direct way to approach such cases. In this case the jurisdiction is not in doubt. This is not to say that the case law on the inherent jurisdiction of the High Court is wholly irrelevant. On the contrary, it may remain of some interest in regard to the ultimate balancing exercise to be carried out under the ECHR provisions… Before passing

> on I would observe on a historical note that a study of the case law revealed that the approach adopted in the past under the inherent jurisdiction was remarkably similar that to be adopted under the ECHR. Indeed the ECHR provisions were often cited even before it became part of our law in October 2000. Nevertheless, it will in future be necessary, if earlier case law is cited, to bear in mind the new methodology required by the ECHR as explained in *Campbell v MGN Ltd* [2004] 2 AC 457."

Lord Steyn's pronouncements were made in the context of an Exception 1 case where the High Court was exercising the *parens patriae* jurisdiction in respect of a child. The authorities cited in [22] were all wardship cases. It would be a mistake, however, to think that the "general" or "ordinary" rule mentioned in [18] or the "ultimate balancing test" referred to at [17] apply only to Exception 1 cases. It is quite clear that Lord Steyn was speaking generally and that his instruction was intended to apply whenever an anonymity order is sought.

However, in *Khuja v Times Newspapers Ltd* [2019] AC 161 Lord Sumption explained at [23] that it would be a grave mistake to think that the common law was irrelevant whenever a derogation from the open justice principle was sought:

> "…in deciding what weight to give to the right of the press to publish proceedings in open court, the courts cannot, simply because the issues arise under the heading "private and family life", part company with principles governing the pre-emptive restraint of media publication which have been accepted by the common law for many years in the cognate areas of contempt of court and defamation, and are reflected in a substantial and consistent body of statute law as well as in the jurisprudence on article 10 of the Human Rights Convention."

This approach has been formalised by the Supreme Court in *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2025] 2 WLR 815. There, the issue was whether a *contra mundum* injunction should be made anonymising the treating clinicians of a baby who had died. In their joint judgment Lord Reed and Lord Briggs stated at [89] that:

> "The court does not act in a way which is incompatible with a Convention right by insisting that individuals avail themselves of the domestic cause of action which is available to protect that right, and that the action is brought by the individual whose Convention right is in issue."

And at [98]:

> "…the general rule [is] that parties should protect their Convention rights by availing themselves of the appropriate cause of action under our domestic law"

Further, they stated in [93] that Lord Steyn's reasoning in *Re S*, where he went directly to section 6(1) of the Human Rights Act 1998, without pausing to consider the availability of domestic remedies, was "highly unusual".

In [94] they stated that the law had "moved on since *Re S"*. The courts now, they said:

> "are willing to develop the common law when necessary, in order to meet the requirements of the Convention, and have deprecated the tendency to see the law solely in terms of the Convention itself."

If a cause of action is either unavailable or fails to provide "practical and effective" protection of the applicant's Convention rights then the court can exercise its broader equitable jurisdiction under section 37 of the Senior Courts Act 1981 read with section 6(1) of the Human Rights Act 1998: see [98].

This approach means that the invocation of direct protection of Convention rights is to be used as a safety net rather than as the first and last port of call. Where the court is engaged in balancing Convention rights which include Article 10, the need for any restriction of freedom of expression must be established convincingly; must be justified by a pressing social need; and must be proportionate to the legitimate aim pursued [182(16)].

Therefore, MacDonald J must have slightly erred in *Rosemin-Culligan v Culligan* [2025] EWFC 26 at [41] where he said that the jurisdictional foundation on which the court rests its decision whether to anonymise a judgment is s.6 of the Human Rights Act 1998.

This new approach had been foreseen in *Millicom Services UK Ltd v Clifford* [2023] ICR 663, CA and in *PMC v A Local Health Board* [2024] EWHC 2969 (KB).

In the former case Warby LJ stated at [29]:

> "The effect of the HRA is not that the Convention supplants or replaces domestic statutory or common law rules; rather it provides certain guarantees against the enforcement of those rules to the extent that would be incompatible with fundamental human rights. As Mr Callus eventually conceded, it is not necessarily the case that the answer given by the common law will be the same as that arrived at through a Convention analysis. And if the two are different, that does not necessarily mean the common law answer is incompatible with the Convention."

In the latter case Nicklin J said at [92]:

> "…an injunction under s.37 [of the Senior Courts Act 1918], the purpose of which is to impose reporting restrictions, should only be granted if the applicant satisfies the Court (a) that there is no other jurisdiction available under which the Court can grant the reporting restriction sought; and (b) by clear and cogent evidence, that, without the order being made, the Court will be in breach of the duty not to act incompatibly with a Convention right under s.6 Human Rights Act 1998; and (c) that the *In re S* parallel analysis leads to the conclusion that such an order should be granted."

Therefore, the court's correct approach where an anonymity order is sought is first to identify and invoke an available cause of action. That would be Viscount Haldane's common law exception. If that answers the question positively then the order may be made, and consideration of Convention rights simply does not arise. If the answer is negative then it is only at that stage that the competing Convention rights applicable by virtue of the facts, come into play.

How they are balanced is considered in Part IX: Anonymity.

PART IX: ANONYMITY

Excluding the press and public and closing the doors of the court is the nuclear option. Yet sitting in camera was the only option used for many years.

In *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, following *In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58, Lord Scarman stated that the court could order that certain evidence should be given in private or written down where it was necessary to protect the administration of justice from interference.

Such a method was an acceptable extension of the common law power of a court to control its proceedings by sitting in private.

In *Khuja* Lord Sumption saw the inherent power to order anonymity as being of a piece with, and subject to the same criterion of exceptionality as, the inherent power to order that a case be heard behind closed doors. He said at [14]:

> "The inherent power of the courts extends to making orders for the conduct of the proceedings in a way which will prevent the disclosure in open Court of the names of parties or witnesses or of other matters, and it is well established that this may be a preferable alternative to the more drastic course of sitting in private... Orders controlling the conduct of proceedings in court in this way remain available in civil proceedings whenever the court "considers non-disclosure necessary in order to protect the interests of that party or witness": CPR r 39.2(4)."

An exceptional power

Lord Neuberger MR explained in his *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003, summarising *H v News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1645, at [21] "Anonymity is an exception to the principle of open justice. It can only be ordered where it is strictly necessary."

Start with the common law

The import of the decision of the Supreme Court in *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* is that Viscount Haldane's common law exception should be the first port of call wherever an applicant seeks anonymisation. That test has at its heart a question: can the applicant seeking anonymity satisfy the Court that by nothing short of anonymisation can justice be done? That question will be answered yes or no.

If the reason that anonymity is sought is that the very subject matter of the case would be destroyed by full publicity then, provided that the facts are proved by clear and cogent evidence then the common law would answer the question affirmatively and there will be no need to consider Convention rights. Similarly, if the applicant can prove by clear and cogent evidence that she faces a real risk of being attacked and robbed (as happened to Mrs Charman) then, again, a decision in favour of anonymisation would properly be made under the common law.

But if the reason is no more than "I would be very distressed if details of my finances were published" then the common law would certainly reject the application for anonymity. which would then lead to an appropriately focussed weighing of the competing Convention rights. But at all times, the decision-maker must have the question at the forefront of his or her mind.

This approach is entirely concordant with the principle of Lord Neuberger and Lord Mance in their joint judgment in *Kennedy v Information Comr* [2015] AC 455, SC at [46] that "the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene." At [133] Lord Toulson memorably stated that "it was not the purpose of the Human Rights Act that the common law should become an ossuary."

The approach reflects precisely the instructions given by Lord Reed and Lord Briggs in *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2025] 2 WLR 815 at [89]. [93] and [94] as discussed in Part VIII above.

How are the Convention rights to be weighed? In *Re S* at [17] Lord Steyn stated:

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

In *Khuja* at [23] Lord Sumption put it this way:

> "These ... are the principal English authorities for an approach to the balancing exercise which is fact-specific rather than being dependent on any a priori hierarchy of rights. On some facts, the claimant's article 8 rights may be entitled to very little weight. On some facts, the public interest in the publication in the media may be slight or non-existent. None the less, in deciding what weight to give to the right of the press to publish proceedings in open court, the courts cannot, simply because the issues arise under the heading "private and family life", part company with principles governing the pre-emptive restraint of media publication which have been accepted by the common law for many years in the cognate areas of contempt of court and defamation, and are reflected in a substantial and consistent body of statute law as well as in the jurisprudence on article 10 of the Human Rights Convention."

This does not mean, however, that one starts the weighing exercise with the pans empty and the scales balanced. The idea of a metaphorical weighing exercise beginning with the scales imbalanced because of the presence on one pan of a particularly important juridical principle is given by the Supreme Court in *AIC Ltd v Federal Airports Authority of Nigeria* [2022] 1 WLR 3223 where the principle in question was the finality of litigation. Lord Briggs and Lord Sales said at [39]:

> "The question is whether the factors favouring re-opening the order are, in combination, sufficient to overcome the deadweight of the finality principle on the other side of the scales, together with any other factors pointing towards leaving the original order in place."

So here. The weighing process starts with the deadweight of the open justice principle already in one of the pans, to which will be added the specific factors militating in favour of full publicity. The question is whether the specific factors in favour of anonymity can overcome that combined weight on the other side.

The idea of an initial "deadweight" of the open justice principle may be derived from a number of authorities. In *Re S* itself at [18] Lord Steyn stated:

> "In oral argument it was accepted by both sides that the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court[9]. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances."

