PROCEDURAL RULES AND JUDICIAL DISCRETION:

*Cameron v Hussain* [2017] EWHC Civ 366

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When interpreting the Civil Procedure Rules,¹ the court is obliged to give effect to the overriding objective of dealing with cases justly and at proportionate cost.² When giving effect to the overriding objective, the court must ensure that it is seeking to achieve both substantive and procedural justice.³ Substantive justice, to borrow from Bentham,⁴ is concerned with the court correctly applying the law to true facts or, to put it another way, deciding the case on its substantive merits.⁵ Procedure, which consists of the rules of court as well as principles such as equality before the law, impartiality, and proportionality, is the means by which the courts discharge their constitutional function of vindicating and enforcing rights and thereby upholding the rule of law. When called upon to interpret rules of procedure, the courts must, therefore, give attention to both substantive justice and

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¹ Rule 1.2(b) states “The court must seek to give effect to the overriding objective when it – (a) exercises any power given to it by the Rules; or (b) interprets any rule subject to rules 76.2, 79.2 and 80.2, 82.2 and 88.2.”

² CPR 1.1. For a detailed scholarly explanation of the overriding objective and the various theories of justice in civil justice reform, see J. Sorabji *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press: Cambridge 2013) and J. Sorabji, ‘The Road to New Street Station: fact, fiction and the overriding objective’ (2012) 86 EBLR 77-89. J. Jolowicz has also made the point that, historically, the civil justice system has been reformed according to a ‘legal philosophy’ of justice – J. Jolowicz, ‘The Woolf Reforms’ in Jolowicz, *On Civil Procedure* (Cambridge University Press, 2000) at 387.


⁵ Sorabji *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (n 2).
procedural justice. As Lord Woolf put it when discussing the need to replace the Rules of the Supreme Court\(^6\) with the CPR:

“Procedural justice is as important as substantive justice. It must be seen to be fair. The rules should, therefore, be comprehensible to the parties (whether or not they are legally represented) and to others who are concerned with the outcome of litigation. The civil process should command respect, not because it generates a sense of awe or mystery, but because it is patently fair.”\(^7\)

His Lordship went on to explain that a paramount consideration of those applying the rules must be to save cost and reduce delay; this approach would be the cornerstone of the new rules.

Thus, procedural questions, including rule interpretation, have since 1999 been subject to a new procedural methodology: rules are to be interpreted and applied in light of the overriding objective and judges are to adopt a purposive approach when exercising their discretion. However, this procedural methodology has not been consistently followed. Judges have failed to balance their wide discretion when interpreting and applying the rules with their obligation to further the overriding objective.\(^8\) These difficulties and tensions in judicial rule

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\(^{6}\) Judicature Act 1873; Judicature Act 1875 Schedule 1; SI unnumbered of 1883; SI 2145 of 1962; and SI 1776 of 1965.


\(^{8}\) For example, prior to the landmark cases of *Mitchell v New Group Newspaper* [2013] EWCA Civ 1537 and *Denton v TH White Ltd* [2014] EWCA Civ 906, the courts failed to effectively apply the overriding objective when dealing with procedural breaches which led to defaulting parties easily being granted relief from sanctions. Consequently, this led to satellite litigation which increased costs and delay in the court process and drained the court’s resources and promoted a culture of non-compliance as noted by Sir Rupert Jackson in his *Review of Civil Litigation Costs Preliminary Report* (London TSO 2009) and *Final Report* (London TSO 2010). A detailed and critical discussion of the new philosophy underpinning the approach to procedural non-compliance and relief from sanctions was given by Lord Dyson MR in ‘The Application of the Amendments to the Civil Procedure Rules’ 18\(^{th}\) Lecture in the Implementation Programme, District Judges’ Annual Seminar, Judicial College, 22\(^{nd}\) March 2013. For an interesting comparative perspective on judicial approaches to sanctions for procedural breaches in England and the United States, see C. Crifo, ‘Enforcement of Process Requirements: A Search for Solid Ground’ (2014) 34(2) OJLS 325-352.
interpretation recently surfaced in *Cameron v Hussain*\(^9\) where the Court of Appeal was required to determine, inter alia, whether it was possible to obtain a judgment in respect of a claim for damages against a defendant identified only by description in the claim form and particulars of claim. Answering in the affirmative, Gloster VP held that there was no reason in principle why, in appropriate cases, it should not be permissible under the CPR for a claimant to bring proceedings against an unnamed defendant, suitably identified by an appropriate description. Sir Ross Cranston, giving a strongly argued dissenting judgment, was of the opinion that the underlying premise of the CPR is that parties should be named and any departure from this demanded “substantial justification.”\(^10\)

