In The Supreme Court of Bermuda

CIVIL JURISDICTION

2026 No 142

IN THE MATTER OF SECTIONS 6 (8), 15 (1) AND 15 (2) OF THE CONSTITUION OF BERMUDA AT SCHEDULE 2 OF THE BERMUDA CONSTITUION ORDER 1968

AND IN THE MATTER OF SECTIONS 67E, 55(3A), 56, 57 (2)-(3), AND 59 OF THE INVESTMENT FUNDS ACT 2006

BETWEEN: **AB** **APPLICANT**

-AND-

(1) THE BERMUDA MONETARY AUTHORITY
(2) THE MINISTER OF FINANCE
(3) THE ATTORNEY GENERAL OF BERMUDA
(AS THE RELEVANT ENTITY UNDER THE CROWN PROCEEDINGS ACT 1966 FOR CLAIMS AGAINST THE GOVERNMENT OF BERMUDA)

RESPONDENTS

Application for the continuation of anonymity granted pursuant to the ex parte Order of Subair Williams J dated 15 May 2026 in relation to anonymisation of the applicant's identity in the proceedings

Appearances

Laura Williamson of Kennedys Bermuda Limited for the applicant

Changez Khan of Marshall Diel & Myers Limited for the first respondent

Shakira Dill-Francois, Solicitor General of the Attorney General's Chambers for the second and third respondents

Before MARTIN J in Chambers

Date of Hearing: **15 September 2026**

Date of circulation of Ruling: **16 November 2026**

Date of formal release of Ruling: 20 November 2026

RULING

Introduction

1. This is the court's Ruling in relation to an application by the Applicant for a continuation of the interim Order made by Mrs Justice Subair Williams on 15 May 2026 made on an *ex parte* basis granting anonymisation of the applicant's identity in these proceedings (as well as the names of any other persons or entities other than the respondents), including the redaction of documents that disclose their identities, reporting restrictions in relation to any public hearings and anonymisation of the Ruling and any Orders or Decisions made in these proceedings. The *inter partes* hearing came on for hearing after directions were agreed.

Disposition and summary of reasons

2. For the reasons explained in this Ruling, the court has decided to refuse the application for the continuation of the restrictions and to discharge the Order of 15 May 2026. This is principally because the nature of the relief sought in these proceedings engages the public interest and takes precedence over any competing public interest in the protection of private life of the applicant.

3. In this case, the applicant seeks to set aside the regulatory mechanisms set out in the Investment Funds Act 2006 as being unconstitutional. If successful, a decision setting aside those mechanisms would impact all other regulatory statutes that contain the same mechanisms. This would undermine the operation of the regulatory regimes of most if not all major financial services industries in Bermuda and would have widespread consequences that would (at least potentially) affect past, pending and future decisions made under the regulatory mechanisms of the Investment Funds Act 2006 and any other similar procedures under regulatory statutes across the financial services sector in Bermuda.

4. While there may be circumstances in which the public interest is not served by the conduct of legal proceedings with disclosure of all the details that relate to the personal or private affairs a private individual, in the court's judgment, where the purpose and effect (if successful) of making a challenge to the constitutional integrity of public regulatory statute would have such widespread effect across the financial services sector, confidence in administration of justice demands that those proceedings take place in public and with no relaxation of the general rule as to Open Justice. This requires disclosure of the details of the case, including the names of the individuals involved and the relevant entities, as well as disclosure of the relevant documents which may be referred to in any report of those proceedings if they are referred to in open court, or if they later become available under the Supreme Court Records Act 1955, and publication of the facts and reasons for the court's decision in a public ruling, in accordance with the ordinary principles of Open Justice which apply to cases routinely determined by the courts in this jurisdiction.

5. For the reasons also explained in more detail in the Ruling, in the court's judgment a person's right to a private life does not extend to the right to anonymity in ordinary civil litigation and, to the extent that any such rights are engaged, in a case where the purpose of the proceedings is to set aside a public statute, those rights must give way to the public interest in conducting litigation in public in accordance with the constitutional principle of Open Justice.

6. In addition, and alternatively, where a party steps outside the regulatory regime in order to challenge its fundamental validity, that party cannot, in my judgment, pray in aid of an application for anonymity the confidentiality that would have applied under the very regime that party seeks to set aside.

