Neutral Citation Number: [2023] EWHC 935 (KB)

Case No: QB-2021-001074
QB-2021-001513

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2023

Before:

MR JUSTICE CHAMBERLAIN

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Between:

(1) DENNY TAYLOR
(2) "EZE"
(3) MINA KUPFERMANN
(4) EMMA PICKEN
(5) "EHL"
(6) COLIN APPLEBY
(7) JULIE CATTELL
(8) EUAN PHILLIPS
(9) ANDREW BURRIDGE — **Claimants**

– and –

DAVID EVANS
(AS REPRESENTATIVE OF THE LABOUR PARTY) — **Defendant**

– and –

(1) KARIE MURPHY
(2) SEUMAS MILNE
(3) GEORGINA ROBERTSON
(4) HARRY HAYBALL
(5) LAURA MURRAY

Third Parties

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Jonathan D.C. Turner and Natasha Hausdorff (instructed by **3D Solicitors Ltd**) for the **Claimants**
Anya Proops KC, Zac Sammour and Michael White (instructed by **Greenwoods Legal LLP**) for the **Defendant**
Jacob Dean and Ben Hamer (instructed by **Carter-Ruck LLP**) for the **Third Parties**

Hearing dates: 21-23 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 24 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 Following its election defeat in December 2019 under the Rt Hon. Jeremy Corbyn MP, the Labour Party ("the Party") set about electing a new leader. Some members wanted to see Mr Corbyn's policies continued; others wanted a change. The election of the Rt Hon. Sir Keir Starmer MP was announced on 4 April 2020.

2 These claims arise out of the publication on 9 April 2020 of a report entitled *The work of the Labour Party's Governance and Legal Unit in relation to antisemitism 2014-2019* ("the Report"). The Report was written by Party staff.

3 The claimants, individuals named in the Report, say that the inclusion in it of their personal data was a breach of their rights under the General Data Protection Regulation ("GDPR"), a misuse of their private information, a breach of confidence and unlawfully discriminatory contrary to the Equality Act 2010. They filed a claim, identifying the defendant as "the Labour Party". That was subsequently changed, by order of Master Dagnall, to "David Evans as representative of the Labour Party". David Evans is the General Secretary of the Party.

4 The defendant says that the Report was not published under its authority but leaked by the third parties for the purpose of undermining the Party's new leadership. The Party incurred substantial costs in dealing with the leak and has brought a Part 20 claim against the third parties.

5 There are three applications before me:

(a) **The claimants' anonymity application.** The claimants seek an order that the second and fifth claimants be permitted to remain anonymous and refer to themselves by ciphers in the claim form and statements of case and that all the claimants be permitted to omit their addresses from publicly accessible court papers. The defendant and third parties are neutral on this application, though they point out that derogations from the principle of open justice must be strictly justified.

(b) **The third parties' unless order application.** The relief sought on this application was originally an order that, unless the defendant applies to substitute for himself a person or persons other than those proposed so far, the Part 20 claim be struck out. The relief sought evolved during the course of the hearing. By the end of the hearing, the third parties sought an order that unless the defendant amends the Particulars of the Additional Claim to explain the basis on which it is said that the claim can be brought by Mr Evans on behalf of the Party, the claim be struck out.

(c) **The defendant's privilege application.** The relief sought is a declaration that an email sent by Ms Murphy to a lawyer, Martin Howe, on 8 April 2020, is not privileged and accordingly may be deployed in the proceedings.

(a) The claimants' anonymity application

The anonymity application before Johnson J

6 Before they filed the claim, the claimants sought permission to issue the claim form and file statements of case that identified them by cipher only. That permission was granted by Nicklin J pending a hearing and then confirmed by Johnson J after a hearing. He gave careful and detailed reasons, setting out the law and the applicable principles: see [2021] EWHC 3821 (QB). What follows is a summary of those principles, taken from his judgment. None of the parties suggests that these are wrong or incomplete.

7 The principle of open justice (*Scott v Scott* [1913] AC 417, 463; *R (Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [2011] QB 218, [38]) gives rise to the "general rule that the names of the parties to an action are made public when matters come before the court and included in orders and judgments of the court": *JIH v News Group* [2011] EWCA Civ 42, [2011] 1 WLR 1645, [21(1)]. These principles are reflected in the requirement in CPR 16 PD that the claim form must include an address at which the claimant resides or carries on business (para. 2.2) and must be headed with the title of the proceedings, including the full unabbreviated name of each party and the title by which he or she is known (para. 2.6). Para. 3.8(3) requires that statements of case also include the full name of the claimant. Statements of case are available for inspection by a non-party under CPR 5.4C(1).

