Neutral Citation Number: [2024] EWCR 6
IN THE CROWN COURT AT SOUTHWARK
SITTING IN THE ROLLS BUILDING
T20227145

Date: 4 October 2024

Before :

LORD JUSTICE FRASER

Between :

REX

Applicant

- and –

GLENCORE ENERGY UK LIMITED

Respondent

- and –

BLOOMBERG LP and others

Hearing date : 17 September 2024

Ms Healy KC (instructed by the **Serious Fraud Office**) for the **Crown**
Ms Hardcastle (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**) for **Glencore**
Mr Wolanski KC (instructed by **Reynolds Porter Chamberlain LLP**) on behalf of Bloomberg LP
Mr Keith KC and Ms Kapila (instructed by **Greenberg Traurig LLP**) on behalf of **GE1**
Mr Allen KC (instructed by **Howard Kennedy LLP**) on behalf of **GE3**
Mr Gibbs KC (instructed by **Kingsley Napley LLP**) on behalf of **GE4**
Ms Pinto KC and Mr Townsend (instructed by **Arnold & Porter Kaye Scholer LLP**) on behalf of **GE5**
Mr Bailin KC (instructed by **Boutique Law LLP**) on behalf of **GE6**
Mr FitzGerald KC (instructed by **Corker Binning**) on behalf of **GE7**
Mr Penny KC (instructed by **Paul Hastings LLP**) on behalf of **GE10**
Mr Whittam KC and Mr de Wilde (instructed by **Arnold & Porter Kaye Scholer LLP**) on behalf of **GE11**

Judgment on
Application to lift Reporting Restrictions
And imposition of further order

Lord Justice Fraser:

Introduction

1. This hearing is in relation to anonymity orders which were imposed on 24 October 2022 in respect of the identity of a number of individuals, and on 31 October 2022 in respect of the identity of a number of companies ("the Anonymity Orders"). This order followed an application by the prosecuting authority, the Serious Fraud Office ("SFO") for an order imposing certain reporting restrictions on the proceedings. The circumstances in which this order came to be granted are further explained below. The defendant in the prosecution that was brought in 2022 by the SFO was Glencore Energy UK Ltd ("Glencore"), a UK domiciled company that has worldwide trading interests including oil trading. It is a subsidiary of the well-known international group headed by Glencore plc.

2. Glencore pleaded guilty on 21 June 2022 before the Honorary Recorder of Westminster to a number of different charges under the Bribery Act 2010 ("the Bribery Act"). There were seven counts on the indictment, and guilty pleas were entered by Glencore in respect of all of them. Five of the counts were of bribery, contrary to section 1 of the Bribery Act; the other two were of failure by a commercial organisation to prevent bribery, which is contrary to section 7 of the same Act. I sentenced Glencore for these offences in the Crown Court at Southwark on 2 and 3 November 2022. The sentencing remarks were published at the time and provided in writing by the court. Certain comments that were made within those remarks were relied upon by some of the parties at this hearing to support their submissions on these applications, but it is unnecessary to repeat them here. In summary only, I imposed fines upon Glencore totalling £182,935,392 together with a confiscation order for £93,479,338.95. I also imposed costs orders against Glencore in the sum of approximately £4.5 million. The calculations of the amounts in respect of each of the seven counts are set out from [51] onwards in the sentencing remarks, and the summary of how the totals were reached is at [68] of the same document.

3. The dates on the indictment in relation to the criminal conduct of Glencore ranged from July 2011 to April 2016. At the time of sentencing Glencore, the SFO was also engaged in an active investigation against a number of different individuals who were said to have been involved in either the same activity, or broadly the same or overlapping activity, as that in respect of which Glencore had been charged (and pleaded guilty). The SFO sought, in 2022, the imposition of reporting restrictions in respect of 17 different named individuals, who were considered potentially to have had some degree of involvement in the criminal activity over approximately the same period of time. The basis of that application for anonymity was said to be the legitimate expectation of privacy of those individuals during the investigation period, prior to charge, which is founded upon their Article 8 rights under the European Convention on Human Rights. The judgment explaining the decision to impose the Anonymity Orders is at [2022] EWCR 1.

4. The individuals had all been identified in a case summary which had been prepared by the SFO for the court. Following the making of the Anonymity Orders, an anonymised case summary was deployed by the SFO for use at the sentencing hearing, using initials and not the actual names of the individuals within the document. The SFO adopted

ciphers based on the individuals' general sphere of involvement, so for example there were GE1 to GE11 (who were individuals associated with or employed by Glencore); two others identified as OT1 and OT2 connected with a company identified in count 2; and others, namely NO1, CD1, NG1 and EG1. I referred to these in the judgment granting the Anonymity Orders as "the Anonymised Individuals". The ciphers were chosen so that it was not possible to identify the individuals from the descriptions or combination of letters.