Consistently with the idea, Warby LJ in *R (Marandi) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin) at [44(5) - (6)] stated:

> "[The judge] was engaging in a process of evaluating the claimant's case against the weighty imperatives of open justice. … It is in that context that the judge rightly addressed the question of whether the claimant had adduced "clear and cogent evidence". He was considering whether it had been shown that the balance fell in favour of anonymity. The cases all show that this question is not to be answered on the basis of "rival generalities" but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case. That is why "clear and cogent evidence" is needed. This requirement reflects both the older common law authorities and the more modern cases."

The reference in [182(16)] of *Abbasi* to the need when weighing competing Convention rights to establish any restriction on freedom of expression convincingly and to justify it by a pressing social need, likewise supports the idea.

I respectfully contend that the test to be applied on an application for an anonymity order is therefore as follows:

> **The facts relied on must be proved by clear and cogent evidence. If those facts show that by nothing short of anonymisation could justice be done, then it may be ordered under the common law. Only if the common law answer is negative does the court balance the competing Convention rights engaged by those facts. In that evaluation the open justice principle itself must be reckoned as a weighty factor in favour of publicity. Any restriction of freedom**

[9] The reference to a "criminal court" reflects the facts of *Re S* where the reason for secrecy being sought in that case was the forthcoming criminal trial of the child's mother. There is no reason to think that Lord Stein was confining his observations only to criminal courts, and they have never been taken that way.

of expression must be justified by a pressing social need. Ultimately, it must be shown that anonymity is strictly necessary for the attainment of justice.

Steps short of full, indefinite, anonymisation include:

1. Anonymisation for a limited period.
2. Partial anonymisation, for a limited period.
3. Sensitive material going in a confidential schedule to the judgment for a limited period.

PART X: HEARINGS IN CHAMBERS AND RULES OF COURT

The decision of the House of Lords in *Scott v Scott* established conclusively that a proceeding in private (then referred to as a proceeding 'in chambers') has nothing to do with secrecy as to the facts of the case; it merely provides for privacy at the hearing. There is not 'the slightest obligation of secrecy as to what passes in chambers' said Fletcher Moulton LJ in his famous Court of Appeal dissent, vindicated in the House of Lords. As already noted, in *Re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 Lord Denning MR explained that the effect of section 12 (1) of the Act of 1960 is that a newspaper may publish information about proceedings in chambers in a civil action not covered by sec 12 of the 1960 Act, and about the pleadings, affidavits, and reports therein, without any fear of being thereby in contempt of court.

Eighty-five years after *Scott* in *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 at 1071 Lord Woolf MR stated to exactly the same effect:

> "(1) The public has no right to attend hearings in chambers because of the nature of the work transacted in chambers and because of the physical restrictions on the room available, but if requested, permission should be granted to attend when and to the extent that this is practical. (2) What happens during the proceedings in chambers is not confidential or secret and information about what occurs in chambers and the judgment or order pronounced can, and in the case of any judgment or order should, be made available to the public when requested. (3) If members of the public who seek to attend cannot be accommodated, the judge should consider adjourning the proceedings in whole or in part into open court to the extent that this is practical or allowing one or more representatives of the press to attend the hearing in chambers. (4) To disclose what occurs in chambers does not constitute a breach of confidence or amount to contempt as long as any comment which is made does not substantially prejudice the administration of justice. (5) The position summarised above does not apply to the exceptional situations identified in sec 12(1) of the Act of 1960 or where the court, with the power to do so, orders otherwise."

The House of Lords recognised that interlocutory hearings in civil proceedings were traditionally heard in the judge's "chambers" (private room) as a matter of administrative convenience. The press and public were not admitted to such proceedings as a matter of practice. In 2009 the press (and latterly legal bloggers) were expressly allowed by the rules to attend family hearings held in private. The lawfulness of the exclusion of the general public has never been tested.

Therefore, it is to be emphasised that the fact that FPR 27.10 provides that most family proceedings will be heard in private gives no reason of itself to make an anonymity or exclusion order.

Rules of Court

CPR 39.2(3) – (4) sets out rules listing the circumstances where a case can be heard in private or where the identity of a person should be anonymised. FPR 7.30(3)-(5), FPR 37.8(4)-(5) and COPR 21.8(4)-(5) are to the same end.

CPR 39.2(4) states that "The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person".

In *PMC v A Local Health Board* Nicklin J held that a RRO cannot be made under CPR 39.2. If it were possible then the various statutory powers permitting the making of RROs (e.g. s 11, Contempt of Court Act 1981 and s 39, Children and Young Persons Act 1933) would be rendered wholly otiose and redundant: those powers, with their own strict standards could be ignored and a wider, looser power under CPR 39.2(4) deployed.

The language of CPR 39.2(4) does not (and cannot) alter the test for making an anonymity order. It is doing no more than describing the court's inherent power, referred to above, to order that the identity of a party or witness be withheld.

CPR 39.2(5) requires that, unless the court otherwise directs, a copy of every anonymity order shall be published on the judiciary website. This requirement does not apply to family cases.

It appears that this provision is not faithfully complied with. In his article "Anonymisation of civil judgments: a routine failure to follow open justice rules" published on 10 March 2024 Paul Magrath shows that in 2023 of 116 cases where one or more parties had been anonymised, 67 (or nearly 60%) did not have a corresponding anonymisation order published on the Judiciary website. While 34 did make some reference to anonymity or reporting restrictions in the judgment itself, the remaining 33 made no such reference. He said:

> "That means that nearly 30% of the judgments appeared in anonymised form with no explanation or justification for doing so. … This raises a serious question about the civil courts' diligence in complying with their oft-publicised commitment to open justice."

PART XI: NATIONAL SECURITY [10]

Somewhat surprisingly, none of the speeches in the House of Lords mentions national security as a reason for holding proceedings in camera. When the House of Lords decided *Scott* in 1913 the then operative Official Secrets Act 1911, like its predecessor of 1889, did not provide for proceedings under that Act to be heard in whole or in part in camera; that power did not arrive until the 1920 Act was passed. It does not appear that anyone was particularly concerned about espionage until the German spy scare in the early years of the 20th century and the establishment of MI5 in 1909. However, eight people were tried for Official Secrets Act offences between 1910 and 1914, before the outbreak of war. Those trials were fully public.

Following the outbreak of war Parliament passed a sequence of Defence of the Realm Acts. The third such Act of 27 November 1914 provided that offences thereunder, which included espionage, were triable by court-martial and permitted the imposition of the death penalty. That Act did not, however, allow for the proceedings, or any part of them, to be heard in camera.

The Manual of Military Law of 1914 governed courts martial and said that that except for deliberation:

> "the court must be open to the public, military or otherwise, so far as the room or tent in which the court is held can receive them. It is not usual to place any restriction on the admission of reporters for the press."

It was not until the passage of the fourth Defence of the Realm Act of 16 March 1915, mentioned above, that provisions allowing proceedings to take place in camera were first promulgated. Spies were normally charged with offences under that Act.

However, these provisions only applied to a civil trial by judge and jury, which a defendant who was a British subject could claim, and not to a court-martial (where all foreign spies were tried).

The first espionage trial from which the public was excluded from part of the proceedings, was that of Carl Hans Lody, alias Charles Inglis, which took place on 30 and 31 October and 2 November 1914. Lody was a German naval reserve officer, who certainly had been openly active as a spy, and he did not deny this at his trial. He was not charged with an offence under the Defence of the Realm Act, nor with any other offence under domestic law. He was tried for a spying offence said to exist under the international law of war namely "war treason". Viscount Haldane LC had apparently been consulted by Lord Kitchener, the war minister, and had ruled that a spy must by international law have a trial before punishment but that the trial may be by court-martial and that the spy cannot invoke the jurisdiction of the civil courts.

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[10] I have been much assisted in the section on national security by the essay "The invention of trials in camera in security cases" by A. W. Brian Simpson originally delivered as the Atkin Memorial Lecture at the Reform Club on 19 May 1994, republished in expanded form as Chapter 5 of R A Melikan (ed) *Domestic and international trials, 1700-2000*, 2003, pp 76-106, and available at https://www.readkong.com/page/the-invention-of-trials-in-camera-in-security-cases-6572489.

An ad hoc military tribunal, with the appearance of a court-martial, was convened. It was presided over by a retired Major General, Lord Cheylesmore, sitting with eight other officers. At the request of the prosecutor part of the trial was held in camera and Lord Cheylesmore ordered the court to be cleared. Lody was found guilty and sentenced to death. He was duly shot in the miniature rifle range of the Tower of London on 11 November 1914.

It is clear that Lody's trial and execution were unlawful both under domestic and international law. There was no provision in domestic law for people to face capital (or any) charges before ad hoc military tribunals. International law did not then and does not now contain a war crime of war treason. However, if the trial had been lawful then it is not difficult to see how sitting in camera for part of the evidence would have been compliant with Viscount Haldane's common-law exception. Lord Cheylesmore presided over all courts martial for spies held in Britain during the war, and presumably held parts of the proceedings in camera, relying on the common-law exception.

However, following the March 1915 Act secrecy enveloped such cases to such an extent that most were heard entirely behind closed doors with no-one knowing anything about the process until a laconic official announcement was made of which the following notice in the Times on 11 September 1915 is a typical example:

Unnamed Spy Executed.

Tried by Court Martial.

It is officially announced that a person who was charged with espionage and tried by General Court Martial on August 20 and 21 was found guilty and sentenced to death. The sentence was duly confirmed and carried out yesterday morning.

During the war a total of nine spies were shot at the Tower and one hanged in Wandsworth prison, following courts-martial, and a further two were shot at the Tower following civil trials. Most of these trials were entirely secret.

It is not difficult to see the force of Lord Shaw's doom-laden predictions should the principle of open justice not be honoured.