7. As in **Re X v B**[1], the names and details of the individuals and entities involved in this case are redacted and will retain the anonymity granted by the Order of Mrs Justice Subair Williams in this Ruling. This is because it would obviously be unjust to disclose these details where the purpose of the application was to preserve their confidentiality, and it would undermine confidence in the administration of justice if parties had to run the risk of disclosure if the application is ultimately unsuccessful. This anonymity will continue in relation to any appeal (or until further Order of the court or the Court of Appeal).

8. For the reasons also explained in the Ruling, the applicant must bear the costs of this application at the conclusion of the proceedings, to be taxed on the standard scale if not otherwise agreed.

Background facts

9. In keeping with the approach described in paragraph 7 above, it is necessary to keep the introductory summary of the background to a minimum and to state only the essential general facts to describe the context of the application.

10. In this case the applicant served as director and later as chief operating officer of an institutional investment fund ("the Fund") regulated under the Investment Funds Act 2006 ("the IFA") over a period of just under two years, immediately preceding the cessation of operation of the Fund, for reasons which it is not necessary to describe here. The Bermuda Monetary Authority ("the BMA") petitioned for an order for the winding up of the Fund under its powers under the IFA and provisional liquidators were appointed to manage the orderly conduct of a liquidation of its affairs. The grounds for the petition included matters related to the duties of the board to comply with the requirements of the IFA, which it is not necessary to describe in detail.

[1] [2024] SC (Bda) 77 civ at [18] to [20].

11. Following the appointment of the provisional liquidators, the BMA served a Warning Notice on the applicant setting out the reasons why the BMA considered that the applicant had not complied with his or her duties as chief operating officer. The applicant responded to the matters set out in the Warning Notice denying any breach of the relevant provisions of the IFA or the Code of Practice made thereunder. Notwithstanding these responses, the BMA later issued a Decision Notice which imposed a ban on the applicant from serving as a director or officer or controller or administrator of a regulated fund for a specified period ("the Prohibition Order").

12. The applicant disputed the findings of the BMA and exercised the right to appeal to a Tribunal under the regime set out in section 55 (3A) of the IFA.

The Constitutional challenge

13. In addition to exercising the statutory right of appeal to a Tribunal, the applicant issued the present proceedings which seek relief under section 15 (2) of Schedule 2 to the Bermuda Constitution Order 1968 ("the Constitution"). These proceedings stand separate and apart from the exercise of the applicant's statutory right of appeal under section 55 of the IFA which are pending but have been postponed until the determination of the constitutional challenges raised in these proceedings.

14. Section 15 of the Constitution permits any person who alleges that any of his or her fundamental rights under the Constitution have been, are being or are likely to be infringed may apply to the court for redress, provided that the Supreme Court shall not exercise its powers of intervention if it is satisfied that there are adequate means of redress are or have been available under any other law.

15. The essential grounds of the constitutional challenges that are raised in these proceedings are (in summary):

    (i) A declaration that section 67E of the IFA (which empowers the BMA to make a prohibition order) is unconstitutional in that it does not afford the applicant a fair hearing before an independent and impartial tribunal;
    (ii) A declaration that section 67E of the IFA is unconstitutional because it does not provide for a full right of rehearing on appeal which is before an independent and impartial tribunal; and
    (iii) A declaration that the Prohibition Order determined the applicant's civil rights in that it restricts the applicant's ability to perform regulated functions for a specified period.

16. Other issues are raised in the proceedings which go to the conduct of the BMA's investigation and the fairness of procedure followed, but these are matters which are within the competence of the Tribunal, namely alleged (appearance of) bias and alleged breaches of natural justice in the procedure followed in the investigation and decision-making process. It is appreciated that there is some overlap in relation to the application of the principle that no one shall be the judge in his own cause.

17. Without going into the nuances and permutations of the arguments that may be deployed, the substance of the point that is sought to be argued is that the BMA cannot at once be the investigator of the regulated entity, a well as the organ which decides guilt or innocence in relation to infringements of the IFA, as well as the organ which decides the penalty that is to be imposed for the breaches it has found. In colloquial terms, it amounts to saying that the BMA cannot rightly be the investigator, prosecutor, judge, jury and executioner in relation to infringements of the IFA. In addition, it is said that a right of appeal which is limited to an appeal on a point of law does not give an appellant a right of full rehearing, which is said to contravene the constitutional requirement that when a person's civil rights are being determined, it must be by an independent and impartial court. By limiting the right of appeal to legal points, it is said that the statutory framework does not give any means of redress in respect of the facts upon which the decision is made. It is said that this infringes the right guaranteed by the Constitution to a fair trial by an independent and impartial Tribunal.