8 However, the court has power to permit a claim form to be issued without it containing the claimant's name or address and to prevent public access to an unredacted statement of case: CPR 39.2(1) and (4), CPR 16 PD para. 2.5 and CPR 5.4C(4). The procedure for applying for such permission was explained in *R v Westminster ex p. Castelli* (1995) 28 HLR 125, 131 (Latham J). The application can be made without notice: *CVB v MGN Ltd* [2012] EWHC 1148 (QB), [48]-[50].

9 The principles to be applied were set out in *JIH*, at [21]:

> "(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.
>
> (2) There is no general exception for cases where private matters are in issue.
>
> (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.
>
> (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.
>
> (5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such

> restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.
>
> (6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.
>
> (7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.
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> (8) An anonymity order or any other order restraining publication made by a judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date.
>
> (9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary.
>
> (10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one."

10 CPR 39.2(4) provides:

> "The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness."

11 Johnson J noted that the order the claimants were seeking was a limited one. They were seeking permission for the claim form and statements of case to remain anonymous, but they were not seeking injunctive relief to prevent disclosure of their names by anyone who happened to know them. In a previous case (*Lupu v Raycoff* [2019] EWHC 2525 (QB), [2020] EMLR 6, [21]), where a similar order had been sought, Nicklin J had said this:

> "I struggle to see what the point of such an order would be in this case. Either there is justification for withholding the claimants' names from the public in these proceedings or there is not. If there is not, the court should not artificially place obstacles in the way of reporting of the case by adopting measures that simply make it more difficult for the media to report information upon which the court has placed no restriction…"

12 However, Johnson J distinguished *Lupu* because, in that case, it was likely that the identities of the claimants would be disclosed without an order preventing disclosure; here, by contrast, nobody other than the defendant would know them and the defendant could be trusted not to disclose them. He went on to say that the fact that there might be a degree of hostility towards the applicant was not enough to justify anonymity. At [26], he said this:

> "26. Some of the applicants are concerned about their employment. One in particular occupies a sensitive post. It is said that it would be damaging to them if they were known to be associated with political activity, and that bringing a claim would place a spotlight on that activity. However, insofar as their names have already been put in the public domain as Labour Party members who have made complaints about anti-Semitism, any such damage has, as it seems to me, already occurred. Put another way, it has not been shown that further damage might be caused, and that that risk justifies a grant of anonymity.
>
> 27. Considering all of the evidence as a whole, I am not satisfied that it provides an unanswerable case for anonymity. I have not heard any opposition to this application, and it is possible that on a further hearing after the issue of proceedings with representations from the defendant and possibly the press a different view might be formed."

13 However, Johnson J took the view that – at the early stage in the proceedings when he was considering the issue – it was necessary to secure the proper administration of justice, and to protect the interests of the applicants, they be permitted to issue their claim form without revealing their names and addresses, for two reasons:

> "29. First, the reaction in social media exchanges and exchanges on the internet to the leaking of the report seems to me to go beyond mere expression of hostility. The name of one of the applicants was placed on a public list of individuals who are said to be paedophiles. The names of the applicants were, on the evidence, shared with websites that are linked to far right extremist groups. Some of the comments that have been made seem to me arguably to amount to incitement of violence. I have not been provided with any form of risk assessment, and I have limited information about the particular websites that are involved. Nevertheless, the reaction, on the face of it, goes beyond mere expression of hostility, and amounts to conduct that puts in issue the prospect of violence towards the applicants. I therefore consider that their rights, including their right to physical integrity, are engaged.
>
> 30. Second, it is clear that a number of the applicants have serious concerns about the consequences if their names are identified as the claimants in these proceedings. One applicant says this:
>
> '(6) Having my name exposed following the leaking and extensive sharing in the public domain of the report titled, 'Labour Party's Governance and Legal Unit In Relation to Anti-Semitism 2014 to 2019' dated March 2020 ('the report') has left me feeling extremely frightened and vulnerable, and

> has affected my ability to function and work. It has been shared on extremist sites, and has invited numerous threatening and abusive comments, as detailed in schedule 3 to the particulars of claim.
>
> (7) …I can be easily tracked to my address. This has left me feeling scared and vulnerable, and at risk of physical attacks. Following the leaking of the report I was unable to sleep, and started to suffer badly from anxiety. At times I woke up in the night feeling unable to breathe. I have also had nightmares. I am also extremely worried that … my mother and brother, who are both vulnerable due to age and health [are] open to attack…
>
> (8) I spoke to my General Practitioner … he prescribed sleeping tablets as a first line prescription. I am not a person who likes to take medication, but felt that I had been forced into doing so.
>
> (9) I am particularly worried that I will face abuse and attacks if I am known to be bringing a claim against the party. I have seen media coverage of abuse faced by Jewish female celebrities such as Rachel Riley and Tracy Ann Oberman, as well as female Jewish MPs such as Ruth Smeeth, Margaret Hodge and Luciana Berger. Given the high profile of The Labour Party and the leaked report, I am concerned that I will be similarly targeted.'"

