[COURT OF APPEAL]

REGINA v. LEGAL AID BOARD, *Ex parte* KAIM TODNER (A FIRM)

1998 April 29; June 10

Lord Woolf M.R., Auld and Buxton L.JJ.

Contempt of Court—Court proceedings—Restrictions on reporting—Legal Aid Board terminating solicitors' legal aid franchise following allegations of dishonesty—Solicitors seeking judicial review—Judge refusing solicitors' application for anonymity in proceedings—Whether proper—Whether legal profession entitled to special treatment—Contempt of Court Act 1981 (c. 49), s. 11

Law Reform—Whether necessary—Solicitors' disciplinary appeals—Need to remove anonymity in appeals to High Court—R.S.C., Ord. 106, r. 12

The Legal Aid Board informed the applicants, a firm of solicitors, that the legal aid franchise at two of their offices was to be terminated following allegations of dishonesty by former employees. The applicants sought leave to apply for judicial review of that decision and applied for an order under section 11 of the Contempt of Court Act 1981[1] forbidding the disclosure of their identity in the proceedings on the ground that they would be caused incalculable damage if the reasons on which the board relied for cancelling their franchise were to be made public. The judge granted the applicants leave to apply for judicial review but refused to make an order affording them anonymity. The applicants appealed and, at the start of the appeal, made a further application for anonymity in respect of the appeal whatever its outcome, indicating that if such an order were not made they would withdraw the appeal or consent to its dismissal. The Court of Appeal refused to make the order and indicated that it would not consent to the withdrawal of the appeal.

On the appeal:—

Held, dismissing the appeal, that any interference with the public nature of court proceedings was to be avoided unless justice required it, and where no specific statutory exception applied protection against identification of a party should therefore be granted only where it was necessary for the proper administration of justice; that there was no justification for singling out the legal profession for special treatment when considering whether to grant anonymity to a party to legal proceedings; that in determining an application for anonymity it was appropriate to take into account the extent of the restriction on disclosure sought, the nature of the proceedings, the identity of the party seeking the order and the reasonableness of the claim; that a person who initiated proceedings could reasonably be considered to have accepted the normal incidence of the public nature of court proceedings and, in general, parties had to accept the embarrassment, damage to

[1] Contempt of Court Act 1981, s. 11: "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

reputation and possible consequential loss which could be inherent in being involved in litigation, the protection to which they were entitled normally being provided by a judgment delivered in public refuting unfounded allegations; that a party could not be allowed to achieve anonymity by insisting upon it as a condition for being involved in proceedings irrespective of whether the demand was reasonable; that the appropriateness of an order for anonymity depended on the individual circumstances and, provided a judge adopted the correct approach, the Court of Appeal would not interfere with his decision; and that in all the circumstances the judge had been right to refuse the application for anonymity (post, pp. 975H, 976C, 977A–B, G, 978A–C, D–H, 979B–D).

Scott v. Scott [1913] A.C. 417, H.L.(E.) and *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440, H.L.(E.) applied.

Per curiam. R.S.C., Ord. 106, r. 12 should be amended to remove automatic anonymity from solicitors in disciplinary appeals to the High Court (post, p. 976A–B).

Decision of Kay J. affirmed.

The following cases are referred to in the judgment of the court:

Acton v. Graham Pearce & Co. [1997] 3 All E.R. 909

Attorney-General v. Leveller Magazine Ltd. [1979] A.C. 440; [1979] 2 W.L.R. 247; [1979] 1 All E.R. 745, H.L.(E.)

Barrister (Wasted Costs Order) (No. 1 of 1991), In re A [1993] Q.B. 293; [1992] 3 W.L.R. 662; [1992] 3 All E.R. 429, C.A.

Director of Public Prosecutions v. H. [1997] 1 W.L.R. 1406, D.C.

Holden & Co. v. Crown Prosecution Service [1990] 2 Q.B. 261; [1990] 2 W.L.R. 1137, C.A.

P., Ex parte, The Times, 31 March 1998; Court of Appeal (Civil Division) Transcript No. 431 of 1998, C.A.