18. These points go to the fundamental operation of the whole of the regulatory mechanism under the IFA and it is common ground that the same structure of regulatory mechanisms has been adopted and replicated across ten other financial service activities in Bermuda. At this stage, it is no part of the court's role to evaluate the merits of any of these points. That will be the court's job at the hearing of the proceedings when they get to trial.

Open Justice

19. This court has previously set out the basis of the principles of Open Justice in **X v B**[2] and will not repeat them here. In summary, section 6 (9) of the Constitution requires that all proceedings in every court for the determination of the existence of or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public. This is the modern foundation of the Open Justice principle as it applies in Bermuda, but whose origins lie much further back in the historical development of English law[3].

20. Normally all applications made to court in civil proceedings are conducted in public, subject to restrictions on access to materials on the court file until the matter has been determined. However, the Writ or Originating Process are available to the public, as well as copies of any orders made in the proceedings. However, until the proceedings have been heard, normally affidavits and documents disclosed in the course of the proceedings in interlocutory applications are not available until they are referred to or relied upon in open court hearings or until the conclusion of the proceedings and a judgment has been entered. The court can exercise a discretion to redact commercially sensitive information or where the interests of justice require it[4].

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[2] Supra at [45] to [51].
[3] See the discussion by Lord Sumption JSC in **Khuja (formerly PNM) v Times Newspapers Limited** [2017] UKSC 49 at [12] to [18].
[4] See the *Practice Direction on the Publication of Judgments and Rulings given in Chambers (No 7 of 2006)* and the *Practice Direction on Access to Court Records in Civil Cases (No 23 of 2015)*.

21. The starting point is therefore that the names of the parties referred to in the headings of the proceedings and referred to in pleadings and documents will be or will become available to the public at least by the time the proceedings have concluded. This is uncontroversial as between the parties.

22. It is also common ground that any exceptions to Open Justice must be established on a foundation of legal principle. Section 6 (10) of the Constitution permits the court to exclude persons other than the parties where publicity would prejudice the interests of justice, or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen, or for the protection of the private lives of persons concerned in the proceedings. Sections 11, 20 and 36 of the Supreme Court Act 1905 give the court power to deal with interlocutory matters in chambers, and the court has inherent powers to regulate its own process. Exceptionally, the court will allow exceptions to the Open Justice principle when the attainment of justice would be rendered doubtful or would result in a denial of justice if the case were to be conducted in public[5].

The applicant's position

23. The applicant has put forward two main arguments in support of the extension of the restrictions on publicity that were granted on an interim basis before Mrs Justice Subair Williams. They are (in broad summary) (i) the applicant has the right to the protection of the applicant's private life under Article 8 of the European Convention on Human Rights 1968 ("ECHR") which the applicant is entitled to enforce under Bermuda law, and (ii) the applicant is entitled to confidentiality under the regulatory procedure that governs the conduct of the applicant's appeal to the IFA Tribunal, and so should be entitled to the same protection in respect of an appeal which the applicant has been forced to make in order to protect the applicant's rights.

The right to the protection of private life

24. The applicant has set out in the supporting affidavit a number of factors which relate to the applicant's family life and the impact that the applicant says that a trial in public would have upon the applicant and the applicant's family, along with the impact on the applicant's professional life in a small business community such as Bermuda as well as the impact on the applicant and applicant's family's social life.

25. The applicant expresses the fear that the applicant and the applicant's family will need to move from Bermuda and seek employment and residence elsewhere if it becomes known that the applicant has been the subject of a prohibition order. The applicant says that even if the applicant is successful in setting aside the BMA's Decision Notice on the basis of the constitutional objections summarised above, the applicant fears that the applicant will be judged by the applicant's peers in the financial services sector as having been found guilty by the BMA of misconduct, on the basis that there is 'no smoke without fire', or that perception that the reversal of the Prohibition Order will have been achieved 'on a technicality'. Ms Williamson referred to **P v T**[6] as an example where

[5] **R v Chief Registrar *ex parte* New Cross Society** [1984] 1 QB 227 at 235C per Sir John Donaldson MR.
[6] [1997] 1 WLR 1309, 1313 C-H per Sir Richard Scott VC.

the court has recognised the damage that suspicion and innuendo can cause to a person's career prospects.