5. The Anonymity Orders that were made in October 2022 withheld the names of the Anonymised Individuals from both the public and the press, and indeed from one anonymised individual to another. Although they may have known, between themselves, who each other was, that would have been from their own separate knowledge and not arising from the sentencing hearing. The making of this order was not opposed by Glencore, which expressed itself at the time as being broadly neutral, and each of the Anonymised Individuals appeared by counsel and also supported the making of the orders, both in written and oral submissions.

6. However, and regardless of the lack of any opposition from any party, because the making of any order for reporting restrictions impacts upon press freedom and freedom of expression, and because such an order is a derogation from the fundamental principle of open justice, the fact that all the involved parties in any particular case wish to have such an order, does not mean that it will be granted. Further, representatives of the press are entitled to know of such applications in advance, and are to be given the opportunity to make representations before such an order is made. It is important that they are given notice of such an application. Notice was given in this case and submissions were received from the press. At the time in 2022, these were from the following organisations. The Financial Times lodged written submissions from Mr Hanson, the Senior Legal Counsel of FT Ltd, but did not seek to add to these orally. Four organisations - Global Investigations Review, Spotlight on Corruption, MLex and Law360 UK – had lodged joint written submissions, and Mr Fry, the News Editor of Global Investigations Review, made oral submissions supplementing these too. All of the submissions from the media were opposed to the making of the order. Orally, Mr Fry also drew the court's attention in particular to the fact that the draft order as submitted was open-ended in terms of time, and he described this as "perpetual" in its effect.

7. Notwithstanding these submissions, I concluded that the Anonymity Orders were justified and granted the application. The reasons were provided in the judgment to which I have referred at [3] above.

8. When the duration of the order was explored by the court at the hearing in October 2022 with Ms Healy KC for the SFO, she explained that the SFO hoped and expected that charging decisions would be taken by April 2023, or within about 6 months after that hearing. In the interests of imposing an order that was proportionate, and accepting the criticisms that the draft order originally sought was open-ended in terms of duration, I made the order but only until a subsequent hearing to be held in June 2023. This was to allow for some flexibility in when the charging decisions were expected to be made, as well as giving the SFO slightly longer than they had indicated through their leading counsel would be needed.

9. However, as matters transpired, the suggestion by the SFO that it would have taken charging decisions by about April 2023 proved to be considerably optimistic. By the first subsequent hearing on 26 June 2023, no charging decisions had been made and the orders were extended to January 2024, with an update to be provided by the SFO to all the parties and to the press by 31 October 2023. No charging decisions had been made by the next hearing after that on 18 January 2024, and therefore the orders were extended again until June 2024. Yet again, by the next hearing on 17 June 2024 no charging decisions had been made, although further information was available and the SFO indicated that it had sought, and was awaiting, permission from the Attorney General in certain respects to proceed. I listed the next hearing on 17 and 18 September 2024, in order to provide sufficient time for all the parties to make submissions (potentially as many as 14 or even more, depending upon how many different counsel might appear for the press) at what was expected to be the substantive hearing as to what should be done once charging decisions had been made in respect of some, or potentially all, of the Anonymised Individuals. At each of these hearings the press was represented, and although they opposed the orders on the same basis that they had in October 2022, they sensibly recognised that the rationale for making the orders remained until the point when charging decisions had been made. There was therefore no substantive argument before me about continuation of the orders, pending the charging decisions, until this hearing on 17 September 2024.

10. Charging decisions were taken and in August 2024 five individuals were charged, namely GE3, GE5, GE6, GE7 and GE10, letters of requisition having been sent to them on 1 August 2024. Additionally, two further individuals, namely GE1 and NG1, who were outside the jurisdiction, were written to by the SFO and invited to attend Westminster Magistrates Court voluntarily to answer written charges on 10 September 2024. GE1 did so attend; NG1 did not. There were therefore, as of the date of this hearing, six different individuals who had been charged.

11. At the hearing before me on 17 September 2024, all of the six charged individuals attended by counsel, as did the SFO and Glencore itself. Additionally, two of the Anonymised Individuals who had not been charged attended, namely GE4 and GE11. Mr Wolanski KC appeared on behalf of Bloomberg LP, the well-known news organisation. Other news organisations wrote to the court in the days preceding the hearing and those letters constituted their written representations or submissions on discharge of the Anonymity Orders. These organisations were Global Investigations Review; Law360; Spotlight on Corruption; MLex; Gotham City; a freelance journalist called Olivier Holmey; Guardian News & Media Ltd; the British Broadcasting Corporation; Independent Television News Ltd; Telegraph Media Group Ltd; Times Media Ltd; the Financial Times Group Ltd; and Reuters.

12. The press was all, more or less, opposed to the continuation of the Anonymity Orders and some were opposed to any reporting restrictions at all. Some, but not all, of them expressly aligned themselves with the more detailed submissions made by Mr Wolanski KC for Bloomberg. No member of the press wished to make oral submissions themselves in addition to their written ones, although they were given the opportunity to do so.