P. v. T. Ltd. [1997] 1 W.L.R. 1309; [1997] 4 All E.R. 200

Reg. v. Dover Justices, Ex parte Dover District Council (1991) 156 J.P.R. 433, D.C.

Reg. v. Evesham Justices, Ex parte McDonagh [1988] Q.B. 553; [1988] 2 W.L.R. 227; [1988] 1 All E.R. 371, D.C.

Reg. v. Horsham Justices, Ex parte Farquharson [1982] Q.B. 762; [1982] 2 W.L.R. 430; [1982] 2 All E.R. 269, D.C. and C.A.

Reg. v. Westminster City Council, Ex parte Castelli (1995) 7 Admin.L.R. 840

Rondel v. Worsley [1969] 1 A.C. 191; [1967] 3 W.L.R. 1666; [1967] 3 All E.R. 993, H.L.(E.)

Scott v. Scott [1913] A.C. 417, H.L.(E.)

T. v. Secretary of State for the Home Department [1996] A.C. 742; [1996] 2 W.L.R. 766; [1996] 2 All E.R. 865, H.L.(E.)

Taylor v. Serious Fraud Office [1997] 4 All E.R. 887, C.A.

The following additional cases were cited in argument:

D., In re (unreported), 17 November 1997, Dyson J.

H. (A Barrister), In re [1981] 1 W.L.R. 1257; [1981] 3 All E.R. 205

Raybos Australia Pty. Ltd. v. Jones [1985] 2 N.S.W.L.R. 47

Securities and Investments Board v. Pantell S.A. (No. 2) [1993] Ch. 256; [1992] 3 W.L.R. 896; [1993] 1 All E.R. 134, C.A.

The following cases, although not cited, were referred to in the skeleton arguments:

Bolton v. Law Society [1994] 1 W.L.R. 512; [1994] 2 All E.R. 486, C.A.

Company (No. 006798 of 1995), In re A [1996] 1 W.L.R. 491; [1996] 2 All E.R. 417

Filmlab Systems International Ltd. v. Pennington [1995] 1 W.L.R. 673; [1994] 4 All E.R. 673

Griffin v. Kingsmill (unreported), 20 February 1998, Buckley J.

Hodgson v. Imperial Tobacco Ltd. [1998] 1 W.L.R. 1056; [1998] 2 All E.R. 673, C.A.

Locke v. Camberwell Health Authority, The Times, 11 December 1989

National Home Loans Corporation Plc. v. Giffen Couch & Archer [1998] 1 W.L.R. 207; [1997] 3 All E.R. 808, C.A.

Nelson v. Nelson [1997] 1 W.L.R. 233; [1997] 1 All E.R. 970, C.A.

Reg. v. Advertising Standards Authority, Ex parte City Trading Ltd. (unreported), 1 November 1996, Ognall J.

Reg. v. Camden London Borough Council, Ex parte Martin [1997] 1 W.L.R. 359; [1997] 1 All E.R. 307

Reg. v. Staffordshire County Council Education Appeals Committee, Ex parte Ashworth (1996) 9 Admin.L.R. 373

Solicitors, In re A Firm of [1992] Q.B. 959; [1992] 2 W.L.R. 809; [1992] 1 All E.R. 353, C.A.

Telegraph Plc., Ex parte The [1993] 1 W.L.R. 980; [1993] 2 All E.R. 971, C.A.

APPEAL from Kay J.

By a notice of application dated 30 January 1997 the applicant firm of solicitors, Kaim Todner, applied for leave to apply for judicial review of a decision of the Legal Aid Board dated 31 October 1996 to terminate the legal aid franchises at two of their offices and for an order granting them anonymity for the purposes of the proceedings. On 25 June 1997 the judge granted leave to apply for judicial review but refused to make the order relating to anonymity.

By a notice of appeal dated 21 July 1997 and by leave of the judge the applicants appealed against the judge's refusal to afford them anonymity on the ground, inter alia, that the threat of unfair publicity as a result of the publication of their identity was such that the firm would be deterred from pursuing the application for judicial review, which was their only available remedy.

The facts are stated in the judgment of the court.

