Neutral Citation Number: [2022] EWHC 1908 (QB)

Case No: QB-2022-002007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 July 2022

Before :

THE HONOURABLE MR JUSTICE NICKLIN

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Between :

EGC	**Claimant**
- and -	
PGF NHS Trust	**Defendant**

- -
- -

Nicola Newbegin and **Madeline Stanley** (instructed by **Clyde & Co LLP**) for the **Claimant**
Jeremy Hyam QC (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing date: 14 July 2022

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Approved Judgment

(Interim public judgment pending appeal)

The Honourable Mr Justice Nicklin :

1. This judgment deals with an application by the Claimant seeking the anonymisation of the parties in this litigation and corresponding reporting restrictions preventing the parties being identified ("the Anonymity Application").

2. For reasons that are explained in a judgment handed down in private today, I have refused the Anonymity Application. In the ordinary way, that would lead to the publication of the judgment and the identification of the parties. However, the Claimant has sought permission to appeal. I have refused that application, as I do not consider that the proposed grounds of appeal have a real prospect of success and there is no other compelling reason why permission to appeal ought to be granted. The Claimant can renew his application for permission to appeal to the Court of Appeal. To preserve the position, pending any renewed application, the ring must be held. That means that my judgment refusing the Anonymity Application must remain private until such time as any appeal has been finally resolved. This shortened public judgment is to ensure that the Court explains as much about the Anonymity Application as is possible in the interests of open justice whilst ensuring that position is preserved pending any appeal.

3. I was strictly satisfied that the hearing on 14 July 2022 had to be heard in private. I explained my reasons at the hearing, but in summary, a public hearing would have immediately defeated the Anonymity Application mainly as a result of pre-existing media coverage.

A: The Parties

4. The Defendant is an NHS Trust that provides hospital and community healthcare in an area of the UK.

5. The Claimant is a doctor. He was employed by the Defendant.

B: Background to the dispute

6. The Defendant wishes to make limited disclosure of certain documents relating to the Claimant to a defined class of people ("the Confidential Information"). It notified the Claimant of its intention to do so in early May 2022. The Claimant has objected to this proposed disclosure.

C: The claim

7. The Claimant has commenced this civil claim seeking an injunction to prevent the proposed disclosure of the Confidential Information. The Claim Form seeks "*a declaration and injunction against the Defendant to prevent a breach of contract, breach of Data Protection Act 2018/GDPR, breach of confidence, misuses (sic) of private information and breach of Article 8.*"

8. The Defendant agreed that it would not make any disclosure pending the Court's decision whether to grant an injunction. It is agreed between the parties that there is an element of urgency in resolving the question of whether the Claimant is entitled to an injunction.

D: The Anonymity Application

9. Prior to issue of the Claim Form, on 27 June 2022, the Claimant issued an Application Notice seeking orders anonymising the parties, for reporting restrictions to enforce the anonymity and corresponding orders limiting third party access to documents on the Court file ("the Anonymity Application").

10. On 28 June 2022, I made an order directing that the Anonymity Action would be heard by a Judge in the week commencing 11 July 2022. I gave directions for the service of any further evidence in support of the Anonymity Application by the Claimant, and for evidence in answer by the Defendant. Pending the hearing of the Anonymity Application, I imposed temporary orders anonymising the parties, reporting restrictions and third-party access to the Court file. I granted the Claimant permission to issue the Claim Form using initials instead of the parties' names and giving the parties' addresses as care of their solicitors.

11. The Anonymity Application is made under s.11 Contempt of Court Act 1981, s.6 Human Rights Act 1998, and CPR 5.4A to 5.4D and 39.2 At the hearing, the Claimant sought an order in the following terms:

> "(1) that the identities of the Claimant and the Defendant shall not be disclosed;
>
> (2) there be substituted for all purposes of this case, in place of references to the Claimant by name and whether orally or in writing, references to 'EGC'. Likewise the Defendant shall be referred to as 'PGF NHS Trust';
>
> (3) that the Claimant and Defendant be described in all statements of case or other documents to be filed or served in the proceedings and in any judgment or order in the proceedings and in any report of the proceedings by the press or otherwise as 'EGC' and 'PGF NHS Trust' respectively;
>
> (4) to the extent necessary to protect the Claimant's and Defendant's identities, any other references, whether to persons or places or otherwise, be adjusted appropriately, with permission to the parties to apply in default of agreement as to the manner of such adjustments;
>
> (5) that the address of the Claimant and of the Defendant be stated in all statements of case and other documents to be filed or served in the proceedings as the address of the Claimant's and Defendant's solicitors respectively;
>
> …
>
> **Court Files**
>
> (7) that the unredacted Claim Form and the unredacted Particulars of Claim be replaced by the redacted Claim Form and the redacted Particulars of Claim;
>
> (8) the unredacted Claim Form and the unredacted Particulars of Claim are to be placed on the Court file marked '*not to be opened without the permission of a Judge, Master or District Judge of the Queen's Bench Division*';