This note critically considers the judgments given in *Cameron*. It argues that Gloster VP’s approach is illustrative of excessive judicial discretion being exercised without justification. It also fails to strike the necessary balance between the need to achieve substantive justice as well as procedural justice as required by the overriding objective. These shortcomings have serious consequences. It creates a dangerous precedent which legitimises excessive judicial discretion and thereby damages the judicial rule interpretation methodology and, consequently, undermines procedural certainty, clarity and predictability.

Before analysing the judgments, it is sensible to reflect on the policy rationale underpinning the general rule to name parties in court proceedings, the exceptions to the general rule and the procedural rules at the centre of *Cameron*.

**Unnamed parties and the CPR**

As a general rule of civil procedure, statements of case should name the parties. The naming of the parties in court proceedings fulfils a number of important policy considerations. The

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\(^9\) *Cameron v Hussain* [2017] EWCA Civ 366.

\(^10\) *Cameron* at [95].
naming of parties in court proceedings is consistent with the fundamental principle of open justice. It enables the parties to know about the existence of the proceedings, the allegations and issues raised and the identity of the parties involved. Naming parties also allows them to conduct any necessary investigations (especially where there has been an allegation of fraud) and to collate any evidence.

There are, however, a number of specific, narrow situations under the CPR that allow unnamed parties to be included in statements of case. For example, CPR 19.7 permits for unnamed parties in group litigation and CPR 55.3(4) permits for unnamed parties in possession claims.

Aside from the above circumstances, the courts have exercised their discretion to permit proceedings against unnamed parties where the claimant is seeking an injunction. The leading case is Bloomsbury Publishing Group plc v News Group Newspapers Ltd and others in which Sir Andrew Morritt V-C decided the court was entitled to grant an order preventing the continuation of an injunction preventing unknown persons, who had offered a copy of one of the Harry Potter books to certain newspapers, from disclosing its content prior to the date of its official publication. Sir Andrew held that he should exercise the discretion to grant the order because the description of the person subject to the injunction was sufficiently certain to identify them. He also stated that there would be no injustice to anyone if the order was

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11 CPR 39.2 and Practice Direction 39A set out the principle of open justice. The principle of open justice was recently considered in Khuja v Times Newspapers Ltd [2017] UKSC 49 in which the Court dismissed the appellant’s application for an injunction to restraining The Times and the Oxford Mail from publishing the appellant’s name and various other personal details. Lord Sumption, delivering the leading judgment, held that matters discussed during public trials are not matters which carry with them a reasonable expectation of privacy. Press reports on court proceedings are important to the public interest as a matter of policy. For a discussion of the case, see G. Cheng ‘Unravelling Gagging Orders: A Step in the Right Direction: Khuja v Times Newspapers Ltd [2017] UKSC 49’ (2017) 37(1) C.J.Q 20. For an in-depth coverage of the principle see J. Jaconelli Open Justice: A Critique of the Public Trial (Oxford: OUP 2002).

made, but he could see “considerable potential for injustice to the claimant if [he] do not
[grant the injunction].”13 Bloomsbury was subsequently followed in Kerner v WX14, Brett
Wilson LLP v Person(s) Unknown15 and Smith v Unknown Defendant, Pseudonym
‘Likeicare’16 and, more recently, in the 2018 case of GYH v Persons Unknown17 in which
Knowles J granted the claimant final injunctive relief against unknown defendants under the

Naming parties in statements of case

The principal rules in Cameron concerned the requirement to name parties in statements of
case. CPR 7A PD 4.1(3) states:

“4.1(3) The claim form and every other statement of case, must be headed with the title of the
proceedings. The title should state:

(3) the full name of each party”18

CPR 16 PD 2.6(a)) also requires the naming of the parties when it states:

“The claim form must be headed with the title of the proceedings, including the full name of
each party. The full name means, in each case where it is known:(a) in the case of an
individual, his full unabbreviated name and title by which he is known.” 19

The facts and lower courts’ decisions

The claimant was injured in a hit-and-run collision as a result of which she sustained various
physical injuries and financial losses. Although the driver of the car at fault was never

13 Bloomsbury at [22].
18 Emphasis added.
19 Emphasis added.
identified, the vehicle registration number was taken down by a passing taxi driver. The police identified the registered keeper of the car at fault as the first defendant. However, the first defendant did not co-operate with the police enquiries into the accident and was subsequently convicted of the offence of failing to give information about the identity of a driver. It was later discovered that the car at fault was covered by a valid policy of motor insurance ("the policy") written by Liverpool Victoria Insurance Co Limited, the second defendant in the matter.

The claimant issued proceedings against the first defendant believing him to be the driver and later amended the proceedings to add the second defendant and to seek a declaration against it pursuant to s.151 of the 1988 Act to the effect that it was obliged to satisfy any unsatisfied judgment against the first defendant. The second defendant filed a defence denying any liability to satisfy any judgment because the policy did not cover the first defendant to drive the car under the terms of the policy and the claimant was unable to prove the identity of the driver at the time of the accident. The second defendant later sought summary judgment relying on the arguments in its defence.

Shortly after the submission of the second defendant’s application, the claimant made an application for permission to amend her claim form and particulars of claim by removing the registered keeper as first defendant and substituting him with a defendant identified only by the following description:

"the person unknown driving vehicle [registration number] who collided with vehicle [registration number] on [date of accident]".
However, the district judge dismissed the claimant’s application to substitute the name of the first defendant and granted summary judgment in favour of the second defendant.

HHJ Parker dismissed the claimant’s appeal. The judge held that it would be unjust to the second defendant to allow the appellant to obtain judgment enforceable against it, when it could not itself hope to trace any unknown defendant so as to attempt recoupment. He also held that there was no injustice to the claimant because she could still submit a claim to the Motor Insurers’ Bureau (“MIB”) under its Untraced Drivers’ Agreement (“UDA”). The judge went on to hold that the relevant rules of procedure required that the claimant “should provide the full name of the defendant. If this was not possible then the claimant should not bring a claim for damages but rather seek compensation through the MIB”. To allow defendants to be identified by description rather than name would, in the judge’s opinion, run counter to the overriding objective of enabling the court to deal with cases justly and at proportionate cost.” The claimant appealed.

**Parties’ submissions in the Court of Appeal**

The claimant relied on the following three grounds of appeal: (i) English civil procedure permitted proceedings to be issued and orders (including judgments) to be made against unnamed parties where it is necessary and efficacious to obtain justice; (ii) it was necessary and efficacious to allow the appellant to proceed against an unnamed defendant in the particular circumstances of this case; (iii) permitting the appellant to proceed was consistent with the policy of s.151 of the 1988 Act.

In support of its first ground of appeal, the claimant relied on *Bloomsbury*. Whilst accepting that the cases involving unnamed defendants were usually concerned with injunctions, the

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20 Cameron at [13].
21 Cameron at [13].
22 Bloomsbury [2003] EWHC 1206 (Ch).
claimant argued that the judgments for damages against unknown persons have been subsequently made without any apparent questioning of the court’s powers to do so and despite obvious difficulties of enforcement. In response, the second defendant submitted, inter alia, that proceedings could only be issued against unnamed parties in exceptional circumstances where an injunction was sought and where there was no other remedy available. This was important because an injunction was prospective and could be targeted at a group of people. Further, the words “should” in CPR 7PD 4.1 indicated that the normal rule was that the defendant must be named. In any event, the claimant would not be without a remedy as it could make a claim to the MIB.