PART XII: FAMILY LAW

In the Family Law sphere the following events since the decision in *Scott v Scott* are of note.

The lurid reporting of the *Russell* divorce case in 1922 (see *Russell v Russell* [1924] AC 687) and of the scandalous case of *Dennistoun v Dennistoun* (1925) 69 Sol Jo 476 tried before McCardie J in 1925, prompted King George V to have his private secretary, Lord Stamfordham, write to the Lord Chancellor's permanent secretary complaining how disgusted he was by such reports. This led to the Judicial Proceedings (Regulation of Reports) Act 1926, which applied to proceedings for divorce, nullity or judicial separation, but did not in terms apply to proceedings for a financial remedy. It did not enact the proposal of the Gorrell Royal Commission that the court could sit in camera. The Act was primarily concerned with public morals, as Lord Rodger was to say decades later in *In re Guardian News and Media Ltd* [2010] 2 AC 697, SC(E) at [24]. It forbad the publication "in relation to any judicial proceedings of any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals."

It also restricted what could be reported during a public trial to (i) the names, addresses and occupations of the parties and witnesses; (ii) a concise statement of the charges, defences and counter charges in support of which evidence has been given; (iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon; (iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court. It is to be noted that the restrictions apply only "during" the trial and not following its conclusion. The Act did not allow anonymisation either of the proceedings or the judgment. On the contrary, the full judgment could be reported. The limitation was therefore very slight – to prevent lurid reports of cases being heard publicly as they were proceeding.

It was not until 1935 that Parliament finally provided that In any proceedings for nullity of marriage, evidence on the question of sexual incapacity shall be heard in camera unless the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court (see the Supreme Court of Judicature (Amendment) Act 1935). Thereby the actual decision of the House of Lords was reversed. Had that been in force in 1910 Mrs Scott would have been guilty of contempt.

Financial remedy procedure after Scott

Annex III contains an account of the development of financial remedy procedure from 1858 to the present deriving from *Xanthopoulos v Rakshina* [2022] EWFC 30; [2022] 2 FCR 712.

There is nothing in any of the various iteration of the Rules supporting a view that financial remedy proceedings heard in the chambers of a Judge or a Registrar were secret, or that the public were not allowed in.

However, it is fair to say that if a member of the public or a journalist had gone to Somerset House, in, say, 1980 and asked to sit in and watch a financial remedy case

taking place, their request would have been treated with incredulity, and they would have been turned away summarily.

In 2009 rule 27.11 was inserted into the FPR. This allowed journalists (and later bloggers) to attend almost all family proceedings. It spelt out a judicial power to order such attendees to leave in specified circumstances. Unfortunately, the rules do not draw a distinction between proceedings covered by sec 12 and those that are not. The rules appear perfectly reasonable inasmuch as they address proceedings covered by sec 12. Those are proceedings which fall within one of the Exceptions. The rules therefore sensibly regulate the terms on which journalists may be admitted and excluded. Inasmuch as the rules purport to regulate the attendance of journalists, or anyone else for that matter, in proceedings not covered by sec 12, they are of doubtful validity. As explained above, a case heard in private is not secret. In principle anyone should be able to attend. The lawfulness of rules which purport to prescribe which members of the public can and cannot attend has never been tested.

Naturally, the court in an individual case, applying Exception 2, has power to hold the proceedings in camera and to require anybody in the court room who is not participating in the case to leave.

In 2004 sec 62(7) of the Children Act 2004 enacted sec 76(2A) of the Courts Act 2003. This provides:

> "Family Procedure Rules may, for the purposes of the law relating to contempt of court, authorise the publication in such circumstances as may be specified of information relating to family proceedings held in private."

At the same time sec 12(4) was amended by s.62(2) of the Children Act 2004 to read (amendment in italics):

> "Nothing in this sec shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section *(and in particular where the publication is not so punishable by reason of being authorised by rules of court)*."

The actual rule-making power lies in s. 76(2A) of the Courts Act 2003. The amendment to sec12(4) is clarificatory only. It is making clear, for the avoidance of doubt, that were rules to be made pursuant to sec 76(2A) authorising certain types of publications, any such publication could not amount to a contempt.

The currently authorised publications are specified by FPR rules 12.73, 12.75, 12 73A and PDs 12G, and 12R for children proceedings under Part 12 with equivalent rules and PDs made in relation to adoption proceedings under Part 14. These permitted publications allow "transparency orders" to be made in those children proceedings covered by sec 12. It is important to note that these rules permitting disclosure to various people and bodies only apply to children and adoption proceedings and do not apply to financial remedy proceedings.

Importantly, sec 76(2A) only allows rules to be made which **authorise** publications for the purposes of the law relating to contempt of court. Thus, a rule can say that a publication which would have been in breach of sec 12, will no longer be in breach. What the rule-making power cannot do is to say that a publication that does not fall within sec 12 and therefore does not amount to contempt of court, will be so treated in the future.

Take a simple example. A rule cannot say that a financial remedy judgment, not falling within sec 12, shall normally have the identities of the parties anonymised, and that any breach thereof will amount to a contempt of court: see *Augousti v Matharu* [2023] EWHC 1900 (Fam) at [93]. Unfortunately, we will see that an unlawful measure to that end has already been made.

Desert Island syndrome

In *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34 Lord Sumption stated at [37] that "Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different."

Similarly in *Tickle v The BBC* [2025] EWCA Civ 42, Sir Geoffrey Vos MR decried the proposition that the statutory limitations in sec12, Administration of Justice Act 1960 (or even those in s 97, Children Act 1989) created any separate 'shielded justice' at [45]. He reiterated at [46] that the Family Court is not 'another country'.

However, there remains at large an ineradicable belief on the family law desert island that family law cases not protected by sec 12 are somehow different to ordinary civil litigation.

Perhaps the most notorious decision is that of the Court of Appeal in *Clibbery v Allan* [2002] Fam 261. This concerned a decision made in proceedings under Part IV of the Family Law Act 1996 not to continue injunctions preventing the applicant from disclosing information about the respondent. It was not an ancillary relief case and no disclosure of private financial information covered by the implied undertaking not to make ulterior use of documents disclosed, had been made by the respondent to the applicant.

However, Dame Elizabeth Butler Sloss P in a rather confusing judgment, with which Keene LJ agreed, decided at [72] that in family proceedings the rules providing that ancillary relief proceedings should be heard in chambers correctly acted to prevent any member of the public from attending those proceedings. This was because, as she put it in circular reasoning, ancillary relief applications are appropriately heard in private in accordance with the 1991 Rules. The public may not, without leave of the court, hear the evidence given in these applications. It would make a "nonsense" of the use of an implied undertaking if information, possibly sensitive, about the means of a party, could be made public as soon as the substantive hearing commenced. Information disclosed under the compulsion of ancillary relief proceedings was, she said, protected by the implied undertaking, before, during and after the proceedings are completed.

However, contradictorily, she stated at [17]:

> "proceedings in the courts are either held in open court, where the public is entitled to enter and listen or in circumstances in which the public is largely excluded either by rule of court or by practice. This exclusion does not, of itself, have the consequence of a ban on later publication."

And at [51]:

> "the hearing of a case in private does not, of itself, prohibit the publication of information about the proceedings or given in the proceedings."

These dicta appear to allow a party to give a full interview to the press about a hearing held in private, subject to any fact-specific RRO that may be made (and which could reflect the existence of disclosure given under compulsion which is protected by the implied undertaking). On the facts of that case the President agreed that no such RRO would be made.

Otherwise, the only protection that an ancillary relief litigant then enjoyed was the barring of the public and press from the court room, which, as explained, was only of limited worth.

Thorpe LJ at [93] relied on the ingrained practice in the Family Division to treat the designation "in chambers" as meaning strictly private. At [100] he maintained that "family proceedings are easily distinguishable from civil proceedings in the other Divisions of the High Court." He explained that "in civil proceedings… the parties bring into the arena such material as they choose to bring together with such material as they may be ordered to bring during the development of the case." In contrast, he said

> "the determination of an ancillary relief application proceeds on a very different basis. First it is to be noted that litigants may not bring into the proceedings such material as they think fit. All parties are under a duty of full and frank disclosure".

And at [106] he concluded (at variance with Butler-Sloss LJ) that:

> "in the important area of ancillary relief … all the evidence (whether written, oral or disclosed documents) and all the pronouncements of the court are prohibited from reporting and from ulterior use unless derived from any part of the proceedings conducted in open court or otherwise released by the judge."

Similar reasoning was advanced in *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, a case where notably an order for anonymity was set aside and the first instance judgment was directed to be published fully. Stanley Burnton LJ said at [76] and [79] that parties to a matrimonial dispute who bring before the Court the facts and documents relating to their financial affairs may in general be assured that the confidentiality of that information will be respected. He continued that the general practice of the Family Division is for judgments in ancillary relief cases not to be published, or if published to be anonymised. That is done out of respect for the private life of the litigants and in order to promote full and frank disclosure, and because the information in question has been provided under compulsion.

With respect, these arguments are quite untenable. They are categorically wrong. Parties in civil proceedings are not entitled to produce only those documents that they think fit. On the contrary, in all civil proceedings there is a fierce and exacting duty of disclosure under CPR 31.6(b) of all documents which (i) adversely affect your own case, (ii) adversely affect another party's case, and (iii) support another party's case. This is just as demanding as the Family Law standard.

Further, the implied undertaking applies fully in civil proceedings, albeit now codified within CPR 31.22 which states:

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public; (b) the court gives permission; or (c) the party who disclosed the document and the person to whom the document belongs agree."

At common law the undertaking does not apply to a journalist covering the case – *Harman v Home Office* [1983] 1 AC 280 per Lord Diplock and Lord Roskill.