…

(10) that a non-party may not inspect or obtain a copy of either the unredacted Claim Form or the unredacted Particulars of Claim from either the Court paper files or digital files without the permission of a Master or High Court Judge. Any application for such permission must be made on 14 days' notice to the Claimant's solicitor, and the Court will effect service;

(11) the court's paper and digital files are to be retained by the Court and marked '*Anonymised*';

Reporting Restriction

(12) that reporting restrictions apply as to the disclosing of any information that may lead to the subsequent identification of the Claimant or Defendant. The publication of the name and address of the Claimant or the Defendant or of any member of the Claimant's immediate family is prohibited.

(13) that reporting restrictions also apply as to the disclosing of information contained in the documents, the confidential and private nature of which the Claimant is seeking to protect by these proceedings.

(12) that any non-party affected by this Order may apply on notice to all parties to have this Order set aside or varied…"

(1) Evidence

12. When issued, the Anonymity Application was supported by the witness statement of the Claimant's solicitor, Jane Lang, dated 27 June 2022. The grounds on which the Claimant sought anonymisation (and associated orders) were identified, and explained, by Ms Lang as follows.

i) Without these orders being granted, the bringing of the proceedings would defeat their purpose; in other words, the litigation process would destroy that which the Claimant seeks to protect. In particular, without appropriate restrictions to access to the Court file, the Confidential Information (or parts of it) would be open to public inspection and the confidentiality that the Claimant is seeking to protect thereby lost.

ii) It would be inevitable that, at any interim and/or final hearing, there would be need to discuss the confidential information in open court which would also threaten to destroy the confidence in the information. This was not a case where the Court would be able to adopt the expedient (as suggested in ***Various Claimants -v- Independent Parliamentary Standards Authority*** **[2022] EMLR 4**) of using confidential schedules to statements of case and witness statements to ensure that the confidential information does not enter the public domain as a result of the proceedings themselves.

iii) Anonymisation of the Claimant (and the making of associated orders to enforce that anonymity) are necessary to protect the Claimant's Article 2 and Article 8 rights.

13. Two further statements have been filed on behalf of the Claimant. The first was a further witness statement of Ms Lang, dated 4 July 2022. This exhibited some of the existing media coverage relating to the Claimant that had been located by a trainee solicitor who was tasked with identifying whether there was any reference to the Confidential Information in the public domain.

14. The second was a witness statement from the Claimant, also dated 4 July 2022. In this statement, the Claimant recounts the events and their impact on him. He had felt anxious and had disturbed sleep. He sought medical advice. The Claimant states that he did have suicidal thoughts, but that he had "*sufficient insight at the time not to go through with this*". He says that "*following further media interest … my condition rapidly deteriorated*" and suicidal thoughts returned. Medication that was prescribed for the Claimant improved his mood. He is no longer taking any medication. In his witness statement, the Claimant stated:

> "I am also most concerned about the effect of publication of [the Confidential Information] would have on me… If the contents… were to be made public, I would be devastated and I worry that I might find myself back in the same position in which I found myself…, when I contemplated suicide.
>
> I am also worried that publicity about my application to prevent publication of [the Confidential Information] will have a similarly adverse effect on my health. I cannot say whether [it] would be such as to result in me contemplating suicide again, but the thought of publicity is already having a negative impact on my health…"

15. Exhibited to the Claimant's witness statement was a letter from his GP, dated 29 June 2022, which included extracts from his GP records. The letter stated:

> "Reviewing his electronic records, the last time that [the Claimant] was issued [identified medication] was on 27.3.19 and [identified medication] on 24.5.19. [The Claimant] is not taking any regular medication and the last consultation regarding depression was on 21.5.18 as below."

I will not set out the detail of the medical records, as they contain sensitive information that it is not necessary to set out in this judgment. It is sufficient to note that there are no entries suggesting that the Claimant was having any suicidal thoughts in the seven appointments he had with his GP between 2 June 2017 and 21 May 2018.