For the second ground of her appeal, the claimant submitted that it was both necessary and efficacious to allow the appeal because the driver had deliberately and unlawfully concealed his identity and therefore did not have a defence. The claimant also submitted that it was efficacious to allow the appeal because it would provide the claimant with a remedy under s.151 of the 1988 Act and this would, therefore, fulfil the policy of the legislation. The remedy under the MIB UDA was irrelevant to the rules of civil procedure and s.151 of the 1988 Act and, in any event, the remedy under the MIB UDA was more limited than s.151.

The second defendant argued that the MIB UDA was a perfectly adequate alternative remedy and it would do injustice to the second defendant if the claimant was permitted to pursue a remedy under s.151 because a claimant could not obtain judgment for damages against an unnamed defendant; to do so would be a novel expansion of the...
Group line of cases. There was also a danger of the “floodgates” opening in respect of fraudulent claims.

Finally, the claimant argued that to permit her to proceed was consistent with the policy of s.151 of the 1988 Act because it was the intention of Parliament that, where an insurance policy covers a vehicle, the insurer should compensate persons injured by the use of the vehicle. The second defendant counter argued that it was an important safeguard on the scope of liability under s.151 of the 1988 Act that there should be a requirement that the driver be identified by name otherwise insurers could face a number of problems including not knowing who they were and would not have any opportunity to question them.

Court of Appeal judgments

Gloster VP (with whom Lloyd Jones LJ agreed) allowed the appeal and, in essence, held that the court can and should exercise its procedural powers to permit an amendment of the claim form and the particulars of claim to allow a claimant to substitute an unnamed defendant driver, identified by reference to the specific vehicle which he or she was driving at a specific time and place, and consequently to enable a judgment to be obtained against such a defendant, which an identified insurer is required to satisfy pursuant to the provisions of s.151 of the 1988 Act.25

Gloster VP first turned her attention to the third ground of appeal: the statutory policy of the 1988 Act. She began her analysis from the basic proposition that the policy of the regime imposed under the 1988 Act makes clear that, where a policy of insurance is in place, the insurer must, where it has received statutory notice of the issue of third party proceedings, generally meet liabilities to a third-party victim irrespective of whether the policy covers the driver/tortfeasor, and irrespective of the identity of the tortfeasor. Her Ladyship stated that an

25 Cameron at [40].
identified insurer’s liability under s.151 should not depend on whether the claimant can identify the tortfeasor driver by name. This was consistent with common sense, previous legislation and case law. Insurers, having taken an economic benefits under the policy, should, as a consequence, also bear the economic risk in respect of the existence or non-existence of the insured or named drivers. Gloster VP also agreed with the claimant’s submission that insurers will commonly have to meet judgment under s.151 where they have no hope of enforcing against the culpable party and, consequently, the defendant’s floodgates argument failed.

Judicial attention then turned to the court’s powers under the relevant rules of the CPR. Gloster VP rejected the second defendant’s submission that a party is unable to bring proceedings against an unnamed party, identified by a specific description, for damages, or is unable to do so in the absence of a claim for an injunction. She put it that there was no reason in principle why it should not be permissible under the CPR for a claimant to bring proceedings against an unnamed defendant where that defendant was suitably identified by an appropriate description. The court must, she explained, pay attention to the circumstances of the case and consider whether allowing proceedings against an unnamed defendant would further the overriding objective. But in any event, the circumstances in which judicial discretion should be exercised did not have to be exceptional. In this regard, Gloster VP adopted Sir Andrew Morritt V-C’s judgment in Bloomsbury who held that there is no reason in principle why it should not be permissible, in appropriate cases, under the CPR for a claimant to bring proceedings against an unnamed defendant, suitably identified by an appropriate description. Although there was no express discussion by Morritt V-C of the issue as to whether it was appropriate to bring a claim for damages against an unnamed

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26 The Road Traffic Act 1934.
27 For example, Zurich Insurance Co Ltd v Morrison [2942] 2 KB 53 (CA) and Hardy v MIB [1964] 2 QB 745.
28 Cameron at [42].
person in the defamation cases, Gloster VP was of the opinion that Morritt V-C’s logic applied equally to a claim for damages. Gloster VP elaborated on this point when she said:

“…..the question is not simply whether a claimant can issue proceedings against a person unknown, notwithstanding the direction in the rules that a defendant "should" be named, or whether the court can permit a party to amend the claim form to substitute an unnamed defendant for a named defendant. The question also arises whether, in any particular case, the court should in the exercise of its discretion permit a claimant to amend in order to substitute an unnamed defendant, or permit such an action to proceed, so as to lead to a judgment against him. Once it is accepted that proceedings can be brought against unnamed defendants, then whether in any particular case that should occur, or whether relief should be granted against such defendants, must, it seems to me, depend on whether the overriding objective (that is to say of deciding cases justly and at proportionate cost – see CPR r1.1) would be furthered by such a course.”