It is impossible to understand how the implied undertaking operates in family proceedings to prevent any reporting of what happened in those proceedings, while it does not have that effect in civil proceedings. It will be seen *below* how in *Norman v Norman* [2017] 1 WLR 2523 Lewison LJ regarded the existence of the duty of full and frank disclosure as justifying, at its highest, fact-specific reporting restrictions and not some kind of blanket ban.

It is not difficult to see how the reasoning of Thorpe LJ is in maximum conflict with the principles in *Scott*. It is not necessary for me to repeat those principles. The untenability of the arguments was put beyond doubt in 2009 when the rules were altered to allow journalists, and later bloggers, into the proceedings. That rule change destroyed the very foundation of Butler-Sloss LJ's (with respect rather puzzling) reasoning that spouses were given protection by excluding journalists from the court room.

In *Norman v Norman*, Lewison LJ attempted to make sense of these decisions. He held at [84] that as regards proceedings on appeal:

> There are, in a case like this, two distinct questions. The first is whether the substance of the proceedings may be reported. The second is whether the parties may be named. So far as the first question is concerned, the mere fact that proceedings are heard in private does not of itself prohibit publication of what happens in those proceedings: *Clibbery v Allan* [2002] Fam 261, paras 17 and 51. However, the fact that parties are required to make full and frank disclosure of financial information may justify reporting restrictions relating to that information: *Clibbery v Allan*, paras 73 and 79. But there is no blanket ban: *Clibbery v Allan*, para 83. So far as the second question is concerned, even assuming (which is controversial) that ancillary relief proceedings fall within the ambit of the Judicial Proceedings (Regulation of Reports) Act 1926 (as extended

> by the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968) that Act expressly permits the publication of the names of the parties. Where Parliament has struck a balance between what may be published and what may not the courts should not create further exceptions to the principle of open justice by analogy except in the most compelling circumstances: see *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 20.

Although Lewison LJ made these observations in support of his reasons for rejecting a submission that the Court of Appeal should change its default position of hearing all financial remedy appeals fully openly, and although he stated at [88] that whether parties to ancillary relief proceedings at first instance should be granted anonymity was a separate question on which he expressed no opinion, his analysis in fact succinctly demonstrates why Thorpe LJ's blanket prohibition at [106] on reporting any evidence (whether written, oral or disclosed documents), and on any pronouncements of the court, is untenable in law. This is because the paragraphs from the judgment of Butler-Sloss LJ cited by him (viz 17, 51, 73, 79 and 83) all relate to the position at first instance, as does the reference to the 1926 Act.

It is ironic that in *Clibbery v Allan*, the lodestar case relied on by the supporters of blanket secrecy in financial remedy cases, Butler-Sloss P is clearly of the view that general non-reportability of such cases is not, and should not become, the law. Consider paras [17] and [51] cited above, as well as [79] where she said:

> There may be cases, as possibly the present appeal might have been, for the court hearing the case in private to decide whether any or even all the information should not be disclosed. It cannot properly be a blanket protection of non-publication in all cases heard in private in chambers under the 1991 Rules. It can however apply not only to the actual case before the court but also to groups of cases arising out of the same type of circumstances… If the financial affairs of any of the parties have to be investigated, and bearing in mind the requirement that the court shall have regard to all the circumstances, that information, if required or likely to be required by the court, would probably be protected. The general principles of discovery would apply. It will however require the parties and the court to consider in each case whether the proper working of the administration of justice requires there to be continuing confidentiality after the end of the proceedings. That is, in my view, no bad thing.'

PART XIII: THE MOSTYN THESIS

In November 2021 I reached the conclusion in *BT v CU* [2021] EWFC 87 (1 Nov 21) that my previous adherence to judicial secrecy (see *W v M (TOLATA proceedings: anonymity)* [2012] EWHC 1679 (Fam) *DL v SL* [2015] EWHC 2621 (Fam), *Appleton v Gallagher* [2015] EWHC 2689 (Fam)) was quite wrong. I have formulated a thesis which explains my error and seeks to correct it.

Sir James Munby has helpfully summarised what he has called "The Mostyn Thesis" in the form of two propositions:

> **Proposition (A)**: *Scott v Scott* [1913] AC 417 and the subsequent case-law establishes that, subject to any statutory provision to the contrary:
> (1) It is not, as such, a contempt of court (a) to publish an account of what has gone on at a hearing of a family case in private or (b) to publish a judgment in a family case delivered in private or (c) to identify the parties in an anonymised family judgment.
> (2) Litigants, even in a family case heard in private, have the right to talk about the case; and a judge has no power to prevent them doing so.
>
> **Proposition (B)**: Restrictions on publication not otherwise imposed by law can be imposed only following a judicial 'balancing exercise' which has regard to and balances the interests of the parties and the public as protected by Articles 6, 8 and 10 of the Convention, considered in the particular circumstances of the case: *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593.

Since then, I have advanced my thesis in a sequence of 10 further judgments:

- *A v M* [2021] EWFC 89 (9 Nov 21)
- *Aylward-Davies v Chesterman* [2022] EWFC 4 (4 Feb 22)
- *Xanthopoulos v Rakshina* [2022] EWFC 30 (12 Apr 22)
- *Gallagher v Gallagher (No. 1) (Reporting Restrictions)* [2022] EWFC 52
- *Re EM* [2022] EWCOP 31, [2022] 4 WLR 101
- *Re PP (A Child)* [2023] EWHC 330 (Fam) (20 Feb 23)
- *R (on the application of Marandi) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin) 17 Mar 2023
- *TT v Essex County Council* [2023] EWHC 826 (Admin) 21 Mar 23
- *James v Seymour* [2023] EWHC 844 (Fam) (19 April 2023)
- *Augousti v Matharu* [2023] EWHC 1900 (Fam) (10 August 2023).

I have elaborated my thesis in the following further texts published in the Financial Remedies Journal:
Multiplied Propagation (8 Apr 24)
A Fabulous Interview (13 Aug 24)
Absence of Authority? (1 Sep 24) and
Re-multiplied Propagation (21 May 25).

Sir James Munby has also written extensively about the open justice problem in the Family Courts. A list of his pieces on that topic is in Annex III.

I have repeatedly challenged those who disagree with my thesis to set out their arguments publicly. For example in *A Fabulous Interview* I stated:

> "I reiterate my challenge to anyone who disagrees with my analysis to set out their arguments with chapter and verse."

But no-one has risen to the challenge.

In the Final Report of the Financial Remedies Sub-Group of The Transparency Implementation Group April 2023 ('the Sub-Group") it was stated at [1.6]:

> "It would not have escaped the notice of those involved in Financial Remedy work that there have been several decisions of Mostyn J that pertain to Transparency in the FRC which have been published during the currency of this group preparing this report. There have also been many articles written in which it is suggested that this report must set out the view of the group on the law in this area, specifically on the issue of anonymity, but also dealing with other issues. I make no apologies in stating that it is not for this report to set out what we consider the law to be on any particular, controversial, point. That must be a matter for the Court of Appeal. We acknowledge that there are different approaches to certain issues by different judges at High Court level and that this is far from ideal.

And at [2.14] it was stated that it was not for the Sub-Group to adjudicate upon the law; that was the remit of the Court of Appeal. Yet the report advanced proposals, later adopted by the President, providing for wholesale standardised anonymisation of financial remedy cases not covered by sec 12. These proposals can only be lawful if the Mostyn Thesis is wrong, but, as seen, no attempt has been made by anyone to put up any argument why it is wrong.

In Chapter 12 of the Report various arguments are advanced why, at complete variance with *Scott v Scott,* the law should treat financial remedy cases as "another country" where justice is "shielded" (as Sir Geoffrey Vos MR put it in *Tickle v The BBC* [2025] EWCA Civ 42 at [45] and [46]). They are summarised in [2.14]:

1. The nature of the vast array of information that must be disclosed in FR cases, being not just financial, but also in relation to health and highly personal issues.
2. The need to protect the privacy of children – if their parents are named then their children will undoubtedly be identified.
3. The risk that the threat of publicity could distort the proceedings in some way, either by a party being more reluctant to disclose vital information or by a party making allegations in the knowledge that the other party would do all they could to avoid that information/allegation being made public.

I fully accept that each objection could, at any rate in theory, form the basis for an application for an anonymisation order in a specific case. A party may be able to demonstrate that, due to one or more such factors, by nothing short of anonymisation can justice be done.

However, it is unlikely that either individually, or collectively, any of these factors or reasons would justify an order for anonymity.

As regards the first reason, the "vast array" of disclosure plainly could not of itself justify anonymisation. The argument in favour of secrecy must surely be the distress caused by the public disclosure of material of a personal nature. But that very point was dealt with by Lord Atkinson in *Scott*. He said that the pain and humiliation inflicted by the process must be tolerated and endured because a public trial is the best security for the pure impartial and efficient administration of justice and the best means for winning for it public confidence and respect. That reason has become almost canonical in the justification of the open justice principle.

In *Norman v Norman* [2017] 1 WLR 2523 Lewison LJ stated that the mere risk of pain and humiliation as a result of publicity will rarely be a sufficient reason in itself for departing from open, unanonymised, justice. Nor, without more, will the fact that private matters are in issue. Nor will the risk that the press may abuse their freedom to publish, even if the coverage is "outrageously hostile" or even abusive. Although he said this in the context of rejecting an application for anonymity on an appeal, the principles apply equally to proceedings heard at first instance.

Similarly, the spectre of a threat of blackmail or other pressure if the case is heard in public was directly addressed by Lord Shaw who described the argument as "very dangerous ground". To make a concession to those concerns would "tend to bring about those very dangers to liberty in general and to society at large against which publicity tends to keep us secure."