16. For its part, the Defendant has filed a witness statement, dated 6 July 2022, from its solicitor Corinne Slingo. Ms Slingo's witness statement concluded with a section setting out the Defendant's position as follows:

> "… the Defendant does not accept that the purpose of the injunction to prevent disclosure [the Confidential Information] would be defeated if the application for anonymity and reporting restrictions were not granted…
>
> So far as strictly necessary, a reporting restriction could be imposed by the Court in relation to [the Confidential Information] (although the Defendant does not consider any such order is likely to be necessary since patient names are anonymised)...

> While it is evident from the application that the Claimant does not wish it to be publicly known that he is seeking to prevent disclosure by the NHS Defendant of the [Confidential Information].., the Defendant considers that there is a significant public interest in:
>
> (1) the nature of the application itself (both the anonymity application and the underlying injunctive relief application); and
>
> (2) how the application is determined by the Court. Given the public responsibilities of the NHS Defendant, with regard to its duty of candour and with regard to protecting patients from harm, the Defendant considers that such applications should not be conducted in secret."

17. Finally, on 11 July 2022, the Claimant issued an Application Notice seeking permission to file and rely upon further evidence in support of the Anonymity Application, including principally a medical report on the Claimant, dated 11 July 2022, from a consultant forensic psychiatrist, Dr NTE (anonymised). An Application was necessary because the Order of 28 June 2022 provided a date by which the Claimant had to file any further evidence and this report came after that deadline. Although not particularly happy with the late receipt of this expert report, sensibly, in my view, the Defendant has not opposed it being admitted in evidence on the Anonymity Application.

18. In preparing his report, Dr NTE carried out a remote video assessment of the Claimant on 6 July 2022. He was provided with the Particulars of Claim, the Claimant's Witness Statement and exhibit, the Anonymity Application together with witness statement in support, and the further witness of Ms Lang dealing with the existing media reporting.

19. Given the importance to that part of the Anonymity Application based upon alleged interference with the Claimant's rights under Article 2 and/or 8, I set out Dr NTE's statement in some detail in the judgment handed down in private.

20. As a result of the lateness of the provision of Dr NTE's report, the Defendant has not had an opportunity to file expert evidence in answer. However, following receipt, in a letter dated 12 July 2022, the Defendant's solicitors set out some initial objections to its contents, including:

> "(iii) It was a remote assessment: para 1.2.
>
> (iv) Dr NTE has not seen the Claimant's medical records: para 1.3 and 10.17
>
> (v) Such medical records as he has seen does not corroborate the history of suicidal thinking which the Claimant gave: para 13.5…"

21. Although, in that letter, the Defendant's solicitors canvassed the possibility that it might be necessary for Dr NTE to give oral evidence at the hearing, ultimately no application for him to do so was pursued by either party.

(2) The legal principles

(a) Hearings in private and anonymisation

22. CPR 39.2 provides:

> "(1) The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties' consent, unless and to the extent that the court decides that it must be held in private, applying the provisions of paragraph (3)
>
> (2) In deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected…
>
> (3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied that one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice:
>
> (a) publicity would defeat the object of the hearing;
>
> (b) it involves matters relating to national security;
>
> (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage the confidentiality;
>
> (d) a private hearing is necessary to protect the interests of any child or protected party;
>
> (e) it is a hearing of an application without notice and it would be unjust to any respondent for there to be a public hearing;
>
> (f) it involves uncontentious matters arising in the administration of trusts or in administration of a deceased person's estate; or
>
> (g) the court for any other reason considers this to be necessary to secure the proper administration of justice.
>
> (4) The court must order that the identity of any person 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 person…

(b) Reporting restrictions

23. s.11 Contempt of Court Act provides:

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

24. The section does not itself confer a power to permit "*a name or other matter to be withheld from the public in proceedings before the court*". When the court has *independently* exercised a power it has to withhold information from public in proceedings, s.11 provides an ancillary statutory power to impose reporting restrictions prohibiting publication of the withheld information. An order granting anonymity to a

party (or witness) under CPR 39.2(4) will usually be an order withholding the name from the public and, as such, the Court can go on to enforce the anonymity by the imposition of reporting restrictions under s.11.

25. As explained in ***Lupu -v- Rakoff*** **[2020] EMLR 6** [21], an anonymity order conventionally has two parts:

    i) an order that withholds the name of the relevant party in the proceedings and permits the proceedings to be issued replacing the party's name with a cipher under CPR 16.2; and

    ii) a reporting restriction order prohibiting the identification of the anonymised party.