On the final issue Gloster VP found that the availability of a remedy under the MIB UDA did not preclude the claimant from pursuing an unnamed defendant. The claimant had a substantive right to a judgment for damages against the driver and a statutory right to payment by the insurer if the judgment was not satisfied. Therefore, it would, Gloster VP held, be unjust to deprive her of the remedy giving effect to those rights simply because she had an alternative remedy under the MIB UDA. The claimant was not obliged to pursue the MIB UDA remedy which could be less favourable than court ordered damages.

Sir Ross Cranston gave a strongly reasoned dissenting judgment. Although he agreed that, in appropriate circumstances, the proceedings could be brought against an unnamed party for injunctions, including damages, he disagreed that HHJ Parker was wrong in refusing to

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29 Cameron at [54].
substitute an unnamed person for the second defendant. The narrow exceptions to naming parties under the CPR indicated to him that the underlying premise of the CPR is that parties should be named and that to move beyond those exceptions required “substantial justification”.30 Reflecting on Morritt V-C’s decision in Bloomsbury, Sir Ross Cranston identified two reasons why the court granted an injunction. The first was the description of the people to whom the injunction should apply was sufficiently certain as to identify those who were included and those who were not. Secondly, Morritt V-C could see no injustice to anyone if the order was made but could see injustice if it was not. 31 Sir Ross went on to observe that Bloomsbury was subsequently applied in a number of cases including Brett Wilson LLP v Person(s) Unknown32 and Kerner v WX33 in which the courts granted injunctions against unnamed defendants because if the courts had refused to do so the wrong complained of would have continued and would therefore be an injustice to the claimant. Drawing on these conclusions, Sir Ross attempted to formulate the test for the exercise of judicial discretion,

“the exercise of the discretion to permit proceedings against unnamed parties demands first, that there be no injustice to the unnamed persons involved, and secondly, that there will be a real potential for injustice to a claimant should such proceedings not be permitted.”34

Applying his test to the facts of the present case, he found that there would not have been an injustice to the unnamed party because the claimant would have the right to obtain

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30 Cameron at [95].
31 Bloomsbury Publishing Group Plc at [22].
33 Kerner v WX [2015] EWHC 128 (QB).
34 Cameron at [105].
compensation under the MIB UDA. Further, the obligation of the insurers under the 1988 Act arose when there is a judgment. It followed that to obtain a judgment a claimant must satisfy the requirements of both procedural and substantive law and, as a rule, procedural law required that defendants in legal proceedings be named and the insurer’s right to recourse under s.151(8) will, he explained, often depend on a driver being identified. There was, therefore, a clear obligation to name parties.

Sir Ross also agreed with HHJ Parker’s conclusions that to allow the claimant the s.151 avenue would increase litigation and costs and would likely prejudice insurers by depriving them of an ability to pursue any indemnity against the unnamed driver. He also agreed that there was no injustice to the claimant because she could claim compensation under the MIB UDA scheme. He concluded with a warning against the exercise of discretion in areas where the legislation was settled:

“….there is the threat of undermining the balance between the statutory and MIB avenues for claimants to obtain redress following motor vehicle accidents. That balance and the existing arrangements may not be ideal…..but the arrangements in this jurisdiction are long standing and have Parliamentary approval. In this difficult field for policy makers it is not for the court to disturb these arrangements through sanctioning an exercise of discretion where there is no injustice to remedy.”35