26. The applicant therefore relies upon the right to private life, which is protected by the European Convention on Human Rights, which the Privy Council has held extends to Bermuda by virtue of the United Kingdom's treaty obligations and its responsibility for foreign affairs for Bermuda[7]. That the considerations as to the impact on the applicant and the applicant's family fall within the description of the right to private life is not disputed.

27. The applicant says that this right falls squarely within the exceptions contemplated by section 6 (10) of the Constitution summarised above, namely the protection of the private lives of the persons concerned in the proceedings.

28. In support of the submission that the right to private life includes a right to the protection of personal development, reputation and private and professional life, including relationships and the ability to seek future employment, Ms Williamson relied upon the decision of the European Court of Human Rights in **Denisov v Ukraine**[8]. It was submitted by Ms Williamson that the affidavit evidence shows that the issues relating to the applicant's private life were necessarily affected by the Decision Notice, and therefore the court's powers under section 6 (10) of the Constitution were engaged, and that the court should continue to provide protection to the applicant's human right of privacy by means of the restrictions on publicity and access to the court records that were granted by Mrs Justice Subair Williams.

29. Ms Williamson relied on **Nursing and Midwifery Council v D**[9] as an example of the application of restrictions where the interests of confidentiality required it when Article 8 ECHR rights were involved.

Confidentiality under the IFA

30. In the alternative, Ms Williamson submitted that the regulatory regime under the IFA is governed by confidentiality and protection from public disclosure. She submitted that it would be consistent with that protection to apply the same types of restriction that would have applied under the IFA regulatory proceedings in the present proceedings.

31. The premise of the submission was that the application to declare the Decision Notice unconstitutional was a necessary incident of the applicant's challenge on appeal, and that the applicant had to take the point, which could only be done by instituting the present proceedings. Therefore, Ms Williamson submitted that the applicant had not stepped outside the IFA regime at all in issuing the constitutional challenge to the IFA. Alternatively, Ms Williamson submitted that

[7] **Minister of Home Affairs v Fisher** [1980] AC 319, 328 G per Lord Wilberforce.
[8] Application No 796639/11 dated 25 September 2018 at [95-100] [107-8] [112] and [115].
[9] [2018] EWHC 498 Admin.

the cases of **R (Willford) v Financial Services Authority**[10] and **DPP v Clarke**[11] (which held that an application to court necessarily resulted in a loss of confidentiality in regulatory or disciplinary proceedings) either did not apply or were distinguishable because the present proceedings were (in effect) forced upon the applicant.

32. In addition, Ms Williamson relied upon other cases in which the courts have applied anonymisation in matters involving disciplinary matters which are conducted in private[12]. It is right to note that since the hearing another case has been decided which involved the grant of anonymisation where the case involved judicial review proceedings in respect of pending disciplinary proceedings against a barrister[13]. In addition, Ms Williamson relied upon examples of cases where the court has exercised its powers to anonymise and restrict publication of details relating to cases involving blackmail, where the purpose of the order was to prevent the publication of the very information that formed the basis of the charge[14].

The BMA's position

33. The BMA's stance on the imposition of restrictions can be stated shortly. Mr Khan submitted that the principle applied in **DPP v Clarke** (supra) is binding on this court, is clear, and does not admit of exceptions: once a party steps outside the regime to which a statutory cloak of confidentiality applies to challenge the legality of that regime in court proceedings, any right to confidentiality under the statutory regime is lost by virtue of the Open Justice principle.

34. Mr Khan submitted that the exceptions in section 6 (10) of the Constitution should be construed narrowly, and the interests of justice are not to be confused with the interests of a private individual to avoid embarrassment or unwanted publicity or scrutiny, relying upon the analysis of Lord Woolf MR in **R v Legal Aid Board *Ex parte* Kaim Todner**[15]. He submitted that the cases involving blackmail were examples of the court preventing abuse of the court's process and were not appropriate comparisons to the present case.