Edmund Lawson Q.C. and *Christina Russell* for the applicants. The issue whether anonymity should be granted to a party to legal proceedings is a matter of public importance. The identity of the party is immaterial to a resolution of that issue. The applicants do not wish to be permanently associated with the alleged impropriety which has given rise to the proceedings and, therefore, a direction should be given that they retain their anonymity, irrespective of the outcome of the appeal, or, alternatively, leave should be given to withdraw the appeal. [Reference was made to *Rondel v. Worsley* [1969] 1 A.C. 191.]

[LORD WOOLF M.R. The application will be refused.]

There is a presumption in favour of open justice: see *Scott v. Scott* [1913] A.C. 417 and *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C.

A 440. However, the presumption should be applied with caution. In *Reg. v. Westminster City Council, Ex parte Castelli* (1995) 7 Admin.L.R. 840 Latham J.'s view that anonymity should only be conferred where failure to confer it would render the attainment of justice doubtful or impracticable was too restrictive. The court may confer anonymity if the applicant can put forward good reasons why the ordinary presumption of open justice should not be followed. However, in the present case Latham J.'s test is B satisfied. The applicants will have no effective remedy without anonymity since any publicity given to the proceedings will cause incalculable and permanent damage to their reputation. [Reference was made to *T. v. Secretary of State for the Home Department* [1996] A.C. 742; *P. v. T. Ltd.* [1997] 1 W.L.R. 1309; *In re D.* (unreported), 17 November 1997 and *Director of Public Prosecutions v. H.* [1997] 1 W.L.R. 1406.] The application C for judicial review is closely analogous to a solicitors' disciplinary appeal where the solicitors are granted anonymity: see R.S.C., Ord. 106, r. 12.

As a matter of practice, solicitors and barristers are, ordinarily, afforded anonymity in legal proceedings if they require it: see *In re A Barrister (Wasted Costs Order) (No. 1 of 1991)* [1993] Q.B. 293. However, since solicitors are officers of the court who owe special duties to the court, they should, as a quid pro quo, receive special treatment, although a dishonest D or incompetent solicitor should not enjoy anonymity once an allegation of impropriety has been proved against him and he has unsuccessfully explored all reasonable avenues of appeal. [Reference was made to *In re H. (A Barrister)* [1981] 1 W.L.R. 1257 and *Securities and Investments Board v. Pantell S.A. (No. 2)* [1993] Ch. 256.]

Presiley Baxendale Q.C. and *Jane Mulcahy* for the Legal Aid Board. E Justice should be administered in public, except where the nature or circumstances of the particular case are such that application of the general rule would frustrate or render impracticable the administration of justice or where there is statutory derogation from the general rule. The court in the exercise of its inherent power to control the conduct of proceedings may depart from the general rule only to the extent reasonably necessary to achieve the ends of justice: see *Attorney-General v. Leveller Magazine* F *Ltd.* [1979] A.C. 440, 449–450; *Reg. v. Westminster City Council, Ex parte Castelli,* 7 Admin.L.R. 840, 845 and *Ex parte P.,* The Times, 31 March 1998; Court of Appeal (Civil Division) Transcript No. 431 of 1998. [Reference was also made to *Raybos Australia Pty. Ltd. v. Jones* [1985] 2 N.S.W.L.R. 47; section 11 of the Contempt of Court Act 1981 and section 67 of the Supreme Court Act 1981.]

G The fact that a report of legal proceedings may damage the reputation of or embarrass the parties is not a reason for not applying the general rule: see *Reg. v. Horsham Justices, Ex parte Farquharson* [1982] Q.B. 762, 793–795 and *Reg. v. Evesham Justices, Ex parte McDonagh* [1988] Q.B. 553, 561–562. Similarly, the fact that the report may result in severe economic loss to a party does not entitle the court to prevent or restrict publication of the proceedings: see *Reg. v. Dover Justices, Ex parte Dover* H *District Council* (1991) 156 J.P.R. 433, 438–439.