**Analysis**

35 *Cameron* at [118].
The decision may be hailed by some as a patently fair and just one for which the court should be commended for striving to achieve substantive justice. The supporters of the decision in *Cameron* will argue that it was necessary to reach a fair and just result for a claimant who would otherwise have had recourse to less favourable compensation than that awarded by the court. Thus, judicial construction of both the legislative regime and the rules of procedure achieved a fair and just result for hit-and-run victims where the driver cannot be found. By expanding the circumstances in which unnamed parties are permitted in court proceedings and the exercise of wide judicial discretion was both necessary and justified. Indeed, Gloster VP places emphasis on the need for the claimant to be able to enforce her substantive rights when she stated:

“I see no reason why the fact that the appellant has an alternative remedy for compensation . . . should be regarded as a legitimate reason for preventing her from enforcing her undoubted substantive rights . . . in circumstances where the appellant has an undoubted right conferred by statute to payment by the insurer of a vehicle in the event that she obtains a judgment against its negligent driver, it cannot be just to deprive her of the remedy to give effect to that substantive right, simply by the court’s refusal to exercise a procedural power on grounds of the existence of an alternative remedy against the MIB . . .”36

However, there are reasons to be more cautious of the decision. In seeking to fulfil their constitutional role of vindicating and enforcing rights, the courts must further the overriding objective and thereby seek to achieve both substantive justice and procedural justice. Lord Woolf explained the importance of the concept of procedural justice thus, “These requirements of procedural justice…. will give effect to a system which is substantively just

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36 *Cameron* at [56].
in the results it delivers as well as in the way it does so.”37 Given the importance of the need for courts to give effect to the overriding objective when interpreting the rules, Gloster VP’s judgment makes surprisingly little mention of it. The focus of her reasoning is on the need to achieve substantive justice, to ensure that the claimant had recourse to damages and that her substantive rights were protected and that insurers remain liable under the statutory regime. However, given the obligation of the courts to give effect to the overriding objective when interpreting rules of procedure, it is only mentioned in passing and without the level of judicial attention and focus which one would expect to be exercised. This is surprising and is a fundamental weakness of the decision. Careful consideration and application of the overriding objective was required during the interpretation process so that equal judicial attention is given to both substantive and procedural justice: this was not adequately done. If it had been, the exercise of judicial discretion would have been constrained because, as Sir Ross Cranston convincingly argued, there would not have been an injustice to the claimant. The claimant would have continued to maintain substantive rights by having recourse to compensation from the MIB. There would not have been a need to unnecessarily expand the situations permitting unnamed parties. This argument is further reinforced by Parliament having legislated on compensating victims of hit-and-run accidents through the MIB. Although that scheme is open to criticism on a number of grounds, nonetheless it provides a remedy for victims.

The decision also undermines the need to have clarity, consistency and predictability in judicial construction and application of rules of procedure. It potentially opens the doors for expensive and time consuming satellite litigation and severely undermines the overriding objective of doing justice at proportionate costs. Although procedural rules form part of the

notion of procedural justice they go beyond simply a theoretical concept in civil justice. Procedural rules provide the framework, the architecture, within which the parties bring and defend claims and within which the courts fulfil their constitutional functions in vindicating and enforcing legal rights. Thus, procedural rules facilitate the dispensation of substantive justice. However, the decision in Cameron undermines these functions and undermines the policies which underpin procedural rules because it creates uncertainty in the procedural process and increases the uncertainty of litigation outcomes. The rules at the heart of the dispute in Cameron clearly state that the parties “should” be named in statements of case and, as explained by Sir Ross Cranston, the limited exceptions to the use of unnamed parties indicates that the premise of the CPR is that the parties should be named. These exceptions, and the use of unambiguous terminology in placing a clear obligation to name parties, reinforce the need for the courts to exercise judicial constraint. This is not helped by Gloster VP’s comments that courts could exercise their powers “[i]n appropriate circumstances.”

Not only does this grant very wide judicial discretion it is also vague as to what is meant by “appropriate circumstances” – surely a more cautionary approach should have been taken so that the general rule and the policy underpinning it were preserved?

A further issue arises in respect of the injunction cases. Both Gloster VP and Sir Ross Cranston made reference to a number of cases in arguing that the courts have the discretion to permit the use of unnamed parties in non-injunction cases. With respect, the courts should restrict the exercise of their discretion to injunction cases because this is in line with the established authorities and it safeguards the courts from unnecessarily expanding the exceptions to the general rule. The case of Bloomsbury and those cases which followed it led to the creation of an exception to the general rule, one which applies to a narrow and very specific situation and circumstances which would justify a departure from the general rule.