13. The issues that arose for consideration were broadly as follows:

(1) Continuation or discharge of the Anonymity Orders;

(2) Whether the charged individuals were entitled to an order pursuant to section 4(2) of the Contempt of Court Act 1981 in respect of the hearing of 17 and 18 September 2024;

(3) Whether the uncharged individuals were entitled to any anonymity or reporting restrictions.

14. The SFO accepted that now charging decisions had been made, there was no basis to maintain the Anonymity Orders imposed in October 2022. The position of the charged individuals was either that the section 4(2) order referred to above in [13](s) was required both in respect of them alone, or (as contended for by GE5 and GE6 in particular) that this order should expressly include the identities of the uncharged individuals too. The position adopted by Bloomberg was that the Anonymity Orders should be lifted; that there was no need or justification for any section 4(2) order in respect of the November 2022 Glencore proceedings including the sentencing remarks, because section 2(1) of the Contempt of Court Act 1981 provided sufficient protection for the charged individuals; and that it was neutral as to whether a section 4(2) order should be made in respect of the September 2024 hearing.

15. Counsel for the uncharged individuals who attended, namely Mr Gibbs KC for GE4 and Mr Whittam KC for GE11, did not actively seek any order in respect of those uncharged individuals. None of the other uncharged individuals attended.

16. I indicated my decision at the conclusion of the hearing, and explained that written reasons would follow. These are those reasons. By adopting this course, this had the advantage of permitting further submissions on the detailed drafting of the order that I proposed to make both lifting the Anonymity Orders and imposing the relevant section 4(2) order concerning the charged individuals, ensuring that there was no interval and therefore risk of adverse identification. However, I explained that I was not prepared to make any order in respect of the uncharged individuals.

17. I shall not repeat, in these reasons, all of the submissions made by all of the parties who appeared before me, as to do so would both lengthen this judgment on the applications very considerably (given the number of parties who appeared and made submissions) but would also become extraordinarily repetitive. Those submissions would also potentially include details the reporting of which would be caught by the section 4(2) order. I did however consider all the submissions prior to reaching the decision concerning lifting the Anonymity Orders and imposing the order under section 4(2). I am grateful for the assistance of all counsel. Particular thanks must go to Mr Keith KC and Ms Kapila who, thanks to their position as first in the batting order of charged individuals (appearing as they did for GE1) provided very considerable assistance with their sensible and careful analysis of the law. I am also grateful to Mr Wolanski KC for advancing the position of the majority of the press so helpfully and skilfully. Indeed, the measured and sensible behaviour of the press during the period October 2022 until September 2024, self-evidently a period of almost two years, is worthy of note. During this period whilst the Anonymity Orders were in place, the freedom of the press was being curtailed whilst charging decisions were being considered. At each hearing

during this period, it must have seemed that the constant message was simply repeated; namely that more time was needed.

18. Finally by way of introduction, after having explained the order that I intended to make, I invited all or any of those in court – which included all the charged individuals; some of the uncharged individuals; and the press – to state if they wanted the lifting of the Anonymity Orders delayed for any period of time whilst they considered whether to appeal my decision. Nobody submitted that this should be done, and none of the parties asked me to do this. Given that the freedom of the press had been curtailed for so long already, it did not seem to me to be consistent with the principle of open justice to delay yet further. I therefore made the order immediately, the Anonymity Orders were discharged on the day of the hearing itself, and replaced with the order under section 4(2) of the Contempt of Court Act ("the Order").

The relevant background

19. The investigation undertaken by the SFO had its origins in an investigation into Glencore plc commenced in the United States by the Federal Bureau of Investigation or FBI. The FBI investigation was opened in 2017, and was into potential violations of the Foreign and Corrupt Practices Act 1977, a US statute. The Department of Justice in the US ("the DOJ") issued a number of subpoenas against Glencore plc and its assorted subsidiaries as part of that FBI investigation. Some of the subpoenas issued by the DOJ in the US concerned potential bribery at one of the trading desks of the defendant Glencore. The oil trading business at Glencore has a number of different desks, each named after their geographical area of operation. As a result of that investigation, the Director of the SFO exercised the power under section 1(3) of the Criminal Justice Act 1987 and commenced a criminal investigation in the UK into Glencore. This led to the charges and guilty pleas to which I have already referred.

20. It is not necessary to go any further in terms of explanation of the subject matter of the charges against Glencore, or any other details.

The legal principles

21. It is important to distinguish, in my judgment, two different concepts. They may, and on occasion do, lead to the same outcome, but they are different. This is anonymity on the one hand; and publication or reporting on the other.

22. The Contempt of Court Act 1981 ("CCA 1981") states at section 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."