The identification of children in any press report about their parents' financial remedy case was not directly dealt with in *Scott*. It is, with respect, a spurious reason for a general policy of anonymity but, as stated, could in the individual case, at any rate in theory, form an argument for an individual order. If it were to be a generalised policy, then it would surely have to apply to any form of litigation. And as most adults have children, it would mean that every case of any nature where one of the parties has a child would presumptively be anonymised. And, as Brian Farmer pointed out in *Gallagher,* the theory would not logically stop there because most adults who feature in press reports about anything sensational have children.

A general policy of anonymity?

In the 18-month period 30 September 2023 – 31 March 2025, 84 financial remedy judgments were placed on Bailii/tna. Bearing in mind that the House of Lords had said that any derogation from full open justice can only happen where it is strictly justified on an individual basis, one would not have expected many of them to have been

anonymised, let alone affixed with a rubric threatening contempt proceedings if the anonymity were breached.

The results are set out in the following table:

30 September 2023 – 31 March 2025	Total		
Judgments	84		
published with names*	13	15%	of total
published anonymously	71	85%	of total
Reasons given for anonymity	7	10%	of these 71 cases
No rubric	14	20%	
Standard rubric	41	58%	
Other rubric **	9	13%	
* of which 2 also had a rubric			
** of which 2 did not explicitly threaten contempt proceedings			

That 85% were published anonymously, and of that cohort only 10% offered any reasons for doing so, demonstrates, I am sorry to say, a defiant refusal by the overwhelming majority of the family judiciary to comply with the law, and their determination to cling to the specious reasoning of Thorpe LJ in *Clibbery* that "family proceedings are easily distinguishable from civil proceedings in the other Divisions of the High Court" and that "all the pronouncements of the court are prohibited from reporting and from ulterior use unless derived from any part of the proceedings conducted in open court or otherwise released by the judge.".

The decisions include *IR v OR* [2022] EWFC 20, where Moor J stated at [29]:

> "I am clear that, until I am told I have to permit publication, litigants are entitled to their privacy in the absence of special circumstances, such as where they having already courted publicity for the proceedings which is not the case here"

And *Barclay v Barclay* [2021] EWFC 40, where Cohen J stated at [16]:

> "In financial remedy proceedings the starting point is one of privacy. This arises from a number of considerations including the fact that parties are obliged by rules of court to give full and frank disclosure of all relevant matters. But, further, the breakdown of a relationship and its consequences are intensely personal matters. For the public to be admitted, whether by attendance at a hearing or being able to read about it, would add a layer of pain and embarrassment which is damaging both to the parties and to their wider families. There is no corresponding public benefit."

To like effect is the decision in *G v S (Family Law Act 1996: Publicity)* [2024] EWFC 231 (B) (6 June 2024) where HHJ Reardon held that in any application under Family Law Act 1996

which involves allegations of domestic abuse or other harm, the starting point when considering the application of the open justice principle should be in favour of confidentiality.

In *Tsvetkov v Khayrova* [2023] EWFC 130 at [114] Peel J attempted to find a way round the Mostyn Thesis. He stated:

> "However, I tentatively take the view that:
> i) As I understand it, in none of the cases before Mostyn J were these issues of principle argued. Insofar as there was any argument between the parties, it was brief and addressed the merits of anonymisation i.e the balance between Articles 8 and 10, rather than any, or any detailed, submissions about the principles underlying the practice of confidentiality and anonymity in financial remedy proceedings.
> ii) Mostyn J describes the decision in *Clibbery v Allen* as obiter, in that it concerned publication of proceedings under Part IV of the Family Law Act 1996. Nevertheless, the judgments of Dame Elizabeth Butler-Sloss P and Thorpe LJ comprehensively considered the broader issue of publicity in family proceedings including financial remedy proceedings. And *Lykiardopulo*, also heard in the Court of Appeal, was not obiter; the appeal concerned ancillary relief proceedings (as they were then termed) and the same conclusion was reached as to the non-reportability of financial remedy proceedings absent court order.
> iii) I repeat that I make no comment on whether Mostyn J is correct or not. But in the circumstances, my provisional view is that I should follow the decisions of the Court of Appeal. In my tentative opinion, it is for a higher court than mine to decide this issue, certainly unless and until I hear full and detailed argument which addresses the hugely important thesis of Mostyn J. I have had no meaningful submissions on this topic, either in this case or in any other case in front of me, since Mostyn J first set out his considered position."

In *Augousti v Matharu* [2023] EWHC 1900 (Fam) I made a full response explaining that I would not want anyone to think that I had not received full argument on the issues, as I had.

I also explained how it could not conceivably be correctly said that the *ratio decidendi* of *Lykiardopulo* is that a financial remedy decision is "non-reportable absent a court order.".

Rubrics

48 of the 71 cases published anonymously bore a rubric threatening that breach of the anonymity either **may** be a contempt of court (42 cases) or **will** be a contempt of court (6 cases). I have described these rubrics in cases not subject to sec 12 as “worthless bloviations” which should be abandoned forthwith. On refection, I consider that my language arguably trivialises the seriousness of what is happening here, which is that litigants are being threatened with fines and imprisonment if they do something that they are lawfully entitled to do, namely to talk about the judgment with their family, friends and

even journalists and in so doing to disclose the identity of themselves, their former spouses and their children.

Litigants are not even allowed, under the terms of the standard rubric, to make those disclosures to a professional legal adviser, a lay adviser, a McKenzie Friend, a health care professional, a counsellor, a police officer, the Children's Commissioner or the European Court of Human Rights, putting them in a considerably worse position than parties in a private or public law children case, who are entitled to make those disclosures under FPR 12.73 and PD 12G.

The judges affixing these Rubrics to their anonymised judgments appear to have forgotten the terms of sec 12 of the 1960 Act. This provides that disclosing details of a case heard in private only amounts, of itself, to a contempt where it is one of the four protected types (and a standard financial remedy case is not) or where "the court (having power to do so) **expressly** prohibits the publication of all information relating to the proceedings or of information of the description which is published." Lord Scarman in *Attorney-General v Leveller Magazine Ltd* makes clear that such an express prohibition must be contained in formal order or ruling. And such a formal order must comply with the terms of Viscount Haldane's common law exception.

A rubric in a financial remedy case is not a formal order or ruling containing such an express prohibition. It is therefore a baseless, and I would say scandalous, *brutum fulmen* the existence of which is entirely at odds with the Rule of Law.

I contend that the number of anonymised cases being published; the almost total absence of reasons for the anonymisation; and the statements from the senior judges which I have set out, all point to the adoption of a general (but unspoken) policy of banket secrecy for financial remedy cases.

I have explained at length that people who litigate in the courts of this country are not entitled to privacy or confidentiality unless their case is protected under sec 12 of the 1960 Act. But there is a more profound reason to object to this policy. It is that the House of Lords in *Re S* stated explicitly through Lord Steyn that the court has no power to analogise, except in the most compelling circumstances, further exceptions to the general principle of open justice.

Yet is that not precisely what the family judiciary have done? And is it not exactly what the Financial Remedy Transparency Pilot (see below) purports to do?

Appeals to the High Court

FPR 30.12A(3)(a) and PD 30B, para 2.1(a) state that the High Court hearing an appeal from a circuit judge should make an order for the hearing to be in public. While PD 30B, para 2.1(b) then goes on to state that the court should normally impose reporting restrictions in the terms of a standard order, para 2.3 states that in a financial remedy appeal where no minor children are involved, the court will not normally impose reporting restrictions.

So, to be clear, in a financial remedy appeal, where no minor children are 'involved' (which must mean that the provision for such children is the subject of the appeal and not merely that that parties have children), these rules say that the court should ordinarily (and without any application having been made) make an order for the appeal to be heard in public without any reporting restrictions. The consequence of such an order would be, to state the obvious, that the judgment would bear no rubric and would not be anonymised.

The makers of these rules appear to have overlooked the terms of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, sec 1, which in its amended form provides (1) that where an appeal is brought against a decision of the Family Court (or an application is made for permission to appeal against a decision of that court) and that court having sat in private during the whole or any part of the proceedings in which the decision was given, then the appeal court shall have power to sit in private during the whole or any part of the proceedings on the appeal or application, and (2) that the appeal court **shall give its decision and the reason for its decision in public** unless there are good and sufficient grounds for giving them in private and in that case the court shall state those grounds in public. The Act added that the powers it conferred on the appeal court were in addition to any other power of the court to sit in private.

These provisions make it abundantly clear that the default position for an appeal is a hearing in public and the appeal court can only sit in private if it makes an order to that effect.

It is worth recalling FPR 27.10. This provides that proceedings to which these rules apply will be held in private, except where the FPR or **any other enactment** provide otherwise.

Therefore, FPR 12A(3)(a) and PD 30B, para 2 appear to have things the wrong way round. If there is to be an initial order, then that has to be the appeal is heard in private not that it is heard in public.

Be that as it may, one way or another, a financial remedy appeal from a circuit judge to a High Court judge should be heard in public without any reporting restrictions.

Yet in in *X v Y* [2025] EWHC 727 (Fam) Trowell J published a judgment in a financial remedy appeal where he granted permission to appeal but dismissed the appeal. It appears that the appeal was heard in private. The judgment stated that it was handed down in private. The judgment was anonymised and prominently displayed a modified version of the standard rubric stating that breach of the anonymity **will be (not may be)** a contempt of court.