The fact that the applicants are solicitors does not justify a derogation from the general rule. Solicitors' duties to the court cannot credit the profession with privileges over and above those of other professionals or,

indeed, of litigants. R.S.C., Ord. 106, r. 12 is concerned with the title to be given to appeals from the solicitors' disciplinary tribunal. It does not give solicitors anonymity. The absence of any similar rule for applications for judicial review by solicitors suggests that they are to be treated in the same way as other litigants. Although solicitors have sometimes been afforded anonymity in legal proceedings, there is no established practice for granting them anonymity: see *Acton v. Graham Pearce & Co. (a firm)* [1997] 3 All E.R. 909 and *Taylor v. Serious Fraud Office* [1997] 4 All E.R. 887. In wasted costs cases solicitors are named: see *Holden & Co. v. Crown Prosecution Service* [1990] 2 Q.B. 261.

The Legal Aid Board is the guardian of public funds and the use of such funds is a matter of public interest. The reasons for terminating the applicants' franchise are matters of public concern and, therefore, the applicants should not be granted anonymity for the purposes of the judicial review proceedings.

John McGuinness for the Law Society, adopting the submissions of the applicants. Those who wish to challenge the rulings or findings of the Legal Aid Board, especially in relation to allegations of dishonesty or gross professional misconduct which may ultimately prove to be wrong, may be deterred by fear of damage to their practice and reputation.

There is no avenue of appeal from a decision to withdraw a legal aid franchise other than an application for judicial review. It would be anomalous if the protection afforded to solicitors appealing under R.S.C., Ord. 106, r. 12 against an order of the solicitors' disciplinary tribunal involving findings of dishonesty or gross professional misconduct were not to be available in the similar circumstances where the only avenue of appeal was judicial review.

Although allegations of dishonesty or professional impropriety against any professional person are likely to be damaging and the consequences of their publicity harmful to his practice and reputation, their effect on a solicitor is especially serious because of the unique relationship between the solicitor and his client.

Lawson Q.C. replied.

Cur. adv. vult.

10 June. LORD WOOLF M.R. handed down the following judgment of the court.

The background to the appeal

This is an appeal by a firm of solicitors in respect of a judgment of Kay J. which was given on 25 June 1997 on an application for leave to apply for judicial review. The judge gave leave to appeal because his decision involved a point of principle. The principle is as to when it is appropriate to grant a party who has initiated proceedings anonymity.

The applicants are a firm of solicitors. They held a franchise from the Legal Aid Board. The board has suspended or terminated that franchise. The firm in their application for judicial review contend that the termination was wrongful and unfair. The merits of that contention are disputed by the Legal Aid Board. In addition to seeking leave to apply for

judicial review (which they have obtained), the firm made an application for anonymity, that is that they should be allowed to keep their identity secret and the court should make an order under section 11 of the Contempt of Court Act 1981 forbidding the disclosure of their identity. The ground for claiming anonymity was that the action of the board was not justified, but if the reasons on which the board rely for cancelling their franchise were to be made public, this is likely to cause the firm incalculable damage. It is suggested that this will be the consequence because the board have acted on allegations involving dishonesty made by former employees of the firm. These are denied by the firm, but if they were to be given publicity, this would seriously prejudice the reputation of the firm.

Although Kay J. refused the application for anonymity, he made an order under section 11 of the Contempt of Court Act 1981 prohibiting the publication of the firm's identity or anything leading to their identification other than by the letter "T." until the hearing or abandonment of this appeal.

Because of the interest of the profession generally in the outcome of the appeal, the Law Society applied to be heard on the appeal although it accepted that it could not be joined as a party. At the outset of the hearing of the appeal the court indicated that it would welcome the assistance of the Law Society and we have been grateful for the assistance that has been provided by Mr. McGuinness. In general Mr. McGuinness firmly endorsed the submissions made on behalf of the firm.

Mr. Edmund Lawson who appeared on behalf of the firm accepted that if the application for judicial review were unsuccessful, any order made prohibiting the identification of the firm should cease to have effect. He accepted that in those circumstances it would not be in the public interest for the identity of the firm to be suppressed. However, he made a separate application in this court for a direction that irrespective of the outcome of the appeal, in relation to the appeal the firm should retain its anonymity. An additional reason for this further application is that his firm feared that the judgment in this case could become a leading authority and as a result permanently associate the firm with the alleged impropriety which has given rise to these proceedings. Put colloquially, Mr. Lawson submits that his clients do not want to become in this field the "*Rondel* v. *Worsley*" [1969] 1 A.C. 191. He indicates that his instructions were that unless this court granted such a direction before hearing the argument on the appeal, he would be instructed to withdraw the appeal or consent to its dismissal. Having considered this application, the court decided that it should be refused for reasons to be given later and indicated that they would not give their consent for the appeal to be withdrawn and would in any event give a judgment. In these circumstances the firm decided to continue its appeal.