23. It is clear that this provision, which formed part of the rationale leading to the imposition of the Anonymity Orders, refers to the exercise by the court of the power to allow the name of somebody (or any other matter) to be withheld from the public in proceedings before the court. This relates to anonymity. Court proceedings are for the most part conducted entirely openly and transparently. In the Judicial College Guidance document "Reporting Restrictions in the Criminal Courts" Lord Burnett of Maldon, the then-Lord Chief Justice, explained in the foreword that "It is a central principle of

criminal justice that the court sits in public so that the proceedings can be observed by members of the public and reported on by the media. Transparency improves the quality of justice, enhances public understanding of the process, and bolsters public confidence in the justice system". The current Lady Chief Justice, Baroness Carr of Walton-on-the-Hill, has created the Transparency and Open Justice Board, whose terms of reference include the following at paragraph 1: "to lead and co-ordinate the promotion of transparency and open justice across the Courts and Tribunals in England and Wales." Transparency and open justice are of exceptional importance.

24. The general principle is that justice is to be administered by the courts in public, so that the proceedings and the courts are open to scrutiny. This has been described by the Supreme Court in ***A v British Broadcasting Corporation*** [2014] UKSC 25 as an aspect of the rule of law in a democracy and a constitutional principle which is to be found in the common law. The freedom of the media to report on court proceedings is inextricably linked to the principle of open justice and is fundamental to the way in which court proceedings are conducted in this jurisdiction.

25. Anonymity is a derogation from that broad and important principle. So are reporting restrictions, but they are of a different nature. If – choosing these names entirely randomly – someone called Mr Smith is referred to in open court in some respect, everyone in court, including members of the public and the press if present, would hear his name. In some circumstances, if there are reporting restrictions, then there is a restriction on that person being identified. But in the usual course of things, Mr Smith would (if, say, a witness) give his name when taking the oath or affirmation, and everyone sitting in court would know that it was Mr Smith who was involved in some way. If Mr Smith were granted anonymity, then no member of the public or member of the press would know that it was Mr Smith; his name would not be referred to at all. This was the situation of all of the Anonymised Individuals after the Anonymity Orders were made in October 2022. The actions of a particular individual – for these purposes I shall refer to them as GE99, as this is a hypothetical example – in doing particular acts relating to the counts against Glencore were explained by the SFO in its opening for the sentencing, but nobody would know who GE99 in fact was or is. That person was referred to in the SFO case summary for sentencing purposes as GE99. This was because GE99 had not been charged with anything, and GE99 had a reasonable right to privacy whilst under investigation and rights under Article 8. Even an interested member of the public sitting in the public gallery listening to the proceedings would not have known who GE99 was.

26. That situation no longer applies to any of the Anonymised Individuals. They have all either been charged, or they have not. The only exception to this is NG1, who as explained at [10] above was invited to attend Westminster Magistrates' Court on 10 September 2024 to answer written charges and did not do so. That person knew of the Anonymity Orders; they also knew that the hearing before me on 17 September 2024 was to take place on that date; they knew its purpose; and they did not appear by themselves or by counsel, nor did they communicate with the court in any way. The court had been very clear on previous occasions that there was a reasonable prospect that the Anonymity Orders would or may be lifted in due course once charges were brought. No application was received on behalf of NG1 inviting the court to make any particular order or opposing this course of action. The only logical conclusion in these

circumstances is that NG1 was entirely neutral as to what was to take place before me on 17 and 18 September.

27. For an individual who has been charged, their identity has become known as a charged individual. For an individual who has *not* been charged, they were (originally) mentioned in the sentencing case summary prepared by the SFO by cipher, but their involvement has been kept entirely secret since the Anonymity Orders were made. The rationale for that was their reasonable expectation of privacy and Article 8 rights during the investigation and pending the charging decision. Now that the decision has been made not to charge them, that falls away.

28. There is no basis to continue, or impose, any order restricting publication of the identities of the uncharged individuals. Their position is entirely analogous to that of Mr Khuja in ***Khuja v Times Newspapers and others*** [2017] UKSC 49. In that case the claimant had been arrested, together with a number of others, on suspicion of serious offences of child sexual abuse. Others were convicted, but he was not charged. He sought an order from the High Court for a non-disclosure order, the media having applied to the trial judge for discharge of an order that the trial judge had previously made. The High Court refused to make such a non-disclosure order, and the appeal of Mr Khuja both to the Court of Appeal and the Supreme Court failed.