14 Johnson J noted that there was authority that the subjective fears of a party or witness were relevant: *Re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135; *Adebolajo v Ministry of Defence* [2017] EWHC 3568 (QB). Balancing the importance of open justice against the risks that could ensue if the claimants' names were published (which could include physical harm), he held that it was appropriate to permit the claimants to withhold their names, at least for the time being.

The issues

15 Jonathan D.C. Turner for the claimants made clear that the only anonymity applications now actively pursued were on behalf of the second and fifth claimants (EZE and EHL respectively). A separate application was pursued for permission to omit addresses. At one stage in his submissions, however, he drew my attention to some evidence about the third claimant (COR) and suggested that, even though no application was made on her behalf, I ought to consider of my own motion whether the interests of justice require me to permit her to remain anonymous. The suggestion appeared to be that the claimants had been constrained to reduce the scope of their anonymity applications for costs reasons.

16 In my judgment, there is no obligation on the court to consider whether to anonymise a party in the absence of an application made on behalf of that party. It is true that CPR 39.4 imposes a duty (rather than merely conferring a discretion) on the court to order that the identity of any person is not to be disclosed if it considers non-disclosure necessary to secure the proper administration of justice. It is also true that in some circumstances Articles 2, 3 and 8 ECHR impose positive obligations on a public authority to take action to protect the interests of litigants and witnesses. However, even where a party or witness is unrepresented, I doubt that these provisions impose a positive obligation on the court to take proactive steps in the absence of a request from

that party or witness. They certainly do not impose an obligation to take such steps in relation to a party who is represented by solicitors and counsel and has chosen (no doubt after careful consideration) not to make an anonymity application. The submission, if accepted, would undermine the autonomy of a litigant to make decisions about the litigation and place an unmanageable burden on the court.

17 The suggestion that the claimants have been constrained to narrow the scope of their anonymity applications by costs considerations does not affect my approach. In this jurisdiction, the prospect of adverse costs awards will frequently operate as a constraint on the decisions of litigants. That is not a reason for the court to seek to go behind those decisions. It would be inappropriate and impossible for the court to inquire into the reasons why a represented litigant has decided to make, or not to make, a particular application. I therefore limit myself to consideration of the applications actually pursued.

The views of the media

18 A copy of Nicklin J's anonymity order was sent out by the alert service to media subscribers. Johnson J ordered that a copy of his anonymity order should be posted on www.judiciary.uk and that any party affected by it could apply to discharge it. At the hearing before me, members of the press attended in person and by video-link (pursuant to transmission directions which I gave before the hearing). I asked whether any member of the press wished to make submissions. Sian Harrison of the Press Association made the point that, if the claimants would in due course be identified at trial, there was little point in delaying that identification. David Rose of the Jewish Chronicle supported the anonymity applications and said that there was a very real and genuine need for them.

Is there any point in anonymity, given the prospect that EZE and EHL may give evidence at trial?

19 The point made by Ms Harrison of the Press Association requires careful consideration. However, I do not think it can be said at this stage that the anonymity orders will necessarily be futile. In the first place, it is not inevitable that the claim will proceed to trial. If it does, it is not clear whether the second or fifth claimants will be required to give oral evidence. That may depend on the extent to which the issues (for example as to quantum) have been narrowed. If they do give oral evidence, it will be open to them to seek further orders as appropriate at that stage.

EZE's application for anonymity

20 EZE's reasons for pursuing the anonymity application are set out in a witness statement. EZE has adopted a child and is in the process of adopting another. EZE is "very concerned that if it were to be made public knowledge that I am a claimant in an action against the Labour Party, alleging a failure to protect my personal data, this will result in threats and abuse which I would be obliged to disclose and could impede the adoption process". EZE explains that the process involves a risk-based approach to the suitability of the putative adopter and that it has already been necessary to contact local police once about an online communication perceived to be a threat from an "anti-Zionist" group. At para. 15, EZE says:

> "I would be very reluctant to continue with this case, and would have to consider very carefully if I had to have my name openly associated with it."