The applicants' case

There is no internal appeal mechanism which applies to the decision of the Legal Aid Board to suspend or terminate the franchise. The only way the firm contend that they can challenge the decision of the Legal Aid Board is to seek judicial review. As leave has been given to make the application for judicial review, Kay J. clearly regarded the firm's application

as one which had a reasonable prospect of success. The firm contends if it is not granted anonymity, the effect would be unjustly to deprive the firm of the prospect of attaining justice. This, the firm said, would be the position because without the cloak of anonymity, at least until the outcome of the application for judicial review is known, the firm would not feel able to pursue its application because of its fear of the damaging consequence of the publicity to which the appeal would give rise. Damage, which it says will not be remedied by the application for judicial review being successful.

Mr. Lawson contends there are two ways of looking at this case. There is a narrow approach which involves asking whether the firm should in respect of this particular judicial review application be granted anonymity and there is a broad approach which involves considering whether there is some special principle which applies to solicitors which entitles them to be granted anonymity when anonymity would not be granted to any other profession.

Mr. Lawson accepts that there is a general presumption in favour of open justice and that ordinarily a litigant's name will be published. However he contends that the general principle set out in cases such as *Scott v. Scott* [1913] A.C. 417 and *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440 has to be applied with caution when what is being sought is no more than the suppression of the name of one or more of the parties to an action. In a case such as the present, the litigant's identity has no relevance to the issue to be determined. If the proceedings are conducted in public and only the name of one of the parties is withheld this will not prejudice the administration of justice since revelation of the litigant's identity will do no more than satisfy prurient curiosity.

Mr. Lawson develops his argument on the sound foundation that the courts have jurisdiction to grant anonymity when it is appropriate to do so. Support for this is to be found in R.S.C., Ord. 106, r. 12. Order 106 deals with proceedings relating to solicitors under the Solicitors Act 1974 and rule 12(1) provides:

> "The notice of the originating motion by which an appeal is brought must be entitled in the matter of a solicitor, or, as the case may be, a solicitor's clerk, *without naming* him, and in the matter of the Act." (Emphasis added.)

A similar provision has appeared in the Rules since at least 1962. In addition to decisions such as *Scott v. Scott* [1913] A.C. 417 and *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440 Mr. Lawson referred to *Reg. v. Westminster City Council, Ex parte Castelli* (1995) 7 Admin.L.R. 840. In that case Latham J. was dealing with a very different situation. There an applicant, who was H.I.V. positive, wished his identity to be concealed. Some publicity had already occurred and Latham J. decided that it would not be right to accede to the application for anonymity. He referred to *Scott v. Scott* [1913] A.C. 417 and the *Leveller Magazine* case [1979] A.C. 440 and cited from the speeches of both Lord Scarman and Lord Diplock in the latter case. The citation from Lord Diplock is in these terms, at pp. 843–844:

> "However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or

A circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule."

Latham J. said, at p. 844, those quotations were:

B "guiding statements of principle which should be applied in any application such as the present. Although *Scott v. Scott* was concerned with the power to hold hearings in camera, *Attorney-General v. Leveller Magazine* was concerned with the power to permit a witness to remain anonymous. The House of Lords in the latter case clearly considered that there was no difference in principle between the two situations."

C

Mr. Lawson rightly acknowledges that in *Ex parte Castelli*, 7 Admin.L.R. 840 the guidance which Latham J. gave was that there is a presumption in favour of "open" justice and that, ordinarily, a litigant's name will be published.