29. Lord Sumption at [14] in that case stated:
"The principle of open justice has, however, never been absolute. There have been highly specific historic exceptions, such as the matrimonial jurisdiction inherited from the ecclesiastical courts, the old jurisdiction in lunacy and wardship and interlocutory hearings in chambers, where private hearings had become traditional. Some of these exceptions persist. Others have been superseded by statute, notably in cases involving children. 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*, supra, at p 446 (Lord Loreburn); *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 457 (Viscount Dilhorne). 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. 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: see *R v Socialist Worker Printers and Publishers Ltd, Ex p Attorney General* [1975] QB 637, 652; *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 451-452 (Lord Diplock), 458 (Viscount Dilhorne), 464 (Lord Edmund-Davies). 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 rule 39.2(4). In criminal proceedings, the common law power to withhold the identity of witnesses from a defendant was abolished by section 1(2) of the Criminal Evidence (Witness Anonymity) Act 2008, and replaced by rules now contained in sections 86-90 of the Coroners and Justice Act 2009. But the court retains the power which it has always possessed to allow evidence to be given in such a way that the identity of a witness or other matters is not more widely disclosed in open court, if the interests of justice

require it. Where a court directs that proceedings before it are to be conducted in such a way as to withhold any matter, section 11 of the Contempt of Court Act 1981 allows it to make ancillary orders preventing their disclosure out of court. Measures of this kind have consistently been treated by the European Court of Human Rights as consistent with article 6 of the Convention if they are necessary to protect the interests of the proper administration of justice: *Doorson v The Netherlands* (1996) 22 EHRR 330, para 71; *V v United Kingdom* (2000) 30 EHRR 121, para 87; cf *A v British Broadcasting Corpn* [2015] AC 588, paras 44-45 (Lord Reed). But necessity remains the touchstone of this jurisdiction."

30. The Anonymity Orders must therefore, in accordance with the principle of open justice, and now that the charging decisions have been made, be lifted.

31. However, I now turn to the application advanced by the charged individuals. They submitted that there was a risk that, without an order under section 4(2) of CCA 1981 in respect of the hearing of 17 and 18 September 2024, press reporting of the proceedings would jeopardise their rights to a fair trial. It was said that press reporting at any point until the conclusion of their trial or trials, identifying them as the person (or one of the persons) whose conduct formed the subject matter of the charges against Glencore and in respect of which Glencore had pleaded guilty, would be extremely damaging. My attention was drawn both to the high-profile nature of the case, and the nature of the conduct alleged to have taken place; also, to the very high level of fine and confiscation orders made against Glencore. To substantiate or supplement those submissions, I was shown a number of press reports in respect of the Glencore situation which were said to demonstrate this very real risk. It was said that were identification to be permitted, even by way of reporting proceedings in the hearing before me on 17 September 2024 (which absent any order would be permitted, notwithstanding the ongoing criminal cases against them), then the charged individuals could not be tried fairly.

32. It should also be remembered, as has been said many times before, that, as Oliver LJ put it in ***Attorney General v Times Newspapers and others*** (1983) unrep. The Times 12 February 1983, "the course of justice is not just concerned with the outcome of proceedings. It is concerned with the whole process of the law, including the freedom of a person accused of a crime to elect, so far as the law permits him to do so, the mode of trial which he prefers and to conduct his defence in the way which seems best to him and to his advisers".

33. The framework of the CCA 1981 is one which is called in the statute "strict liability". Under the "strict liability rule" in section 1 of the CCA 1981, "conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so", and the rule applies when proceedings are active. Under the CCA 1981, it is not necessary to prove any intent to interfere with the administration of justice. However, although it is characterised in the statute as a "strict liability rule", there are some defences available, for example, under section 3 of the CCA 1981, which provides the defence of innocent publication or distribution. However, whether the CCA 1981 creates strict liability in the technical sense, meaning that liability can be established regardless of fault, that is the phrase used in the Act and is the one most often deployed when analysing it. Any reporting or comment in the press as to the identity of the charged individuals associated with details of the conduct

that is said to found the charges against them, would probably fall foul of the strict liability rule. Doing so would put the person publishing such material in a very difficult as well as unlawful position, as being guilty of an offence of contempt of court is punishable by an unlimited fine and imprisonment.

34. However, section 4 of the CCA 1981 states as follows:

"4(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

35. Therefore, absent any order under section 4(2) of the CCA 1981, the proceedings of 17 and 18 September 2024 before me in respect of lifting the Anonymity Orders could be reported fairly and accurately by the press, contemporaneously and in good faith, without those publishing being liable under the strict liability rule. It is for that reason, and the points that I have made at [31] about the type of case it is and the nature of it, that the charged individuals seek an order under section 4(2) in respect of the hearing of 17 and 18 September 2024.

36. Some of the submissions expressly raised the risk of what is sometimes called jigsaw or derivative identification of the charged individuals, if the identity of the *uncharged* individuals were not expressly included in any order. In other words, if the uncharged individuals were not also included in such an order and therefore expressly given its benefit, it would be possible for the identity of the charged individuals to be discovered. I was not persuaded by those submissions for two reasons. Firstly, it did not seem to me that, given how large an entity Glencore is, identifying the uncharged individuals would automatically and of itself lead to derivative identification of any of the charged individuals. I find that submission to be speculative at best. Secondly and in any event, and even if I were wrong about that first point, the wording of the proposed order would include postponement of publication of the names of the charged individuals, and any such other matter as could lead to their identification. The second part of that provision – "any such other matter" – would seem to me potentially to include matters of the notional type identified in particular by Ms Pinto KC and Mr Bailin KC for GE5 and GE6 respectively, who advanced these submissions in respect of the uncharged individuals in so far as that would impact those for whom they appeared, who had been charged. It seems highly unlikely to me that every single one of the charged individuals could potentially be impacted in the same way by the identity of any of the uncharged individuals becoming known. Each situation, and the connection between uncharged and specific charged individuals, must depend upon its own facts. The strict liability principle and a section 4(2) order in respect of the charged individuals would seem to me to be sufficient safeguards for them, and a proportionate and suitably narrow restriction on the principle of open justice. Simply adopting a blanket approach and restricting publication of the identity of *any* of the individuals, whether charged or uncharged, would be the wrong approach in principle.