It would appear that both counsel, the wife's solicitor, and the judge collectively overlooked the existence of the statute and rules set out above, with the result that the open justice principle was not upheld. Apparently, both counsel made common cause in favour of anonymity. In *Spencer v Spencer* [2009] 2 FLR 1416 at [44] Munby J observed, following Lord Woolf MR in *R v Legal Aid Board ex parte Kaim Todner* [1999] QB 966 at 977,

that it was when both sides agreed that information should be kept from the public that the court had to be most vigilant.

It is extremely dispiriting that time and again such basic errors are still being made at High Court level. No such criticism can be levelled at the Court of Appeal which applies the open justice principle scrupulously. The inexplicable difference in approach between the Court of Appeal and the Family Court is another reason for suggesting that the latter should comply with the law. In *Rosemin-Culligan v Culligan (Re Costs and Anonymity)* MacDonald J stated at [40]:

> "Each case will turn on the application of that principled approach to the particular facts of the case. As such, to suggest that because a large number of cases are anonymised in any given period all cases should be anonymised is to succumb to a logical and legal fallacy and falls into the very trap that the jurisprudence indeed warns against. Further, in so far as the exercise can be said to have any persuasive force, it is interesting to conduct the same type of survey in respect of financial remedies judgments in the Court of Appeal. That exercise reveals a number of examples where the Court of Appeal has published the names of parties who were anonymised at first instance … More importantly, and again consistent with the approach set out above, where the Court of Appeal has determined to anonymise its judgment in a financial remedies case, this has followed the careful balancing of the various interests protected by Arts 6, 8 and 10."

PART XIV: THE FINANCIAL REMEDY TRANSPARENCY PILOT

The President accepted the recommendations of the Sub-Group. He decided that its recommendations would be piloted from 29 January 2024 in Birmingham, Leeds and the Central Family Court. On 11 November 2024, the pilot scheme was extended to the Royal Courts of Justice. On 29 January 2025, it was applied to all courts nationwide and continued to 29 January 2026.

Pilot schemes are permitted under FPR Part 36. FPR 36.2 provides that Practice Directions may modify or disapply any provision of the rules for specified periods and in relation to proceedings in specified courts for assessing the use of new practices and procedures in connection with proceedings. Pursuant to sec 81 of the Courts Act 2003 Practice Directions may be given in accordance with the Constitutional Reform Act 2005 by the President using powers delegated to him by the Lady Chief Justice under that Act. Under Schedule 2 para 3(1) the directions must be agreed by the Lord Chancellor. In practice that agreement is delegated to the Parliamentary Under-Secretary of State at the Ministry of Justice. This is how family pilot schemes are normally promulgated. Therefore, at the present time the pilot scheme for the new express procedure for low value cases is proceeding under PD 36ZH, signed by both the President and Lord Ponsonby, Parliamentary Under-Secretary of State at the Ministry of Justice.

The making of such Practice Directions is a matter of the utmost seriousness. Although the President is not formally obliged to obtain the approval of the Family Procedure Rule Committee before issuing a practice direction, in practice he invariably does.

Practice Directions about the practice and procedure of the Family Court can be made otherwise than under Constitutional Reform Act 2005 but these require the approval of both the Lord Chancellor and the Lady Chief Justice.

The President can also give Guidance as to practice and procedure or delegate the giving of Guidance to others. Examples include the FRC Efficiency Statement (January 2022), Drafting Orders (November 2021), Experts (November 2021), Jurisdiction of the Family Court – Allocation and Transfer of Cases: (May 2021), E-bundles (December 2021), Costs in Divorce proceedings (March 2022), Witness Statements (November 2021).

Such Guidance cannot modify or disapply any provision of the rules. Such Guidance does not have to be agreed or approved by either the Lord Chancellor or the Lady Chief Justice.

In contrast, where a pilot scheme proceeds under Part 36, the implementing Practice Direction has the effect of formally modifying the existing rules for the purposes of the scheme.

Surprisingly, the financial remedy transparency pilot initiated in January 2024, and extended to all courts in January 2025, was not established under Part 36. It is not implemented by a Part 36 Practice Direction which modifies the existing rules to allow the steps in the pilot to be taken. Rather, it is governed by Guidance issued by the President dated 11 December 2023. Para 19 of the Guidance says that when a reporter

attends court "The Court will **consider** making a standard Transparency Order in accordance with Annexe II". However, at para 8 the Guidance states categorically that it will adopt the recommendations contained in the Sub-Group's Report. In para 7 it records the main recommendation of the Report that:

> "In any case attended by a reporter, a Reporting Order **should be made** entitling the reporter to see the ES1 and position statements of the parties, and setting out what reporting is permitted in the case, whilst preserving the anonymity of the parties, and the confidentiality of their most private details."

It is notable that this Reporting Order is only to be made where a reporter attends a hearing. If a reporter does not, then presumably the authors of the report consider that routine anonymisation accompanied by a standard rubric will be sufficient to ensure that the identities of the parties remain forever secret. Yet, as shown, that would be an entirely incorrect assumption, and there would be nothing to stop a newspaper identifying the parties in a full report about the case. The scheme therefore is arbitrary: if a reporter attends an order preventing you from talking to anybody about the judgment, without limit of time, will be made against you; if a reporter does not attend a rubric will be issued which cannot prevent you talking to anybody about the judgment.

The draft order at Annex II of the Guidance states that it applies "to anybody who attends some or all of a hearing in the case and to anybody who is served with a copy of this order or is aware of its contents." It states:

9. A reporter may publish any information relating to the proceedings save to the degree restricted below.
10. No person may publish any information relating to the proceedings to the public or a section of it, which includes:
    a. The names and addresses of the parties (including any intervenors) and their children and any photographs of them;
    b. The identity of any school attended by a child of the family;
    c. The identity of the employers, the name of the business or the place of work of any of the parties;
    d. The address of any real property owned by the parties;
    e. The identity of any account or investment held by the parties;
    f. The identity of any private company or partnership in which any party has an interest;
    g. The name and address of any witness or of any other person referred to in the hearing save for an expert witness.

The front of the order bears a penal notice threatening anyone who does not comply with the order with imprisonment, fine or asset seizure.

I regret to say that this Guidance and the terms of its draft order are unlawful. It includes terms, which do not even have the status of rules, which expose the media to the risk of contempt proceedings in respect of acts (e.g. reporting the names of the parties) which previously carried no such risk. If this were a Part 36 pilot scheme the terms would be

beyond the rule-making power of the President as sec 76(2A) of the Courts Act 2003 only allows existing contempt risks to be relaxed, not enhanced. That impediment cannot be avoided by using Guidance instead of a Part 36 Practice Direction.

The Guidance offends the principle that no new exception to the open justice principle can be effected other than by statute. It does not identify what statutory power the court would use to make what is an exceptionally fierce all-encompassing RRO.

The Guidance abrogates the requirement for a party seeking privacy to prove their case strictly. It abrogates the requirement on the court to conduct the intensely focussed balancing exercise. It abrogates the requirement on the court to reflect that making such an order is exceptional.

It offends almost every precept devised and implemented for over a century to give effect to the general principle of the open administration of justice.

For these reasons, any "transparency order" made pursuant to this Guidance will be invalid. There will not have been a valid order or ruling under sec 12(1)(e) and a party will be entitled to discuss the judgment with anyone he or she chooses (including a journalist) without fear of contempt proceedings. The exercise will have been futile, a *brutum fulmen*.

It is scarcely believable, 112 years after the House of Lords declared unlawful an order which purported to cloak Mrs Scott's family law case in secrecy, that the President should issue Guidance which purports to require the family judiciary to issue secrecy orders in financial remedy proceedings.

I hope that the Family Procedure Rule Committee will consider these arguments very carefully when it comes to consider putting the pilot scheme on a permanent footing.

PART XV: AUSTRALIA

Australia has grasped the nettle. Sec 121 of the Family Law Act 1975, as enacted, provided that it was an offence for any person to print or publish (a) any statement or report that proceedings have been instituted in the Family Court or in another court exercising jurisdiction under this Act, or (b) any account of evidence in proceedings instituted in the Family Court or in another court having jurisdiction under the Act, or any other account or particulars of any such proceedings. Sec 97(1), as enacted, provided that " all proceedings in the Family Court, or in another court when exercising jurisdiction under this Act, shall be heard in closed court." Sec 97(4) provided that "Neither the Judge hearing proceedings under this Act nor counsel shall robe." In *Russell v Russell* [1976] HCA 23 the High Court of Australia held that inasmuch as sec 97 purported to require state courts exercising powers under the Act to do so in camera, it was invalid. Gibbs J stated:

> "It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted "publicly and in open view" (*Scott v. Scott* (1913) AC 417, at p 441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for "publicity is the authentic hall-mark of judicial as distinct from administrative procedure" (*McPherson v. McPherson* (1936) AC 177, at p 200). To require a court invariably to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court. If the Act had empowered the Supreme Courts when exercising matrimonial jurisdiction to sit in closed court in appropriate cases I should not have thought that the provision went beyond the power of the Parliament. In requiring them to sit in closed court in all cases - even proceedings for contempt - the Parliament has attempted to obliterate one of their most important attributes. This it cannot do."

These provisions have been amended substantially. Sec 97 no longer applies to state courts and provides now that all proceedings in the Federal Circuit and Family Court of Australia when exercising jurisdiction under the Act shall be heard in open court. The publication prohibition is now contained in Part XIVB (Secs 114N – 114T). This provides that it is an offence to communicate an account of proceedings under the Act to the public, if the account identifies certain people involved in the proceedings. It is also an offence to communicate a list of proceedings that are to be dealt with under the Act to the public, where proceedings are identified by reference to the names of the parties to those proceedings. A communication is not, however, made to the public if it is made to

a person with a significant and legitimate interest in the subject matter of the communication that is greater than the interest of members of the public generally.