Latham J., having examined the authorities, does indicate, at p. 845, D that while he has no doubt that the court's have the power to give anonymity "in exercise of the court's inherent jurisdiction and to support it with an appropriate order under the Contempt of Court Act 1981" that the power is only to be exercised when "the applicant can establish the basis of that power, namely that the failure to grant anonymity would render the attainment of justice really doubtful or, in effect, impracticable."

Mr. Lawson submits that the approach of Latham J. is too restrictive, E in so far as it involves anonymity only being granted where not to extend anonymity "would render the attainment of justice really doubtful or, in effect, impracticable." He submits that no particular test needs to be or should be formulated; alternatively if a "test" is required, it should be that an applicant for anonymity must put forward good reasons why the ordinary practice should not be followed.

F In addition to the cases referred to in *Ex parte Castelli*, Mr. Lawson relies upon a variety of cases where anonymity has been granted in addition to the obvious situations, of which cases involving rape or blackmail victims and children are examples. Among the cases to which he refers are *T. v. Secretary of State for the Home Department* [1996] A.C. 742 (the case which went to the House of Lords concerning an asylum seeker who claimed that he was in fear for his life or freedom but was himself a G member of a terrorist group); *P. v. T. Ltd.* [1997] 1 W.L.R. 1309 (a case which was heard by Sir Richard Scott V.-C. and involved an issue of discovery in a dispute between an employer and an employee where the allegations were of "gross misconduct" and the employee was complaining that his career had already been wrecked (as a result of it being well known that he had been dismissed for impropriety)) and *Director of Public Prosecutions v. H.* [1997] 1 W.L.R. 1406 (a decision of the Divisional H Court, where the issue was whether H. could rely upon insanity as a defence to a charge of driving when the proportion of alcohol in the blood exceeded the prescribed limit contrary to section 5(1) of the Road Traffic Act 1988).

Basing himself upon R.S.C., Ord. 106, r. 12, Mr. Lawson also submits that the situation in the present case was closely analogous to a disciplinary appeal by a solicitor to the courts. As in the case of such an appeal there is an established practice for solicitors to be granted anonymity, so here anonymity should be given. He also relied upon the practice of conferring on barristers anonymity on applications for wasted costs orders and cited *In re A Barrister (Wasted Costs Order) (No. 1 of 1991)* [1993] Q.B. 293 as an example of anonymity being provided in these circumstances.

In so far as solicitors are given special treatment by the courts, Mr. Lawson submits that this is justified because solicitors are officers of the court who owe a special duty to the court. It is in return for this that they receive special treatment. Furthermore a solicitor's reputation for integrity is vital and a solicitor is peculiarly exposed to unjustified complaints.

On behalf of the Law Society, Mr. McGuinness also stresses the special position of solicitors. He submits that, while allegations of dishonesty or professional impropriety against any professional person are likely to be highly damaging, in the case of solicitors this is more serious because the relationship between solicitor and client is unique. This is because solicitors are entrusted with clients' money, the nature of their professional privilege, the duty they owe to the courts and the additional duties they owe if their clients are legally aided.

The board's case

Miss Presiley Baxendale who represents the board naturally accepts that there can be cases where it is appropriate to grant a party to litigation anonymity. But she submits this is a departure from the general rule and the circumstances of this case do not justify such a departure. In particular she submits that damage to the reputation of individuals concerned in the litigation and the fact that the proceedings might be embarrassing, does not justify an exception to the general rule. Here she relies upon the views expressed by Lord Denning M.R. in *Reg. v. Horsham Justices, Ex parte Farquharson* [1982] Q.B. 762, 793G–795D and Watkins L.J. in *Reg. v. Evesham Justices, Ex parte McDonagh* [1988] Q.B. 553, 561H–562C. She also submits that the fact that publication may result in very severe economic loss to a defendant does not mean that a court is required to prevent or restrict publication of the proceedings. Here she refers to the judgment of Neill L.J. in *Reg. v. Dover Justices, Ex parte Dover District Council* (1991) 156 J.P.R. 433, 438A–439C.