35. Mr Khan submitted that the court must balance any right to private life against the public interest in Open Justice, and that the balance of justice favours the absence of restrictions on publication or anonymity given the nature of the challenge, which involves the validity of the regulatory regime in the context of a failed institutional investment fund with a constituency of investors.

The Attorney General's position

36. The Solicitor General adopted the same approach as the BMA in relation to the application of the Open Justice principle, and the binding nature of the decision in **DPP v Clarke**. Ms Dill-Francois also submitted that the application was misplaced because the applicant did not have to step outside

[10] [2013] EWCA Civ 674.
[11] [2019] CA (Bda) 8 Civ.
[12] **AB (a barrister) v Bermuda Bar Council** [2026] CA Bda 3 civ.
[13] **Metis v Bermuda Bar Association** [2026] SC (Bda) 95 civ per Mussenden CJ at [34].
[14] ANM v v HXW [2010] EWHC 2457.
[15] [1998] 3 WLR 925 at 934 E-F and 935 D to G.

the IFA regime in order to raise the challenge, and these proceedings usurp the Tribunal's function in determining the procedural fairness of the steps taken by the BMA in issuing the Decision Notice.

37. Ms Dill-Francois submitted that the proviso in section 15 (2) of the Constitution applies and that the court will be asked not to exercise its powers of intervention because there is another remedy available to the applicant, namely an appeal to the Tribunal, and thereafter an appeal to the court on a point of law. Therefore, she submitted that the applicant was not 'forced' to step outside the IFA regime and could have preserved the right of confidentiality of the applicant thereunder. The public interest issue would only arise on an appeal from the Tribunal to the court on a point of law.

The applicant's reply

38. Ms Williamson deferred the question of whether the proviso to section 15 (2) of the Constitution applies on the basis it was not before the court on this occasion and indicated that even if there is an overlap between the issues raised before the Tribunal and the court, it did not mean that the applicant had not been forced to issue these proceedings. In addition, she criticised the reliance on the principles set out in ***Ex parte*** **Kaim Todner** as a lazy 'floodgates' argument. Moreover, Ms Williamson submitted that the applicant was entitled to issue the present proceedings in defence to the actions taken by the BMA and so should not be treated as having initiated the proceedings voluntarily.

39. Ms Williamson also warned the court against applying the Open Justice principle in a manner that would stifle consideration of the genuine constitutional issues that arise in these proceedings, to which submission Mr Khan (not unreasonably) objected that there is no evidence of any intention by the BMA to stifle the applicant's right of access to the justice system.

The court's assessment of the arguments

40. I will deal with the applicant's two main themes in turn. There is not much (if any) daylight between the parties on the application of the Open Justice principles. The issue is how the court should apply the exceptions to the general rule to the facts of the present case.

41. In **Khuja (formerly PNM) v Times Newspapers Limited and Others**[16] Lord Sumption JSC discussed the origins of the Open Justice principle in a case involving the press coverage of allegations that the police and child protection authorities in the United Kingdom have failed adequately to confront a pattern of crime involving the sexual exploitation of vulnerable teenage girls by older men. This issue is obviously a very different context from the present but involves issues of serious public concern.

42. In **Khuja**, Lord Sumption referred to the modern starting point of the principle in **Scott v Scott**[17] in the House of Lords. That case involved a wife's petition to annul a marriage on the grounds of impotence. Again, this is a context very different from the present. **Scott v Scott** was heard *in camera* and the wife's petition was granted, but she sent copies of the shorthand notes to the

[16] [2017] UKSC 49
[17] [1913] AC 417

respondent's father and sister and to a third person. On appeal from a finding of contempt of court by the trial judge, the House of Lords upheld the Court of Appeal's decision to set aside the contempt on the basis of the Open Justice principle. The principle was expressed in several different ways in the speeches of the members of the House, the one quoted by Lord Sumption being the statement by Lord Atkinson in these terms:

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

43. Importantly, Lord Sumption also noted that the Open Justice principle finds expression in the ECHR, citing **B and P v United Kingdom**[18]. This is relevant when considering the arguments made by Ms Williamson based on the applicant's reliance on the right to the protection of the applicant's right to a private life under the ECHR. This is a point to which I will return.