21 In my judgment, this unusual set of facts is sufficient to justify derogating from the open justice principle to the extent of permitting EZE to remain identified by cipher in the claim form and statements of case. Litigants (especially claimants) can expect to have to deal with a certain amount of unwanted attention when they bring claims in a court or tribunal. As the authorities make clear, the fact that the claim relates to matters which are private, or that the publicity will be embarrassing, will not ordinarily be enough to justify anonymity. In this case, however, the fact that EZE is applying to adopt a child means that online material which is or could be construed as a threat could be especially damaging, even if it is not acted upon. There is a powerful public interest in qualified and suitable families being encouraged to adopt children. On the unusual facts of this case, there is a risk that the publication of EZE's name would make adoption impossible or more difficult. There is also, on the evidence, a risk that the subjective fear of that outcome would cause EZE, for understandable reasons, not to continue with this claim. To refuse the application in these circumstances would place EZE in an invidious position and thereby cause real damage to the interests of justice.

22 I would not have granted this application if its purpose or effect were to keep from the authorities responsible for judging the suitability of putative adopters information that might be relevant to that task. That is not, however, the purpose or effect of the order sought. There is nothing to indicate that EZE has been anything other than candid in disclosing to the relevant authorities the threats and risks faced in the past. Neither Johnson J's order nor the order now sought would prevent such disclosure. The purpose of continued anonymity is to prevent further threats and risks from arising, not to prevent them coming to the attention of the relevant authorities if they do arise. That, in my view, is a proper basis on which to derogate from the principle of open justice.

23 I bear in mind that no general order prohibiting publication of EZE's name is sought. As Nicklin J said in *Lupu*, that would be a sufficient reason to refuse an application for anonymity if there were evidence that anyone who knew EZE's identity would be likely to publish it. In this case, however, the position remains as it was before Johnson J: there is no reason to suppose that EZE's name will be disclosed by the Party or anyone else. If EZE's identity were to be disclosed in relation to this claim, and the connection were to become widely known, the continued justification for anonymity would have to be reconsidered.

24 EZE's application for anonymity is therefore granted.

EHL's application for anonymity

25 EHL works in a "highly sensitive role" for an international organisation. Following the leaking of the Report containing the claimant's personal data, EHL's professional name was linked to the group Labour Against Anti-Semitism. EHL became aware that the Report had been published on several extremist (including neo-Nazi) websites, on the "Wiki-spooks" website and on the social media pages of vocal supporters of terrorism. A well-known Holocaust denier shared EHL's name on Facebook.

26 EHL has a child, who has become concerned for EHL's safety. EHL is also concerned that, if the connection with this litigation were disclosed, the connection would raise

"yellow flags" with EHL's current employer or other potential employers. EHL explains as follows:

> "I find myself in a very difficult position. I need to pursue the claim against the Labour Party as I need a finding of liability so that, if challenged about my name appearing in the report on extremist sites, I can explain that the error was not through carelessness on my part. But I am also very scared that by my name being associated with the claim, it will place a spotlight on my involvement in political activity and my making of the complaints about which I have spoken."

27 EHL engaged a specialist consultant to identify and where possible remove online references to EHL's professional name. It was not, however, possible to remove references on third party sites. EHL remains concerned that information linking this name to the current litigation would generate further online abuse and draws attention to examples of posts by anti-Zionist groups which appear to encourage violence, or at least harassment. EHL's witness statement concludes as follows:

> "I am also concerned that I can be identified as a person who is involved in this claim against the Party by association. I am identified in the Report as a member of LAAS, and so if it is known that other claimants named in the Report are associated with or members of LAAS, I too will be identified."

28 The merits of this application are more finely balanced than that of EZE, because the principal harms which EHL fears will flow from the linking of her professional name with this litigation are harms caused by the reaction of an employer to publicity stemming from the involvement of an employee in an issue which has generated political controversy. However, on analysis, the position is less straightforward than that. The risks which EHL fears come not from ordinary discussion of EHL's role in the campaign against anti-semitism or in this litigation (something which, as a claimant in legal proceedings, she could not expect to avoid), but from anti-semitic and extremist online abuse, which on the evidence has been and would likely continue to be generated by the public disclosure of involvement in these proceedings. Given EHL's particular employment situation, that abuse would itself be liable to generate professional difficulties.

29 In my judgment, that is a sufficient basis for permitting the limited derogation from the open justice principle involved in continuing the anonymity order sought. Whether continuation of the order is justified at a later stage of the proceedings can be reconsidered then.

30 EHL's application for anonymity is therefore granted.

<u>The claimants' addresses</u>

31 The application in respect of the claimants' addresses involves a lesser interference with the open justice principle. In general, and in this case, the public's understanding of the litigation is much less likely to be affected by the non-disclosure of addresses than of names. Nonetheless, a public interest reason must be shown to justify any departure from the usual rule that addresses are disclosed.