38 Cameron at [53].
Those cases concerned the granting of injunctive relief against unnamed person where the harm was continuing and in circumstances in which an injunction was the only effective remedy for the claimant. Although Morritt V-C’s comments in Bloomsbury acknowledged that a failure to name a party does not invalidate proceedings, it is interesting to note that since those comments the courts have consistently exercised their discretion only in injunction cases. The most recent case, GYH, was a case which concerned the granting of an injunction and damages under the Protection from Harassment Act 1997. At the interim hearing, Warby J, applying Bloomsbury, issued a word of caution when he said:

“The court must however keep a watchful eye on claims brought against person unknown, to guard against an abuse of the facility to bring claims in this way.”

Warby J’s comments may be taken in one of two ways. First, his comments may be taken to mean that the courts must exercise judicial caution in respect of all cases which concern unnamed parties, regardless of whether those cases concern injunctions, and guard against any potential abuse of process. The other, more likely interpretation of his comments is that he is specifically referring to injunctive relief cases, after all, that was the issue before him. This interpretation would support the proposition that the use of unmanned persons relates specifically to injunction cases, that courts have not gone beyond this area of law when exercising their discretion, and that GYH is supportive of this proposition. Thus judicial discretion should be confined to injunction cases.

If the argument against restraining judicial discretion fails, then Sir Ross Cranston’s two stage test provides a sensible way forward with a slight refinement. The test should be commended for providing potential guidance to the courts and litigants in a complex area of civil procedure. It attempts to strike a balance between the need to uphold procedural and substantive justice between the parties. It also rightly sets a high threshold to be met before
discretion can be exercised and as such it protects the underlying policy considerations of the CPR and the conduct of court proceedings. And the test, when applied to the facts of Cameron, demonstrated that the claimant would not have suffered an injustice because she could enforce her rights under the MIB.

The test may be slightly refined. Although stage one demands that there be no injustice to the unnamed parties, there should be an express obligation within the test which places a clear obligation on the claimant to ensure that it has taken all reasonable steps to try to identify the unnamed parties. This addition to the test is in line with the courts’ approaches in the injunction cases. In those cases the courts made reference to the attempts made by the claimant to identify the unnamed party before granting an injunction.\(^3^9\) Although, in practice, the court will seek to establish what enquiries the claimant has made to try to identify the unnamed party, this obligation should, for the sake of clarity for litigants and in order to promote judicial consistency, form a party of Sir Ross Cranston’s test.

**Conclusion**

When exercising their rule interpretation powers, the courts should proceed with caution and do so with the intention to further the overriding objective to achieve both substantive and procedural justice, as advocated by Lord Woolf, and to promote certainty, clarity and predictability. The unnecessary expansion of the exceptions to the general rule on unnamed parties runs counter to the policy rational underpinning the rules and the aims of the overriding objective and is in real danger of increasing delay and costs through satellite

\(^{39}\) See, in particular, Warby J’s comments in when granting an interim injunction in *GYH v Persons Unknown (Responsible for the publication of Webpages)* [2017] EWHC 3360 (QB) at [12] “I am satisfied that the claimant has taken all the steps that could be taken to identify a defendant who might be served with this claim, but without success.”
litigation. As Dyson LJ lamented when referring to the litigation surrounding the rules on service:\footnote{40}{CPR 6 (Service of Documents).}

“The CPR were intended to be simple and straightforward and not susceptible to frequent satellite litigation. In this area, that intention has not been fulfilled. As a result, the explicit aims of the Woolf reforms to reduce cost, complexity and delays in litigation have been frustrated.”\footnote{41}{Collier v Williams [2006] EWCA Civ 20 at [1]. For comment on the practical implications of the decision, see S. King ‘Civil procedure: claim forms - service - service of proceedings on solicitor J.P.I. Law (2006) 2 C96-101; P. Hungerfield-Welch ‘Civil Litigation’ (2006) 156 (7211) N.L.J. 238.}