So, while a member of the public can come and watch any proceeding under the Act it is an offence for any communication of an account of the proceedings to be made to the public.

Unsurprisingly, a communication in accordance with a direction of a court or otherwise approved by a court, or in accordance with the applicable Rules of Court, is not an offence. This exception is the foundation for the universal anonymisation of Family Law judgments by the use of pseudonyms. Judgments will invariably state prominently that Part XIVB of the Family Law Act 1975 (Cth) makes it an offence, except in very limited circumstances, to publish an account of proceedings that identify persons, associated persons, or witnesses involved in these family law proceedings. They also invariably note on their face that publication of the judgment by the Court under a pseudonym has been approved pursuant to sec 114Q(2) of the Family Law Act 1975 (Cth).

This is how the question of whether there should be a general derogation from the open justice principle in family law cases should be addressed. It should be dealt with by primary legislation democratically and publicly enacted by the people's tribunes in the legislature in a process where all views can be fully debated.

PART XVI: CONCLUSION

In *Gallagher v Gallagher* [2022] 1 WLR 4370 at [36] I suggested that in disputes about the application of the open justice principle to financial remedy proceedings the advocates in favour of confidentiality invariably asked the wrong question: "Why is it in the public interest that the parties should be named?" rather than the right one: "Why is it in the public interest that the parties should be anonymous?"

My personal view is that unless the case is protected by sec 12 it is not in the public interest for parties to be anonymous for the reasons given by Mr Fenn in 1910, Viscount Haldane, Lord Atkinson and Lord Shaw in 1913 and by Applegarth J in 2024.

It is my respectful contention that anonymity can and should only be imposed in an individual case where the following test is met:

The facts relied on must be proved by clear and cogent evidence. If those facts show that by nothing short of anonymisation could justice be done, then it may be ordered under the common law. Only if the common law answer is negative does the court balance the competing Convention rights engaged by those facts. In that evaluation the open justice principle itself must be reckoned as a weighty factor in favour of publicity. Any restriction of freedom of expression must be justified by a pressing social need. Ultimately, it must be shown that anonymity is strictly necessary for the attainment of justice.

I acknowledge fully that there is a strong view held by many laypersons, professionals and judges that financial remedy cases should be treated as a class apart from ordinary civil litigation and that as such the extensive anonymity as spelt out in the Guidance Annex II draft order is right and just for them.

But I do strenuously maintain that if this view is to be vindicated it must be done in the High Court of Parliament and not in the High Court of Justice.

I end by repeating this prescient declaration from Lord Moulton:

Nothing would be more detrimental to the administration of justice in any country than to entrust the judges with the power of covering the proceedings before them with the mantle of inviolable secrecy.

Thank you for listening to me.

ANNEX I

Cases in the House of Lords and Supreme Court where *Scott* has been considered

Attorney-General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745; 68 Cr App R 342, HL(E)

Home Office v Harman [1983] 1 AC 280; [1982] 2 WLR 338; [1982] 1 All ER 532, HL(E)

In re F (Mental Patient: Sterilisation) [1990] 2 AC 1; [1989] 2 WLR 1025; [1989] 2 All ER 545; [1989] 2 FLR 376, HL(E)

Attorney General v Times Newspapers Ltd (No 3) [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398; (1991) 141 NLJ 528; The Times, 12 April 1991; The Independent, 23 April 1991, HL(E)

M v Home Office [1994] 1 AC 377; [1993] 3 WLR 433; [1993] 3 All ER 537; (1993) 143 NLJ 1099; The Times, 28 July 1993; The Independent, 28 July 1993, HL(E)

In re L (A Minor) (Police Investigation: Privilege) [1997] AC 16; [1996] 2 WLR 395; [1996] 2 All ER 78; 95 LGR 139; [1996] 1 FLR 731, HL(E)

In re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683; [2005] 1 FLR 591, HL(E)

A v Secretary of State for the Home Department (No 2) [2005] UKHL 71; [2006] 2 AC 221; [2005] 3 WLR 1249; [2006] 1 All ER 575, HL(E)

R v Davis [2008] UKHL 36; [2008] AC 1128; [2008] 3 WLR 125; [2008] 3 All ER 461; [2008] 2 Cr App R 462, HL(E)

In re British Broadcasting Corpn [2009] UKHL 34; [2010] 1 AC 145; [2009] 3 WLR 142; [2010] 1 All ER 235; [2009] WLR (D) 192, HL(E)

A v HM Treasury (JUSTICE intervening) (Nos 1 and 2) [2010] UKSC 5; [2010] 2 AC 534; [2010] 2 WLR 378; [2010] 4 All ER 829; SC(E)

In re Guardian News and Media Ltd [2010] UKSC 1; [2010] 2 AC 697; [2010] 2 WLR 325; [2010] 2 All ER 799; [2010] WLR (D) 13; SC(E)

W (Algeria) v Secretary of State for the Home Department [2012] UKSC 8; [2012] 2 AC 115; [2012] 2 WLR 610; [2012] 2 All ER 699; [2012] HRLR 15; [2012] WLR (D) 69; (2012) 162 NLJ 390; The Times, 9 March 2012; SC(E)

A v British Broadcasting Corpn (Secretary of State for the Home Department intervening) [2014] UKSC 25; [2015] AC 588; [2014] 2 WLR 1243; 2014 SC (UKSC) 151; [2014] 2 All ER 1037; [2014] WLR (D) 196; SC(Sc)

Director of the Serious Fraud Office v B [2014] UKSC 23; [2014] AC 1246; [2014] 2 WLR 902; [2014] 2 All ER 798; [2014] Lloyd's Rep FC 401; [2014] WLR (D) 151; SC(E)

Kennedy v Information Comr [2014] UKSC 20; [2015] AC 455; [2014] 2 WLR 808; [2014] 2 All ER 847; [2014] WLR (D) 143; SC(E)

R (C) v Secretary of State for Justice (Media Lawyers Association intervening) [2016] UKSC 2; [2016] 1 WLR 444; [2017] 1 All ER 513; [2016] WLR (D) 34; SC(E)

Khuja v Times Newspapers Ltd [2017] UKSC 49; [2019] AC 161; [2017] 3 WLR 351; [2018] 1 Cr App R 1; [2017] WLR (D) 490; SC(E)

Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd [2019] UKSC 38; [2020] AC 629; [2019] 3 WLR 429; [2019] 4 All ER 1071; [2020] 1 All ER (Comm) 95; [2019] WLR (D) 462; SC(E)

R (Miller) v Prime Minister (Lord Advocate intervening) [2019] UKSC 41; [2020] AC 373; [2019] 3 WLR 589; 2020 SC (UKSC) 1; [2019] 4 All ER 299; [2019] WLR (D) 524; SC(Sc)

ZXC v Bloomberg LP [2022] UKSC 5; [2022] AC 1158; [2022] 2 WLR 424; [2022] 3 All ER 1; [2022] 2 Cr App R 2; [2022] WLR(D) 96; The Times, 3 March 2022, SC(E)

*QX v Secretary of State for the Home Department [*2024] UKSC 26; [2024] 3 WLR 547; [2025] 1 All ER 209; [2024] WLR(D) 376, SC(E)

Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust [2025] UKSC 15; [2025] 2 WLR 815; [2025] WLR(D) 220, SC(E)

ANNEX II

Excerpts from speeches in *Scott v Scott* [1913] AC 417

Viscount Haldane:

> ...unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires. He may be able to shew that the evidence can be effectively brought before the Court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. But this further conclusion he will find more difficult in a matrimonial case than in the case of the secret process, where the objection to publication is not =confined to the mere difficulty of giving testimony in open Court. In either case he must satisfy the Court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal Court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors.
>
> A mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made. Whether this state of the law is satisfactory is a question not for a Court of justice but for the Legislature

Earl of Halsbury

> I am of opinion that every Court of justice is open to every subject of the King.
>
> I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do not deny it, because it is impossible to prove what cases might or might not be brought within that category, but I should require to have brought before me the concrete case before I could express an opinion upon it.

Earl Loreburn

> I cannot think that the High Court has an unqualified power in its discretion to hear civil proceedings with closed doors. The inveterate rule is that justice shall be administered in open Court. I do not speak of the parental jurisdiction regarding lunatics or wards of Court, or of what may be done in chambers, which is a distinct and by no means short subject, or of special statutory restrictions. I speak of the trial of actions including petitions for divorce or nullity in the High Court. To this rule of publicity there are exceptions, and we must see whether any principle can be deduced from the cases in which the exception has been allowed.
>
> It has been held that when the subject-matter of the action would be destroyed by a hearing in open Court, as in a case of some secret process of manufacture, the

doors may be closed. I think this may be justified upon wider ground. Farwell L.J. aptly cites Lord Eldon as saying, in a case of quite a different kind, that he dispensed with the presence of some of the parties "in order to do all that can be done for the purposes of justice rather than hold that no justice shall subsist among persons who may have entered into these contracts." An aggrieved person, entitled to protection against one man who had stolen his secret, would not ask for it on the terms that the secret was to be communicated to all the world. There would be in effect a denial of justice.

Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence by hearing the evidence of others. Or, to use the language of Fletcher Moulton L.J., in very exceptional cases, such as *D. v. D* where a judge finds that a portion of the trial is rendered impracticable by the presence of the public, he may exclude them so far as to enable the trial to proceed. It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.