32 In my judgment, the appearance of material about this case on extremist websites provides such a reason. Although there is no specific evidence about the extent of any risk of attacks, the nature of some of the websites on which material has appeared, taken together with the well-known fact that anti-semitic attacks have markedly increased in the UK in recent years, provides a sufficient basis to conclude that disclosure of the claimants' addresses would give rise to an appreciable risk to them and their families. Equally importantly, it would be bound to cause the claimants distress and worry, which they should not have to endure as a condition of bringing this claim.

33 The application for an order that the claimants' addresses need not be disclosed in publicly available documents is therefore granted.

(b) The third parties' unless order application

The basis on which the claim against the third parties was/is brought

34 The correspondence passing between the additional claimant and the third parties on this issue is voluminous. It would take a great deal of time to set it all out. What follows are the bare bones only.

35 The claim against the third parties was first notified by Greenwoods in a letter of 21 September 2021. They said that the claim would be brought by "The Labour Party". That is how the additional claimant was identified in the additional claim form. However, in para. 5 of the Defence and Part 20 Claim, this was said:

> "The proper Defendant to this claim is the individual who occupies the office of General Secretary of the Labour Party ('the Party') and who is sued as a representative of all members of the Party, namely David Evans. The Claimants and the Defendant have agreed a consent order providing for the 'the Labour Party' to be substituted as Defendant in these proceedings with 'David Evans sued as a representative of all members of the Party'. They have filed that order with the Court. At the time of drafting, that order has not yet been approved. For ease of reference, and for consistency with the Particulars of Claim, references to 'the Defendant' in this Defence and Part 20 Claim are to the Party as though it were a corporate body, and without prejudice to the foregoing averment."

36 In fact, the consent order referred to, made by Master Dagnall on 8 October 2021, gave the claimants permission to change the name of the defendant to "David Evans (as representative of the Labour Party)". In subsequent correspondence on 23 December 2021, however, Greenwoods confirmed that Mr Evans was bringing the claim against the third parties "as a representative of all members of the Labour Party from time to time".

37 In their Defence to the Additional Claim, the third parties pleaded that neither Mr Evans nor the represented parties were the employers of the third parties and the represented parties had not suffered any claimable loss. This led Greenwoods to propose that Mr Evans be replaced with "the members of the Labour Party's National Executive Committee from time to time". The basis for that proposal was set out in a Reply. Further correspondence ensued, in which the third parties said that a draft

Amended Particulars of Additional Claim should be served and the additional claimant declined to provide such a draft.

The third parties' application

38 The third parties issued the application notice which is now before me, seeking an order that:

> "unless by [date 14 days from Order] the Defendant issues an application pursuant to CPR 19.4(2)(a) seeking the Court's permission to substitute the Defendant for a party or parties other than 'David Evans (as representative of the members of the National Executive Committee of the Labour Party ("the NEC") as amended from time to time)' the Particulars of the Additional Claim be struck out".

The defendant/additional claimant's response

39 The response of the defendant was that the application was in reality seeking to strike out not only the case that is currently pleaded but also the case the defendant might bring by way of amendment (as presaged in the Reply). On established principles, this should only be done if, assuming the facts pleaded to be true, the case is "unwinnable": *Partco Group Ltd v Wragg* [2002] EWCA Civ 594, [2004] BCC 782, [49]-[50].

40 At the hearing, Anya Proops KC for the defendant submitted that there were three ways in which the additional claim could be maintained. First, it was at least arguable that "The Labour Party", despite being an unincorporated association, could itself be a party applying the principle established in *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 and *Bonsor v Musicians' Union* [1956] AC 104 and that Mr Evans could sue as its representative or nominee. This argument depends on the submission that the Political Parties, Elections and Referendums Act 2000 invests the Labour Party with sufficient legal personality to enable it to sue in its own name or through a nominee. Second, Mr Evans can sue on behalf of the members of the party or as a representative of the members of the National Executive Committee. Third, Mr Evans can sue as a representative of the class of individuals who, under the Labour Party Constitution, employed the third parties.

The third parties' position

41 Mr Dean for the third parties pointed out that the defendant had consistently said in correspondence that the claim against the third parties was advanced on the basis that Mr Evans represented the members of the Labour Party. The argument that the Labour Party was itself entitled to sue (whether through Mr Evans as nominee or otherwise) was first advanced in the skeleton argument, which was filed shortly before the hearing. Although he initially argued that the argument based on *Taff Vale* was unsustainable, by the end of the hearing, he accepted that it was arguable, but nonetheless pressed for a modified order that the claim be struck out unless the defendant amends the Particulars of the Amended Claim to set out the basis on which Mr Evans is entitled to bring it.