44. In ***Ex parte*** **Kaim Todner**, heavily relied upon by the BMA, Lord Woolf MR set out nine propositions[19] which apply to the grant of anonymity or applying special rules of privacy to the conduct of proceedings. In his summary, Lord Woolf MR referred to the statements made by Viscount Haldane LC in **Scott v Scott** to the effect that exceptions to the Open Justice principle reflect the fact that the fundamental object of the court is to secure that justice is done, but the burden lies on the party seeking to displace the principle of Open Justice to establish that it is necessary to avoid defeating the ends of justice in any particular case[20].

45. Lord Woolf MR made it clear the grant of an exception cannot depend on the discretion of an individual judge but is more likely to reflect the particular circumstances of a case, which has resulted in the absence of a consistent pattern. He said that a public hearing also deters inappropriate behaviour by the judge and suggested that secrecy should be limited to situations where justice would be frustrated without it. Having warned against the erosion of the general principle of Open Justice by making exceptions, Lord Woolf MR said this:

> *"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 equal interest 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 the parties may depend on their co-operation.*

[18] (2001) 34 EHRR 19 at [36].
[19] At 933 A to 935 G.
[20] At 933 E citing Viscount Haldane's speech at 437-9 in **Scott v Scott**.

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 a witness can reasonably require protection. In prosecutions for rape and blackmail, it is well established that the victim can be entitled to protection. Outside 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 unreasonable. There must be some objective foundation for the claim which is being made."

The right to a private life

46. The court must approach the present application with these weighty statements of principle in the front of its mind.

47. I prefer to approach the question from the starting point that it is not a competition between a private right and a public interest. In my view, the question for the court in all these cases really boils down to the court's balancing exercise of the public interest in ensuring that justice is administered openly to maintain public confidence in the fair application of the law to all subjects equally and in accordance with established legal principle, and the public interest in giving effect to a citizen's rights to a private life.

48. This approach was applied by Lord Woolf MR in **A v B plc and another**[21] in which he explained the approach to interpreting and applying two Articles of the ECHR, namely Article 8 (the one on which Ms Williamson relies) and Article 10 which relates to freedom of expression, and therefore publicity. He said:

"The manner in which the two Articles operates is entirely different. Article 8 operates so as to extend the areas in which an action for breach of confidence can provide protection for privacy. It requires a generous approach to the situations in which privacy is to be protected. Article 10 operates in the opposite direction. This is because it protects freedom of expression and to achieve this it is necessary to restrict the area in which remedies are available for breaches of confidence. There is a tension between the two Articles which requires the court to hold the balance between the conflicting interests they are designed to protect. This is not an easy task, but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights both Articles are designed to protect. Each Article is expressly qualified in a way which allows the interests under the other Article to be taken into account."

[21] [2002] EWCA civ 337 at [6].

49. Of course, the present proceedings are not concerned with protecting the applicant's rights to a private life or preventing the press from publishing otherwise confidential details about the applicant's private life. The present proceedings involve a challenge to the constitutional validity of provisions of public statutes under which the applicant has been the subject of a prohibition order. The applicant wishes to retain anonymity during the trial of that application on account of the effect it is feared that revealing the applicant's identity and the identity of the Fund may have on the applicant's private life.

50. Ms Williamson submitted that the constitutionality of the provisions under challenge does not depend on knowing the identity of the applicant, but is a matter of general principle, and its validity does not depend on the identity of the individuals who are involved. Despite its attractive simplicity, it is a submission the court cannot accept.

51. While the two interests protected by Articles 8 and 10 can co-exist comfortably in ordinary life, when there is a conflict between them the court must evaluate which interest must take precedence and which must give way. In my judgment, in the light of the passages quoted above, unless the applicant can show that the interests of justice would be defeated by applying the Open Justice principle, that principle must prevail over the public interest in giving protection to the citizen's right to a private life so far as it relates to the litigation.

52. It is true that in some situations the court has been prepared to provide anonymity in relation to private matters which have to come before the court as a matter of jurisdiction, such as the regulation of the internal affairs of a family trust, where there is no public interest in knowing the details of the family or its wealth when the Trustee is (for example) seeking a blessing of a particularly momentous transaction. The process and reasoning of the court is made public, but the details of the family's private family affairs are not made public, in keeping with striking the balance referred to above by Lord Woolf MR in **A v B plc**. However, when the court is asked to adjudicate on the rights of contesting claims in relation to a trust in what is referred to as hostile trust litigation, those details are invariably made public[22].