37. Ms Pinto KC for GE5 also sought "the continued restriction of the reporting of the identity of individuals referred to in the sentencing of Glencore" which happened in November 2022. I am not persuaded that such an order is required, due to the existence of the strict liability rule in the CCA 1981. There are two important matters which lead to this conclusion. Firstly, the press is to be trusted to comply with the strict liability rule, which governs the criminal proceedings against the charged individuals whilst those proceedings are active. This is clearly stated at [25] of ***Re B*** [2006] EWCA Crim 2692. In that case, the President of the QBD (as he then was, sitting with Penry-Davey and Mackay JJ) heard an appeal against a section 4(2) order imposed by the trial judge on the sentencing hearing of B, who had pleaded guilty to conspiracy to murder, pending the trial of the co-defendants for the same crimes on a 23 count indictment. At [25] the PQBD stated:
"…. the responsibility for avoiding the publication of material which may prejudice the outcome of a trial rests fairly and squarely on those responsible for the publication. In our view, broadcasting authorities and newspaper editors should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings, and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice. They have access to the best legal advice; they have their own personal judgments to make. The risk of being in contempt of court for damaging the interests of justice is not one which any responsible editor would wish to take. In itself that is an important safeguard, and it should not be overlooked simply because there are occasions when there is widespread and ill-judged publicity in some parts of the media."

38. The strict liability rule is described in the Judicial College Guidance to which I have referred at [23] above as "a significant safeguard". Secondly, the sentencing of Glencore took place almost two years ago. Media reporting to date has been responsible. Imposing specific restrictions upon publication of the identities of uncharged individuals could not be granted on the same juridical basis that it was imposed originally, as their reasonable expectation of privacy during a criminal investigation has come to an end. It would also be contrary to the dicta in ***Khuja*** at [28] above. There is no application for any such continuation by the uncharged individuals, and Mr Gibbs KC for GE4 accepted that there was no legal basis for seeking one. In my judgment, imposing any such restriction would be unprincipled.

39. Reporting restrictions must be considered to be "measures of last resort". In ***R v Sarker and BBC*** [2018] EWCA Crim 1341, the Court of Appeal (Lord Burnett LCJ, Stuart-Smith and Nicklin JJ) heard an application by the BBC, supported by the Press Association and most of the major national news organisations and newspapers, for permission to appeal a reporting restrictions order that had been made under section 4(2) CCA 1981 on the first day of the trial of the defendant, one Sudip Sarker, who was tried and later convicted of fraud. He was a surgeon and the case against him was that he had dishonestly exaggerated his professional experience in order to obtain an appointment as a consultant surgeon at an NHS hospital in Redditch. The trial judge imposed the order, taking into account also that the trial was intended to be short, and the order was lifted immediately upon his conviction four days later (he was sentenced to six years' imprisonment). Notwithstanding the short duration of the order and the fact that it was lifted, the BBC pursued the matter as a point of principle, as during the trial itself the order meant that reporting of the trial itself was not permitted. The BBC's

position was that the order ought never to have been made. The Court of Appeal agreed, and held that the order should not have been made, granted permission to appeal, allowed the appeal and quashed the order. The fact that it was of short duration was not relevant. The press ought to have been permitted to report the court proceedings during his trial, and the order wrongly prevented them from doing so. There was no proper basis to have imposed such an order.

40. The principles and further articulation of the correct approach are set out at [29] and [30] of that judgment. The test to be applied is as follows. This is my summary but draws centrally upon the contents of [30] onwards in the judgment. The court must address the following questions:
(1) Would reporting give rise to a substantial risk of prejudice to the administration of justice in the relevant proceedings? If not, that will be the end of the matter.
(2) If such a risk is perceived to exist, then the second question arises: would a section 4(2) order eliminate it? If not, there could be no necessity to impose such a ban. On the other hand, even if the judge were satisfied that an order would achieve the objective, the court must still consider whether the risk could satisfactorily be overcome by some less restrictive means. If less restrictive means would achieve this, then it could not be said that such measures were necessary. A different way of expressing this is that given an order under section 4(2) is a drastic measure, it must be objectively justified. If the risk could be addressed by adopting lesser measures, there would be no objective justification for the order.
(3) If the court were satisfied that there was no other way of eliminating the perceived risk of prejudice, that would not necessarily of itself lead to the conclusion that such an order had to be made. The court should still consider whether "the degree of risk contemplated should be regarded as tolerable in the sense of being 'the lesser of two evils'. It is at this stage that value judgments may have to be made as to the priority between the competing public interests; fair trial and freedom of expression/open justice." This could be described as performing a balancing exercise.

