

Victoria Jones appears before the QBD in a successful appeal against a Master's decision refusing to approve a Tomlin Order with a schedule containing confidential terms on the basis that it was contrary to the principles of open justice.

In *Zenith Logistics Services (UK) Ltd and others v Coury* [2020] EWHC 774 (QB), the High Court allowed an appeal against a Master's refusal to approve a Tomlin Order on the ground that the parties' wish to keep the terms of the schedule confidential, was contrary to principles of open justice.

The Claimants and the Fourth Defendant reached a settlement in proceedings between them and submitted a Tomlin Order for approval by the court. The Schedule to the Tomlin Order stated:

"The terms of settlement are set out in a confidential settlement agreement between the Claimants and the Fourth Defendant dated 6 December 2019, the original of which has been kept by the Claimants' solicitors and a copy of which has been kept by the Fourth Defendant's solicitors"

Master Davison refused to approve the Order stating that his practice was not to "make Tomlin orders with confidential schedules unless confidentiality is justified on the usual grounds" and on the ground that the order contravened the open justice principle.

Following a hearing of the appeal against this decision by way of video link Mr Justice Warby handed down his judgment allowing the appeal on 3 April 2020. In his decision he recognised that transparency is a key feature of litigation in a democratic society and that it has long been recognised as a cardinal principle of English law. He went on to find that the only parts of a Tomlin Order which represent the exercise of judicial power to require, prohibit or allow a

party to take any action are the stay of proceedings and the liberty to apply. Unlike a Consent Order which contains enforceable provisions, the Schedule to a Tomlin Order does no more than record the terms of settlement, which amount to a contract between the parties. In the present case, the terms of settlement were referred to but not included within the Schedule.

Warby J found that the form of settlement and the form of Order sought by the parties was unobjectionable, with the central point being that what open justice requires is that the court's exercise of its powers should be transparent and open to scrutiny and criticism. The requirements of transparency are fulfilled as the Order will be publicly accessible and it will reflect the entirety of what the Court has done, namely to grant an agreed application to stay the proceedings on terms that the parties may apply to enforce the settlement agreement, reserving to itself the power to make such further orders if such an application is made and if the Court is persuaded that enforcement is appropriate. Accordingly, whilst the Schedule forms part of the court 'Order' within the meaning of CPR 5.4C and is subject to the default rule that it forms part of the court record, it does not contain or record a direction or imperative issued by the court. As such, the *terms* of the Schedule are not an order made by the court. The parties' decision to refer to those terms in the Schedule rather than set them out in the Schedule, was for the purpose of preserving confidentiality, recognising that the document (i.e. the Schedule) will be accessible to third parties if no order to the contrary is made. This did not constitute a derogation from open justice.

[Victoria Jones](#) was instructed by [Lucy Nash of Royds Withy King](#) on behalf of the Fourth Defendant.