Discussion

42 Ms Proops and Mr Dean each deployed detailed legal arguments on the question whether the Labour Party could itself bring proceedings by analogy with the position of unions established by *Taff Vale* and *Bonsor*. Having heard those arguments over many hours, it would have been sensible to rule on the issue. But there was no application to take this point as a preliminary issue. Accordingly, I agree with Ms Proops that the point could be determined at this stage only if the defendant's case could be characterised as unwinnable. By the end of the hearing, Mr Dean had conceded that it cannot be so described. I accordingly proceed on the basis that it is arguable that the Labour Party, despite being an unincorporated association, can bring legal proceedings either in its own name or through Mr Evans as nominee.

43 However, given that the Labour Party's capacity to sue remains undetermined, it is important that there should be clarity at trial about the way in which the case against the third parties is put. At present, the claim form, as amended pursuant to Master Dagnall's order, identifies the defendant/additional claimant as "David Evans (as representative of the Labour Party)". But the Amended Particulars of the Additional Claim still pleads that Mr Evans is sued and sues as "representative of all members of the Party".

44 In my judgment, there is force in Mr Dean's submission that the defendant/additional claimant should amend their pleadings to plead the primary and any other bases on which it is said that Mr Evans can sue. Under the defendant's primary argument (which relies on the analogy with unions and the reasoning set out in *Taff Vale* and *Bonsor*), it may be that Mr Evans is suing not as a representative (in the sense in which that term is used in CPR Part 19) but as a nominee. If that is the correct analysis, it should be pleaded, as should all the factual and legal similarities between the Labour Party and the unions in *Taff Vale* and *Bonsor* upon which the analogy depends. Equally, if the secondary and tertiary arguments depend on factual or legal premises, these too should be pleaded, so that the third parties can plead a response and all parties know where they stand at trial.

45 I do not consider that any unless orders are required at this stage, but it will be necessary to set a timetable for amended pleadings.

(c) The defendant's privilege application

<u>The email</u>

46 This application relates to an email sent on 8 April 2020, the day before the Report was published, by Ms Murphy to Mr Howe, a solicitor, who has in the past provided legal services both to the Labour Party and to Ms Murphy.

47 The email came into the possession of the Labour Party during the course of the investigation into the publication of the Report. The Labour Party asked members of staff involved in the drafting of the Report to provide their work laptops (which it owned) for forensic analysis by its data protection team and external forensic experts. Ms Murphy did so, explaining that she had "previously removed all the personal documents that I required". The email was discovered in the course of a review by Cassie Mathers, the Labour Party's data protection officer, who is not a lawyer.

<u>The law</u>

48 A party who has a document to which privilege attaches is entitled to deploy that document in legal proceedings. However, if he has not yet done so, the party whose privilege it is can require all copies of the document to be delivered up and can restrain him from making use of the information contained in them: *Goddard v Nationwide Building Society* [1987] QB 670, 683E. Ms Murphy has not made any such application. However, the Labour Party has pre-emptively sought a declaration that the email is not confidential and therefore not privileged.

49 The relevant law was recently summarised by Simon Salzedo KC sitting as a Deputy High Court Judge in *Jinxin Inc. v Aser Media Pte Ltd* [2022] EWHC 2856 (Comm), [26]-[37]:

(a) Confidentiality is an essential prerequisite of a claim to privilege.

(b) There is a presumption that a communication between client and lawyer will be confidential, but if the communication is shared with a third party, the confidence may be lost as against that party.

(c) The critical question is whether the information has been imparted "in circumstances importing an obligation of confidence". This depends on whether "any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence": *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, 419 and 420-421 (Megarry J).

(d) Breach of confidence and misuse of private information are separate torts: *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158, [45] and [150]. The question whether information is confidential should therefore be answered by reference to Megarry J's test in *Coco v AN Clark*, not to whether there is a reasonable expectation of privacy in relation to the information: *Brake v Guy* [2022] EWCA Civ 235, [66] (Baker LJ).

(e) The question whether the information was imparted in circumstances importing an obligation of confidence requires an intensive focus on the facts to assess what a reasonable person in the position of the party seeking to use the information (or in a three party situation the person from whom that party obtained the information) would have understood from all the circumstances in which the information was received.

(f) The principle that information can be confidential as against certain persons, and in relation to certain uses of it, as opposed to having to be absolutely secret or else unrestricted, is important in the law of privilege. This means, first, that privilege is not lost merely because its owner shows the privileged document to one or more third parties: *Gotha City v Sotheby's* [1998] 1 WLR 114 at 118H to 120B; *USP Strategies Plc v London General Holdings Limited* [2004] EWHC 373 (Ch) at [18]-[21]. Secondly, privilege in a document is not lost generally against even one of the persons to whom it is shown or given if it was disclosed only for a limited purpose: *Berezovsky v Hine* [2011] EWCA Civ 1089, at [28]-[29].