41. When considering the question of substantial prejudice, the position of sequential trials was addressed. Sometimes, and in particular where there are multiple defendants, a number of trials may be required. In those circumstances, sometimes an order is made in the first trial to protect or guard against prejudice in the second and subsequent trials. The judgment stated at [34] that:
"….the judge must still consider carefully the nature of the prejudice that is relied upon to justify the order. Where the following trial will take place some months after the first, it must be demonstrated convincingly that the risk of prejudice is substantial (or that an order is necessary), having well in mind (a) that the jury in the following trial must be taken to be willing and able faithfully to discharge their duty….; and (b) the established "fade factor" (the effect of the lapse of time between publication and trial) that applies in news cases. In terms of jurors remembering publicity about a trial or the people involved in it, the "staying power of news reports is very limited": *Re C (A Child)* [2016] 1 WLR 5204 at [30] per Lord Dyson (but cf. *Sherwood* at [31] in respect of very high-profile cases)".

42. In ***R v Sherwood ex p Telegraph Group*** [2001] EWCA Crim 1075, [2001] 1 WLR 1983, the Court of Appeal (Longmore LJ, Douglas Brown and Eady JJ) dismissed an appeal against an order made in respect of the first trial of a number of defendants relating to the murder of a suspected drug dealer shot in a police raid, who was naked

and unarmed. In considering what has in other cases been called the "fade factor", and whether the trial could or should be delayed for (say) another six months to allow the story to "slip from the public consciousness" the court said this at [31]:
"It can be very significant in low profile cases of that kind, where the story is of passing interest only to general readers. This is hardly such a case. Even if we left aside the question whether it would be fair to the defendants concerned to impose yet more delay (as to which we have considerable doubt), the striking facts of this police raid are such that they are not likely to fade quickly from people's minds; they would in any event be easily revived once the second trial got underway. Unfortunately, we cannot see how the necessary objective can be accomplished, in this very unusual case, with anything falling short of a complete postponement of coverage."

43. The expression "fade factor" had been used by Simon Brown LJ in ***Attorney-General v Unger*** [1998] 1 Cr App R 308. In that case, two newspapers published articles including photographs taken from video of a person described as a "trusted home help and neighbour" of a lady who was 82 years old and a pensioner. Money started to go missing from where she hid her pension, which was in the fridge in her kitchen. Her son, a British Telecom engineer, became convinced that this was, as he put it, "an inside job" and so he installed a hidden video camera. Having recorded irrefutable evidence that it was the neighbour/home help responsible for the regular disappearance of money hidden there, he took the evidence to the Manchester Evening News at about the same time that the person was arrested. A few days after that arrest and the subsequent charge of the home help, when proceedings were undoubtedly "active" for the purposes of the CCA 1981, both the Manchester Evening News and the Daily Mail published the story in dramatic terms. This included photos of her taken from the video stills, showing her going into the fridge and taking the money. As Simon Brown LJ (sitting with Garland J, as he then was) expressed the situation at [16] "if ever there was a case of trial by newspaper, this surely was it". The case was brought by the Attorney-General against the publishers for contempt of court.

44. The matter described as the fade factor was expressed in the following terms when considering "the residual impact of the publication on the notional juror at the time of trial". That had formed part of the seventh principle governing the application of the strict liability rule which had been expounded by Schiemann LJ in the earlier case of ***Attorney General v MGN Ltd*** [1997] 1 All ER 456, 460. That was a decision of the Divisional Court and therefore persuasive only, but the "fade factor" has been referred to in different cases since then, and is an obvious consideration. I would only observe that in the third decade of the 21st century this feature of any case may be diminishing in importance or likely impact, given the prevalence now of published material on the internet. In the 1990s and even in the early 2000s, published reports of matters would or may, perhaps, fade into the background far quicker than they do now. It might be that the "staying power of news reports" is now far greater than it was. A few minutes at a computer by somebody using half-literate search terms will usually, in 2024, result in a great many search results including articles published years before on any particular subject.

45. But in any event, even in 2001, Longmore LJ recognised that in some cases, such as the fatal shooting of a naked unarmed suspected drug dealer in a police raid, this factor would be far less significant than in respect of an article about a home help stealing firstly £20, then £40, from a pensioner's hiding place in her fridge.

46. In the instant case, although they are not sequential trials in the usual way that term is used (Glencore pleaded guilty and was sentenced upon the counts against the company almost two years before the charged individuals were charged), the same considerations apply as to conventional sequential trials, due to the nature of the conduct alleged and the high degree of overlap between the alleged conduct of the individuals (including the dates) and that of the company.