53. In this case, the challenge is an all-out attack on the legality of a public statute which regulates the affairs of institutional investment funds registered in Bermuda and potentially affects the interests of all investors who invest in those funds from across the globe. It is not a case which is restricted to one fund or its private internal operations. Moreover, the regulatory regime which applies to institutional investment funds registered in Bermuda has been replicated in the regulatory regimes

[22] See for example in Bermuda **Thyssen-Bornemiszva and others v Thyssen-Bornemiszva and others** [1998] Bda LR 11 (CA) and others; **Wang and Wong v Grand View Trust Company Ltd** [2022] Bda LR 59 and [2022] Bda LR 115 (CA).

across all sectors of the regulated financial services industries in Bermuda (save one) and any decision in relation to the issues in this case will necessarily have much wider implications for all regulated financial services. Given the importance of the contribution made by international financial services to Bermuda's economy, these issues attract both national and international significance.

54. It is also true that in some cases involving disciplinary proceedings against regulated professionals confidentiality is maintained at least until the professional body has adjudicated against the professional[23]. Where, for example, the legality of the Bar Council's conduct of disciplinary proceedings has been in issue, the proceedings fall within the ordinary rules of publicity and Open Justice[24], even though the court may in other cases seek to balance the interests of the parties by making some restrictions pending the outcome of the proceedings[25].

55. In my judgment, while recognising the right of a private individual to keep their private affairs private, once a private individual embarks upon litigation which has as its very object to overturn a public regulatory statute to which the applicant is subject, that individual must accept that the Open Justice principle will apply to the conduct of the case according to the normal rules.

56. In this case there is no basis in fact or law for suggesting that the interests of justice will be defeated by applying the Open Justice principle. The justice of the result of the proceedings will not depend upon nor be affected by the public disclosure of the identity of the applicant or the Fund. In weighing the public interests referred to above, in my view the Open Justice principle must clearly take precedence over any considerations of privacy. Constitutional challenges to public regulatory legislation cannot be conducted appropriately on a 'need-to-know' basis.

57. Therefore, I am not prepared to accede to the continuation of the restrictions granted *ex parte* by Mrs Justice Subair Williams on the footing that the applicant was entitled to protection from the potential effects that bringing this litigation might have on the applicant's private life. This approach has been recognised and applied consistently by the courts since **Scott v Scott** was decided, and the applicant cannot reasonably have expected that this case would be subject to any other special rules. I therefore hold that the Order dated 15 May 2026 should be discharged in relation to the future conduct of this matter. It is a matter for the applicant to decide whether to progress the matter or not. If the applicant decides to do so, it will be on the basis that the protections thus far afforded will no longer apply.

58. However, for the reasons I explained in **X v B** referred to above, it would be contrary to the interests of justice for the applicant to run the risk that the application would fail and thereby remove the anonymity under which the court had earlier allowed the applicant to proceed. Therefore, the conditions in Mrs Justice Subair Williams' Order will continue to apply to the court's file and

[23] As in **Metis v Bermuda Bar Association** (supra).
[24] See eg **Hall v Bermuda Bar Council** [1983] Bda LR 1.
[25] See eg **Metis v Bermuda Bar Association** (supra) at [24].

documents, and the anonymisation of the applicant for all steps taken in the case to date, and any application for leave to appeal and, if leave is granted, any appeal from the court's decision on this point.

The applicant was forced to step outside the IFA regime

59. The second and alternative argument that was made was that it would be unfair to the applicant to lose the protection of confidentiality that will apply to the appeal to the IFA Tribunal, and would be inconsistent with the policy objectives of the IFA appeal procedure not to grant confidentiality to these proceedings because the applicant was forced to take the proceedings as a result of the (allegedly) unlawful actions of the BMA.

60. This submission also requires careful consideration. It is not entirely accurate to say that the whole of the enforcement process is subject to strict conditions of confidentiality. The relevant provisions can be summarised as follows.