Submissions for the defendant

50 Ms Proops for the defendant submitted that, in this case, the email was stored on a machine owned by the Labour Party and provided to Ms Murphy for the purpose of undertaking work on its behalf. Although it was sent from an iCloud account, and not from the Labour Party's email system, Ms Murphy had decided to synchronise her iCloud account with her Outlook account on her laptop. She used the iCloud account for Labour Party work on a significant number of occasions and positively asserts that she used that account to send sensitive work emails. Ms Murphy returned the laptop to the Labour Party in the full knowledge of the Party's plans to interrogate it for the purpose of its investigation into the leaking of the Report. She did not seek to impose any limits on the searches that could be conducted. The email was not marked "privileged" and was not in a segregated folder. The solicitor to whom it was sent had an ongoing professional relationship with the Labour Party. The review of the contents of the laptop was, as Ms Murphy knew, overseen by Ms Mathers and undertaken by non-lawyers. Finally, the email was relevant to the investigation into the leak and contains *prima facie* evidence of wrongdoing on the part of Ms Murphy or at least would have been reasonably so regarded by those conducting the investigation.

51 The defendant placed reliance on *Simpkin v The Berkeley Group Holdings plc* [2017] EWHC 1472 (QB), [2017] 4 WLR 116. There, the claimant brought proceedings in the Employment Tribunal against his former employer. The employer adduced documents provided to his solicitors for the purpose of seeking advice about an ongoing divorce. The employer had these documents because the employee had produced them at work and emailed them from his work email to his home email. Garnham J held that the documents were not confidential as against the employer, because they had been created and stored on the employer's IT systems, were not password protected or segregated from work documents and because the claimant knew that he could not expect privacy in relation to material stored on his work email server.

52 Ms Proops confirmed that she was not contending that the iniquity exception applied in this case.

Submissions for the third parties

53 Mr Dean for the third parties emphasises that Mr Howe's evidence is clear: he had a long-standing solicitor-client relationship with Ms Murphy, under a general retainer with her; he considered Ms Murphy to be his client when advising her on issues relating to the EHRC investigation; he did not consider himself to have a general retainer with the Labour Party and was not retained to advise it in relation to the EHRC investigation.

54 Ms Murphy was informed by her bank that her Apple ID had been compromised. She was advised to change her Apple ID and open a new account. She spoke by telephone to Josh Wishon, a mobile communications and support manager for the Labour Party. He took steps to uninstall her iCloud account from her laptop. Ms Murphy's recollection of the conversation is that she asked him to ensure that there would be no access to her emails or photographs and he replied that he would do this. It was his understanding at the time that uninstalling iCloud would break the link to Outlook so that iCloud emails would be accessible in that application.

55 On 12 May 2020, Mr Perry, Director of HR and Safeguarding for the Labour Party, emailed Ms Murphy requesting access to her work laptop, making clear that "steps will be taken to protect the integrity of the information on the devices(s)" and to "safeguard personal information". Ms Murphy replied on 14 May 2020 stating, among other things, that she had "previously removed all the personal documents that I required but nonetheless I welcome the safeguarding assurances outlined in your email".

56 The laptop was then examined by Tammi Robson, Mr Wishon's line manager, who messaged Mr Wishon on 19 May 2020 saying: "What she didn't think about was that she had her iCloud emails sync'd to Outlook as well". Mr Wishon replied:

> "wow
>
> soooo… her personal email is in her outlook?
>
> …still
>
> god."

57 Ms Murphy's personal iCloud emails were then made available for examination by Ms Mathers, who came across the email to Mr Howe and his response. At the top of the response are the words "LEGALLY PRIVILEGED". Since the email was accessed from Ms Murphy's inbox, these are the first words the reader would have seen. The email was then passed to the Labour Party's lawyers and to external solicitors, who discussed it with leading counsel. The legal team realised that it might "ignite a dispute around privilege".

58 Mr Dean submits that, on these facts, any reasonable person standing in the shoes of the Labour Party would consider that the circumstances imposed a duty of confidence in relation to the email.

59 As to the suggestion that the iCloud account was, to all intents and purposes, a work account, Mr Dean responds that the evidence shows Ms Murphy used that account for work purposes only occasionally when she was communicating with someone senior in the Party about something particularly sensitive. In any event, even if it had been sent from a work email account that would not make it "fair game" for the Labour Party to use it against Ms Murphy. Reliance was placed on the remarks of the deputy judge in *Jinxin*, at [59]-[62]:

> "Practices will no doubt develop, but in the 2010s, any corporate executive would be expected to be provided with corporate email and document storage facilities, and only the most fastidious would have implemented a full segregation between work and private use of such facilities.
>
> In a perfect world, no doubt, all the information on corporate servers would be confidential to the corporation alone, and it would only be the corporation's confidentiality that employees would be obliged to protect. But the mere fact that [the employer] had access for proper purposes does not establish that the real world was perfect in that respect."