In relation to the applicants' argument based on the analogous position on an appeal to the High Court against a decision of a solicitors' disciplinary tribunal and R.S.C., Ord. 106, r. 12, she draws attention to the fact that the solicitors' disciplinary tribunal generally hears appeals in public: see rule 13 of the Solicitors (Disciplinary Proceedings) Rules 1994 (S.I. 1994 No. 288). Here, having considered the history of the disciplinary proceedings of solicitors and what is now R.S.C., Ord. 106, r. 12, it does appear that the present practice in the courts in relation to those appeals is a hangover from earlier times when the appeal to the tribunal was heard in private.

Miss Baxendale accepts that there have been instances of solicitors being afforded anonymity which may have involved treating solicitors differently from other professions. However, she contends that this is by no means a universal practice and was able to refer to a number of authorities where serious allegations were made against solicitors where anonymity was not granted: see e.g. *Acton v. Graham Pearce & Co.* [1997] 3 All E.R. 909 and *Taylor v. Serious Fraud Office* [1997] 4 All E.R. 887. She also contends that the practice is by no means unanimous of granting anonymity to the legal profession in wasted costs cases. Drawing attention to the absence from the notes to R.S.C., Ord. 62, r. 11 in *The Supreme Court Practice 1997* of any requirement of anonymity, she argues that it is part of the deterrent of the wasted costs procedure that solicitors are named and the adverse publicity is therefore an important deterrent to impropriety: see *Holden & Co. v. Crown Prosecution Service* [1990] 2 Q.B. 261, 269H.

The judge's approach

In his judgment, Kay J. stated that it is inherently wrong if there is any difference in practice between solicitors and barristers on the one hand and other professional people on the other. He could see no justification for a different approach. Kay J., having considered the authorities to which he had been referred, including *Reg. v. Westminster City Council, Ex parte Castelli*, 7 Admin.L.R. 840, felt "it is not immediately obvious how the application of those principles [the principles in the cases to which he was referred] applies to the present situation." He summarises his conclusions in these terms:

> "At the end of the day I have come to the conclusion that there is no good basis for permitting anonymity in the particular circumstances of this case. To do so could only be done by extending to a very wide extent the practice of the courts in allowing anonymity. I do not think that it is right to say that simply because there are special rules governing appeals from the disciplinary body that those rules should be extended as a matter of practice to cover any sort of similar allegation which it is sought to raise and which will need to be raised in order that some decision can be challenged. It seems to me that to do so would simply open the floodgates and very many cases, which might affect the professional standing of people, doctors and the like, would all require similar anonymity. At the end of the day the overriding principle has to be that save in limited circumstances or circumstances where it can be demonstrated that justice will be frustrated by the naming of the other person that the proceedings should take place in public, and subject to further scrutiny."

Accordingly he was not prepared to order anonymity except on an interim basis. For the reasons which we will now explain, we consider his decision was correct.

The general approach

1. There can be no justification for singling out the legal profession for special treatment. The inference that they should be singled out should not

be drawn from Ord. 106, r. 12. The Order certainly presupposes that solicitors in disciplinary appeals to the High Court should not be identified in the title to the proceedings. However this is probably a remnant from earlier times when the disciplinary proceedings were themselves in private which is no longer the position. The situation in relation to other professions, e.g. doctors and dentists appealing to the Privy Council, is that in general they are not granted any anonymity. In our view, the Rules of the Supreme Court should now be amended to bring the position of solicitors in line with that general practice.

In any event it is of interest to note that the fact that solicitors are not to be named in the title of the proceedings does not provide the protection of the law of contempt for the publication of the name of the firm. This would require, as was made here on an interim basis by Kay J., a direction under section 11 of the Contempt of Court Act 1981.

2. This not being one of the four specific situations identified in section 12 of the Administration of Justice Act 1960 where publication of information relating to proceedings for a court sitting in private is given statutory protection, any protection against identification of a party must depend upon some exception to the general principle that all proceedings should be conducted in public. As to what are the exceptional situations where the general principle will not apply, it is always necessary to start with the guidance given by the House of Lords in *Scott v. Scott* [1913] A.C. 417. In that case Viscount Haldane L.C. made it clear, at pp. 437–439, that:

> "the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done ... As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration ... I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made."

To this statement there can usefully be added the comment of Earl Loreburn, at p. 446, that:

> "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."