Applying this principle to proceedings for nullity, if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera may lawfully be made. But I cannot think that it may be made as a matter of course, though my own view is that the power ought to be liberally exercised, because justice will be frustrated or declined if the Court is made a place of moral torture. Very learned judges of the Divorce Court have acted upon the view that they possess peculiarly extensive powers in this respect, inherited from the old Ecclesiastical Courts. I do not think so. The 46th section of the *Matrimonial Causes Act, 1857*, requires evidence to be given in open Court, an expression so clear that I was surprised to hear its meaning contested, and this provision overrides the old practice of secret hearing in the Ecclesiastical Courts. I do not, however, read s. 46 of the *Matrimonial Causes Act, 1857,* as prohibiting a trial in camera where such considerations may require it as in other Courts equally bound to sit in public. That sec almost invites the framing of rules under the Act to regulate hearings otherwise than in open Court. Such rules would, in my opinion, be valid if they did not go beyond the limitations indicated. But no rules to that effect have been made, and the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception.

And though the traditional law, that English justice must be administered openly in the face of all men, is an almost priceless inheritance, it does seem strange that it may be relaxed in order to save property, but cannot be relaxed in order to safeguard public decency against even the foulest contamination. I feel certain that considerations of this kind have influenced judges, especially in the Divorce Court, and I wish that I could agree with their view of the law.

Lord Atkinson

It would be manifestly unjust to allow a disclosure of a secret, made during the hearing of such a suit in camera, either under the compulsion of the presiding judge or at his invitation, in order to enable him to decide the points at issue, to be made use of at any time thereafter to destroy the value of the property.

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.

Lord Shaw

in my humble opinion these sections of the Act of 1857 were declaratory in another sense. They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than that for all other causes whatsoever. And it is to this point accordingly that the discussion must come. The historical examination clears the ground. So that the tests of whether we are in the region of constitutional right or of judicial discretion — of openness or of optional secrecy in justice — are general tests.

I am of opinion that the order to hear this case in camera was beyond the power of the judge to pronounce. I am further of opinion that, even on the assumption that such an order had been within his power, it was beyond his power to impose a suppression of all reports of what passed at the trial after the trial had come to an end. But in order to see the true gravity of what has occurred, these two things must be taken together. So taken, my Lords, they appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security. The Court of Appeal has by its majority declared a review of this judgment by it to be incompetent. I therefore make no apology for treating the situation thus reached as most serious for the citizens of this country.

I admit the embarrassment produced to the learned judge of first instance and to the majority of the Court of Appeal by the state of the decisions; but those decisions, in my humble judgment, or rather, — for it is in nearly all the instances only so, — these expressions of opinion by the way, have signified not alone an encroachment upon and suppression of private right, but the gradual invasion and

undermining of constitutional security. This result, which is declared by the Courts below to have been legitimately reached under a free Constitution, is exactly the same result which would have been achieved under, and have accorded with, the genius and practice of despotism.

What has happened is a usurpation — a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.

It was no wonder that in the later case in 1876 even the Master of the Rolls, Jessel, made an exception to the rule of open Courts of justice of "those cases where the practice of the old Ecclesiastical Courts in this respect is continued." But it is perfectly manifest that the practice of the old Ecclesiastical Courts was not continued. Taking evidence under private examination was stopped. What was continued was the remainder of the practice, which was open, and the closed portion was by statute declared also to be open. But while this observation was made by Sir George Jessel, obiter in that case, his judgment upon the main question was one that must command respect. He "considered that the High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action." These, my Lords, constitute the exceptions, definite in character and founded upon definite principles, to which I shall in a little allude

The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention — trade secrets — is of the essence of the cause. The first two of these cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs. The third case — that of secret processes, inventions, documents, or the like — depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the excuse of a report of proceedings in a Court of law, would be to destroy that very protection which the subject seeks at the Court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secret which the Court may judicially determine to be of patrimonial value and to maintain.

But I desire to add this further observation with regard to all of these cases, my Lords, that, when respect has thus been paid to the object of the suit, the rule of

publicity may be resumed. I know of no principle which would entitle a Court to compel a ward to remain silent for life in regard to judicial proceedings which occurred during his tutelage, nor a person who was temporarily insane — after he had fully recovered his sanity and his liberty — to remain perpetually silent with regard to judicial proceedings which occurred during the period of his incapacity.

And even in the last case, namely, that of trade secrets, I should be surprised to learn that any proceedings for contempt of Court could be taken against a person for divulging what had happened in a litigation after the secrecy or confidentiality had been abandoned and the secrets had become public property.

For the reasons which I have given, I am of opinion that the judgment of Bargrave Deane J. cannot be sustained. It was, in my opinion, an exercise of judicial power violating the freedom of Mrs. Scott in the exercise of those elementary and constitutional rights which she possessed, and in suppression of the security which by our Constitution has been found to be best guaranteed by the open administration of justice. I think, further, that the order to hear the case in camera was not only a mistake, but was beyond the judge's power;

The cases of positive indecency remain; but they remain exactly, my Lords, where statute has put them. Rules and regulations can be framed under s. 53 by the judges to deal with gross and highly exceptional cases. Until that has been done, or until Parliament itself interferes, as it has done in recent years by the Punishment of Incest Act, and also in the Children Act, both of the year 1908, Courts of justice must stand by constitutional rule. The policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider. As an instance of the watchful attention of the Legislature in regard to any possible exceptions to the rule of publicity, s. 114 of the latter Act may be referred to. It provides for the exclusion of the general public in the trial of offences contrary to decency or morality, but this exclusion is to be only during the giving of evidence of a child or young person, and under this proviso, that “nothing in this sec shall authorise the exclusion of bona fide representatives of a newspaper or news agency.” I may add that for myself I could hardly conceive it a likely thing that a general rule consigning a simple and inoffensive case like the present to be tried in camera could ever be made; but that is a consideration which is beyond our range as a Court administering the existing law. Upon the basis of that law I am humbly of opinion that the judgments of the Courts below cannot stand.

ANNEX III

Financial remedy procedure 1858 to the present

The 1857 Act required proof to be made by oral evidence subjected to cross-examination in open court. The 1858 Act allowed the judge to transact business in his private room "as if sitting in open court". This was for purely practical reasons given the very cramped facilities in Westminster Hall which was then hosting four separate courts (the Court of King's Bench, the Court of Common Pleas, the Exchequer Court, and the Divorce Court), and did so until the opening of the Royal Courts of Justice in 1882. The first edition of Rayden on Divorce stated that "… Judges' summonses are heard, with the same powers as if in open Court, in the Judge's private room [adding in a footnote] usually at 10.30 on Saturdays". But it went on to explain that "the judges of the Divorce Division sit at the Royal Courts of Justice… ordinarily in open court".

The 1858 Act provided that the Registrars of the recently created Court of Probate would act as Registrars of the new divorce court. That Act provided that all proceedings before Registrars would be held in Chambers.

For the first seventy-odd years of their existence the work of the Registrars was overwhelmingly procedural, dealing with applications to amend pleadings, extend time, and the like. The great bulk of the financial remedy work was done by the judge, some in court and some in chambers as if sitting in open court. The judge's work in chambers appears to a very great extent to have been the dispatch of procedural summonses.

An application for ancillary relief in the latter part of the 19th century would be made by petition addressed to the Judge Ordinary. Once the pleadings were closed the registrar would "investigate the averments contained therein" and prepare and file a report suggesting the outcome. Either party could apply to the Judge Ordinary on motion to confirm or reject the report. The motion would be heard in open court or in chambers as if in open court.

The Matrimonial Causes Rules 1924 provided that applications for alimony *pendente lite*, permanent alimony or maintenance would all be investigated by the Registrar who would have the power either to make an order on the application, or to refer it, or any question arising on it, to the Judge.

The Matrimonial Causes Rules 1937 were to like effect. Those rules do not say that the Judge should hear an ancillary relief application in chambers. The only reference in those rules to a hearing in chambers is in rule 59 which states that a party may appeal from an order or decision of a Registrar to a Judge in chambers.

An application for variation of settlement, the only capital award available, and for settlement of the wife's property, remained the subject of the Registrar's report procedure for many years, but in due course were devolved.

By the time of the Matrimonial Causes Rules 1973 the only remaining application which was the subject of the report procedure was an avoidance of disposition application. The Matrimonial Causes Rules 1977 removed that final exception.

From that point the default position was that all applications were to be heard by the Registrar, but, of course, any application could be referred to the Judge. None of the many iterations of the Matrimonial Causes Rules actually say that the Registrar must hear the application in chambers. The simple reason was that from the moment of the creation of their office in 1857 they could only sit in chambers. Hence, the Rules of the Supreme Court 1875, Order LIV, provided that in the Probate, Divorce, and Admiralty Division of the High Court a Registrar may transact all such business and exercise all such authority and jurisdiction in respect of the same as may be transacted or exercised by a Judge at chambers

Rule 2.66 of the Family Proceedings Rules 1991 stated that where an application for ancillary relief has been referred or adjourned to a judge, the hearing shall, unless the court otherwise directs, take place in Chambers. These rules were silent about the nature of any hearing before a Registrar, as everyone understood that such hearings would be held in chambers. It was not until 2010, in the Family Procedure Rules, rule 27.10, that it was for the first time explicitly stated that hearings before District Judges, as Registrars had become in 1991, would take place in private.

ANNEX IV

Pieces by Sir James Munby.

Some Sunlight Seeps In 06/07/2022

Family Justice: Ostiis Apertis? Or a mantle of inviolable secrecy? A challenge to those who would keep the doors closed. 12/01/2023

Groundhog Day: a Response to the Report of the Financial Remedies Sub-Group of the Transparency Implementation Group 06/07/2023

The Use and Misuse of the Rubric in the Family Courts 08/01/2024

Groundhog Day Again: A Response to The Transparency Reporting Pilot for Financial Remedy Proceedings 26/01/2024