Discussion

Should the issue be determined at all?

60 Ms Proops is correct to point out that the fact that a document is privileged does not prevent the opposing party from deploying it. Ordinarily, it is for the privilege holder to seek injunctive relief to prevent the document from being deployed. All the usual bars to equitable relief (delay, clean hands etc.) would apply on such an application. No such application has been made.

61 However, the defendant has decided to apply for a declaration that the email is not privileged and accordingly may be deployed in the proceedings. This means that the matters that would have been relevant to the exercise of my discretion had Ms Murphy sought injunctive relief are not relevant. The only question is whether Ms Murphy is entitled to assert privilege in respect of the email. If so, I must refuse the declaration sought.

Is the email prima facie *privileged?*

62 The evidence of Mr Howe and Ms Murphy are sufficient (at least for the purposes of the current application) to establish that, at the time the email was sent, there was a solicitor-client relationship between them. As both parties agreed, the question whether the email is *prima facie* privileged can only be answered by reading it. I have done that. It is not necessary or appropriate for me to say anything in this public judgment about its contents other than that it quite obviously contains a request for legal advice. There can be no real doubt that had it not been disclosed to the Labour Party, Ms Murphy would be entitled to withhold it from disclosure in this litigation, i.e. it is *prima facie* privileged.

63 The real question is whether the circumstances of its discovery by Ms Mathers were such as to mean that the email ceased to be confidential as against the Labour Party.

Did the circumstances in which the email came into the possession of the Labour Party mean that it is no longer confidential as against the Party?

64 Whether confidentiality (and therefore privilege) was lost depends on whether "any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence". That requires an "intensive focus" on the circumstances in which the information was communicated. In my judgment, the critical circumstances were as follows:

(a) The laptop on which the email was found belonged to the Labour Party, but that fact tells one relatively little. If the fact that a document was sent from an employer-provided email account would not necessarily mean that it lost its confidentiality for all purposes (see *Jinxin*), the same should be true of the fact that the document was saved on an employer-owned laptop. In any event, the email of 12 May 2020 indicates that the Labour Party was aware that employees' laptops would or might contain personal information.

(b) The fact that Ms Murphy told the Labour Party that she had removed all personal documents might have led them to assume that whatever they found on the laptop did not fall into the "personal" category. But the exchange of messages set out at

[56] above shows that Labour Party staff were aware that Ms Murphy's attempts to remove personal information from the laptop had been unsuccessful. Whether Ms Mathers was also aware of this is not clear (there is no evidence from her), but it is certainly not safe to assume that the Labour Party as an entity was unaware of it.

(c) Against this background, the fact that Ms Murphy imposed no constraints on the searches that could be undertaken is of little significance. She mistakenly believed that she did not need to impose such constraints, because her personal information had been removed. The Labour Party's IT staff knew this to be false but quite deliberately did not alert her to this fact.

(d) I accept that the situation in which the laptop was handed over was not identical to that in which material is disclosed in error during adversarial proceedings. But the differences should not be overstated. The leak of the Report took place in the context of the EHRC investigation. It was reasonable to expect in that context that staff members might have taken their own legal advice.

(e) Similarly, the fact that the contents of Ms Murphy's Outlook account were searched by a non-lawyer, Ms Mathers, is of limited significance. She was the Labour Party's data protection officer and could be expected to be familiar at least in general terms with legal professional privilege (a concept with relevance to data protection law).

(f) The email itself was by its contents obviously a request for advice from a lawyer and the reply was obviously a reply to that request. Whether Ms Mathers read the reply first does not matter. The fact that Mr Howe's reply was headed "LEGALLY PRIVLEGED" gave context to Ms Murphy's email. Moreover, the evidence establishes that the email was in fact identified as possibly privileged.

65 When the circumstances of its communication are considered in the round, the circumstances in which the email were communicated were not such as to destroy its confidentiality as against the Labour Party. The recipient should have realised that it was confidential. Ms Murphy remains entitled to assert privilege over it. I shall therefore refuse the declaration sought.

Conclusion

66 For these reasons:

(a) EZE and EHL are permitted to remain anonymous in public versions of the claim form and statements of case. The claimants are permitted to withhold their addresses from public versions of the claim form and statements of case.

(b) The application for an unless order is refused. However, there will be directions for amended pleadings setting out the factual and legal basis of the defendant's contention that it is entitled to bring the additional claim through Mr Evans and of any other alternative basis on which it is said that Mr Evans is entitled to bring the additional claim.

(c) The declaration that Ms Murphy's email of 8 April 2020 is not privileged is refused.