Application of the principles to the instant case

47. Turning therefore to considering the principles above in the context of this case, I have concluded that reporting of the hearing on 17 September 2024 would give rise to a substantial risk of prejudice to the administration of justice in the relevant proceedings in that reporting of the hearing of 17 September that identifies the charged individuals would risk compromising the fairness of their trial. It is unnecessary, and potentially undesirable, to explain in this judgment the factual background of the case against the company and the alleged involvement of the charged individuals which leads to this conclusion in any detail. Suffice it to say that I accept the submissions concerning the nature of the conduct and degree of overlap and consider that the facts justify this conclusion. As it happens, and predominantly due to the excellent preparatory work and skeleton arguments of all counsel, and the opportunity for pre-reading, the hearing before me in fact only took one of the two intended hearing days and was concluded before 18 September. There is therefore no need for the order to refer to that date at all.

48. I would also make clear at this juncture that this is also undoubtedly a high-profile case generally due to its subject matter.

49. I therefore turn to the next consideration, which is that given I perceive that such a risk does exist, would a section 4(2) order eliminate it? Were I to conclude that it would not, then there could be no necessity for such an order restricting the freedom of the press. Mr Wolanski KC for Bloomberg expressed himself as "neutral" as to whether such an order be imposed in terms of the hearing of 17 September 2024 insofar as the identity of the charged individuals is concerned. That is a relevant consideration but is not determinative, as the court must satisfy itself that the necessary requirements for such a drastic measure are properly and objectively justified. Some drafts of the orders suggested by some of the charged individuals went far wider than merely the identity of the individuals. I have concluded that an order under section 4(2) in respect of their identities would, to all intents and purposes, eliminate the risk of prejudice.

50. I therefore turn to the next consideration. Even though I have concluded that an order would achieve the objective, I must still consider whether the risk could satisfactorily be overcome by some less restrictive means. This is the step at which objective justification of such an order must be considered. Could the risk be reduced by lesser measures? The two ways considered and analysed in the submissions before me, although the charged individuals strongly argued that lesser measures would be insufficient, were directions to the jury, and the "fade factor".

51. Jurors will invariably be given directions to ignore anything they may previously have heard about, or read or heard in the press, about any case in which they are selected to sit as jurors. They are also directed to try the case only on the evidence put before them in court during the trial, and not to research any element of the case privately themselves. They are also told to ignore contemporaneous press reports during the trial

itself. The court will proceed on the basis that jurors faithfully follow such directions. However, in my judgment, given the nature of this case generally, those measures – which will inevitably be given in the subsequent trial of the charged individuals – alone would not remove the risk which I have identified. Association of the identity of a particular individual with the facts of the case against Glencore could sit in the consciousness of potential jurors and become indelibly linked.

52. Turning to the fade factor, given the nature of the case and the conclusions that I have reached at [44] and [46] above, I have concluded that this is the type of case where the fade factor would be insufficient to remove the risk. In my judgment, the impact of any fade factor in this case is negligible.

53. All of the requirements for making the order sought under section 4(2) are therefore satisfied in this case. I therefore address, as the final consideration, whether the degree of risk contemplated should be regarded as tolerable, in the sense of being 'the lesser of two evils' when the competing public interests both of freedom of expression and open justice are considered on the one hand, with the risk of substantial prejudice to the fairness of the trial of the charged individuals on the other. I have considered this in great detail, and also taken account of the lengthy period that the order under section 4(2) may be in place. The SFO submitted that the trial of the charged individuals would be likely to occur in 2026. A delay in full and frank reporting of the hearing of 17 September 2024 is likely therefore to be measured in years, rather than months.

54. However, in my judgment the degree of risk contemplated should not be regarded as tolerable or the lesser of two evils. Again, it is not necessary to recite in great factual detail why that is, but I have taken into account all the relevant matters including the nature of the case, the nature of the charges, the period over which the alleged conduct is said to have taken place and the full extent and impact of that alleged conduct. I have also taken into account that the order as drafted – and this went through various iterations, in order to frame the prohibition as narrowly as possible – is a proportionate one and relatively limited. The restriction is on reporting the identity of the charged individuals only, and such other matter or matters as could lead to their identification.

Conclusion

55. The ongoing investigation by the SFO into the Anonymised Individuals has come to an end, and charges have now been laid against six individuals. The Anonymity Orders made in October 2022 both in respect of the 17 Anonymised Individuals and certain limited companies are lifted and therefore no longer in force. An order under section 4(2) of the Contempt of Court Act 1981 is imposed in respect of the hearing of 17 September 2024 only, prohibiting reporting of the identities of the six charged individuals, or matters that would lead to their identification, until the end of the trial of the six charged individuals. Their identities are included in a schedule by reference to their cipher, and that schedule is attached to the order. That order should be consulted for its precise terms. No orders are made in respect of the uncharged individuals or the limited companies.