61. The conduct of appeals against a Decision Notice issue by the BMA under the IFA are subject to the Investment Funds Appeal Tribunal Regulations 2012 ("the IFA Appeal Regulations").

62. The statutory appeal procedure from the Decision Notice is also governed by strict conditions of confidentiality until the Tribunal has reached its decision[26]. The process of enforcement under the IFA by the BMA is governed by conditions of strict confidentiality[27].

63. The BMA has the right to publish such information about the Decision Notice as it considers appropriate[28].

64. On an appeal from the BMA's Decision Notice, the Tribunal may in its discretion publish its decision with a statement of reasons, but if it does so, the IFA Regulations require the Tribunal to take into account the desirability of safeguarding confidential or commercially sensitive material or information communicated or obtained in confidence or the identity of or information relating to any party who is not a party to an appeal, and to make necessary amendments to the text of its determination or statement of reasons to give effect to those considerations.

65. The decision of the Tribunal is subject to a right of appeal limited to a point of law only[29]. That appeal is conducted in open court, subject to the Open Justice principle.

66. It can be seen therefore that the whole purpose of the enforcement process is to make public a Decision Notice of the BMA which has been made but which has not been appealed, or to make public a Decision Notice which has been unsuccessfully appealed to the Tribunal.

[26] Section 67M of IFA.
[27] Regulations 11 (6) and 15 (1) of the Investment Funds Appeal Regulations 2012 ("the IFA Regulations").
[28] Section 67E of IFA.
[29] Section 59 of IFA.

67. In an appeal to the court on a point of law, there is no confidentiality provided by the IFA or the general law that applies to court proceedings conducted in public, unless an exception to the Open Justice principle can be applied. In this context, for the reasons already given, those cases will be vanishingly rare.

68. The only aspects of the process which are covered by strict confidentiality are (a) the process of the BMA's investigation and Warning Notice (b) the Decision Notice until the appeal period has expired or an appeal has been allowed.

69. In this case, Ms Williamson says that these proceedings were only taken defensively against the Decision Notice and were not initiated by the applicant by stepping outside the IFA regime. With respect to the adroitness of the argument, it is in my judgment both wrong in fact and in law.

70. Plainly the applicant has taken a strategic decision in the context of objecting to the enforcement process as a whole to issue a new and separate set of legal proceedings which are outside the framework of the IFA as a matter of fact. This is the applicant's right, without deciding whether the point could, as the Solicitor General submitted, have been taken within the appeal to the Tribunal itself. (I pause to observe that if it had been a point argued before the Tribunal, either way it would have been determined by the Tribunal, the issue would almost certainly be or have to be taken on appeal to the court as a point of law in a public appeal proceeding.)

71. As a matter of decided case law, the act of commencing separate proceedings outside the relevant regulatory regime to challenge the validity of the process within the regulatory regime must of necessity involve stepping outside it. This is the case whether the applicant wished to do so or not, or whether the applicant felt forced by the circumstances of the case or that it is the best or only strategic option available.

72. The case of **Willford v Financial Services Authority** is authority for that proposition. That principle has been adopted and applied in similar circumstances in Bermuda in **DPP v Clarke** and that decision is binding on this court. Those principles were applied by this court in **X v B**.

73. There can be no doubt that as a matter of law in Bermuda, this means that once outside the IFA, any proceedings that seek to strike down the validity of the IFA regime must be conducted in public, except where the court is satisfied that the interests of justice would be defeated otherwise. In my view, the logical inconsistency in the applicant's argument is that once the applicant has stepped outside the IFA regime the applicant cannot pray aid the conditions of confidentiality pending appeal that would have applied had the applicant remained within its framework.

74. For the reasons already given above, no conditions apply in this case that would defeat the interests of justice if the case were to be conducted in public. Therefore, the court must also reject the alternative arguments advanced on the applicant's behalf.

Costs

75. It follows that the costs of the application must be paid by the applicant in any event because the application has failed and it has no bearing on the merits of the issues to be determined or the eventual outcome of the proceedings. The court therefore directs that the costs of the application will be awarded to the respondents to be taxed if not agreed on the standard scale at the conclusion of the proceedings.

Dated this 20th day of November 2026



THE HON. MR. JUSTICE ANDREW MARTIN

PUISNE JUDGE OF THE SUPREME COURT