Lord Loreburn's statement was regarded as indicating the general approach by Viscount Dilhorne in the *Leveller Magazine* case [1979] A.C. 440, 457E. The speeches in those cases make it clear that an exception can only be justified if it is necessary in the interests of the proper administration of justice. Latham J.'s approach in *Reg. v. Westminster City Council, Ex parte Castelli,* 7 Admin.L.R. 840 was correct.

3. While Viscount Haldane L.C. in *Scott v. Scott* [1913] A.C. 417, 435 emphasised that the limits to the exceptions to the general principle that proceedings should be conducted in public could not depend on "the individual discretion of the judge," there are an immense variety of situations in which it is appropriate to restrict the general rule. These situations depend very much on their individual circumstances. So if a judge adopts the correct approach in determining any particular application, indicated by the passages from *Scott v. Scott* and the *Leveller Magazine* case [1979] A.C. 440 already cited, the Court of Appeal will not interfere with the decision of a judge on an issue of this nature.

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

5. Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary. Section 12 of the Administration of Justice Act 1960 specifically identifies proceedings relating to minors, proceedings under the Mental Health Act 1959, proceedings where the court sits in private for reasons involving national security and proceedings involving secret processes, discovery or invention as candidates for special protection. In addition section 12 refers to proceedings "where the court (having power to do so)" expressly prohibits

publication, but this does no more than recognise the general principle. The language of section 2 of the Contempt of Court Act 1981 is also of interest. It provides that, while proceedings are active, there is strict liability for contempt if a publication creates a "substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced."

6. In deciding whether to accede to an application for protection from disclosure of the proceedings it is appropriate to take into account the extent of the interference with the general rule which is involved. If the interference is for a limited period that is less objectionable than a restriction on disclosure which is permanent. If the restriction relates only to the identity of a witness or a party this is less objectionable than a restriction which involves proceedings being conducted in whole or in part behind closed doors.

7. The nature of the proceedings is also relevant. If the application relates to an interlocutory application this is a less significant intrusion into the general rule than interfering with the public nature of the trial. Interlocutory hearings are normally of no interest to anyone other than the parties. The position can be the same in the case of financial and other family disputes. If proceedings are ex parte and involve serious allegations being made against another party who has no notice of those allegations, the interests of justice may require non-disclosure until such a time as a party against whom the allegations are made can be heard.

8. A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation. In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule.

9. There can however be situations where a party or witness can reasonably require protection. In prosecutions for rape and blackmail, it is well established that the victim can be entitled to protection. Outside the well established cases where anonymity is provided, the reasonableness of the claim for protection is important. Although the foundation of the exceptions is the need to avoid frustrating the ability of the courts to do justice, a party cannot be allowed to achieve anonymity by insisting upon it as a condition for being involved in the proceedings irrespective of whether the demand is reasonable. There must be some objective foundation for the claim which is being made.

Conclusions as to this appeal

This last point is particularly relevant to the claims for anonymity in this court which the applicants are putting forward. It is not a reasonable basis for seeking anonymity that you do not want to be associated with a decision of a court. Nor is it right for an appellant to seek to pre-empt the decision of this court by saying in effect we will not co-operate with the court unless the court binds itself to grant us anonymity. The applicants had secured anonymity until the end of the appeal and they could not reasonably ask for more.

It also cannot be reasonable for the legal profession to seek preferential treatment over other litigants. If the applicants had not raised the issue of anonymity, at the leave stage, it is not likely that their proceedings would have resulted in any publicity at least until the substantive hearing. If publicity did result from the substantive hearing then that publicity, so far as it was unfair, would be mitigated within a short time scale by the judgment of the court. If the judgment was adverse, then it is accepted on their behalf, that publicity could no longer be restrained since their alleged conduct should then be known. If the judgment was favourable, then the judgment would to a substantial extent provide the answer to any adverse publicity.

Kay J. came to the right answer in deciding not to grant the application. The appeal against his decision will therefore be dismissed.

Appeal dismissed with costs.

Solicitors: Kingsley Napley; Legal Director, Legal Aid Board; Head of Court Business, Law Society.

[Reported by JILL SUTHERLAND, Barrister]