26. If the necessary conditions are met, a reporting restriction order can be made under s.11 Contempt of Court Act 1981 (or other statutory powers) or, in injunction cases, it can be part of the injunction order itself (see the ***Practice Guidance (Interim Non-Disclosure Orders)*** **[2012] 1 WLR 1003** model order §6(b)).

(c) Restricting non-party access to the Court file

27. Where the Court makes an anonymity order and/or sits in private, it is usually necessary to impose restrictions on non-party access to the Court file. That is because, if restrictions are not imposed, public access to the Court file may defeat the orders for anonymity/sitting in private that the Court has made.

28. CPR 5.4C sets out the circumstances in which a non-party may obtain copies of documents from the Court file whether as of right, or with the permission of the Court. However, CPR 5.4C(4) enables the Court to impose restrictions on non-party access to documents on the court file.

(d) Derogations from open justice

29. Orders anonymising parties, directions that a hearing should be in private, reporting restrictions, and limits upon access to documents that would ordinarily be open for public inspection on the Court file are all derogations from the principle of open justice that require justification.

30. The principles that apply when seeking any derogation from open justice are summarised conveniently in ***Practice Guidance (Interim Non-Disclosure Orders)*** under the heading "*Open Justice*":

> [9] Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see article 6.1 of the Convention, CPR 39.2 and ***Scott -v- Scott*** **[1913] AC 417**…
>
> [10] Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: ***R -v- Chief Registrar of Friendly Societies, Ex p New Cross Building Society*** **[1984] QB 227, 235**; ***Donald -v- Ntuli*** [52]-[53]. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.

[11] The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: ***M -v- W*** **[2010] EWHC 2457 (QB)** [34].

[12] There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: ***Ambrosiadou -v- Coward*** **[2011] EMLR 21** [50]-[54]. Anonymity will only be granted where it is strictly necessary, and then only to that extent.

[13] The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: ***Scott -v- Scott*** (above) **438–439, 463, 477**; ***Lord Browne of Madingley -v- Associated Newspapers Ltd*** **[2008] QB 103** [2]-[3]; ***Secretary of State for the Home Department -v- AP*** **(No.2) [2010] 1 WLR 1652** [7]; ***Gray -v- W*** **[2010] EWHC 2367 (QB)** [6]-[8]; and ***JIH -v- News Group Newspapers Ltd (Practice Note)*** **[2011] 1 WLR 1645** [21].

[14] When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled. The proper approach is set out in ***JIH***.

31. There is little dispute as to the principles to be applied. The leading authorities are ***In re S (a child)*** **[2005] 1 AC 593**; ***Re Officer L*** **[2007] 1 WLR 2135**; ***XXX -v- Camden London Borough Council*** **[2020] 4 WLR 165**; ***JIH -v- News Group Newspapers*** **[2011] 1 WLR 1645**; ***RXG -v- Ministry of Justice*** **[2020] QB 703**; and ***R (Rai) -v- Crown Court at Winchester*** **[2021] EMLR 21**. Counsel also referred to the following first instance decisions which help to illuminate the principles: ***Khan -v- Khan*** **[2018] EWHC 214 (QB)**; ***General Medical Council -v- X*** **[2019] EWCH 493 (Admin)**; ***Lupu -v- Rakoff*** **[2020] EMLR 6**; ***CWD -v- Nevitt*** **[2021] EMLR 6**; ***Various Claimants -v- Independent Parliamentary Standards Authority*** **[2022] EMLR 4**; and ***AG -v- BBC*** **[2022] EWHC 380 (QB)**.

32. From these authorities, I would extract the following principles.

33. CPR 39.2 reflects the fundamental rule of common law that proceedings must be heard in public, subject to certain specified classes of exceptions: ***XXX*** [17].

34. Derogations from open justice can be justified as necessary on two principal grounds: maintenance of the administration of justice and harm to other legitimate interests: ***Various Claimants -v- Independent Parliamentary Standards Authority*** [36]-[40].

    i) In the first category (recognised expressly in CPR 39.2(3)(a)) fall the cases – such as claims for breach of confidence – in which, unless some restrictions are imposed, the Court would by its process effectively destroy that which the claimant was seeking to protect. There is no general exception to the principles of open justice in cases involving alleged breach of confidence/misuse of private information. However, it is well recognised that this type of case may well justify some derogation. The challenge is usually to ensure that the measures imposed are properly justified; that they are tailored to the facts of the individual case; and that they are proportionate, i.e. the least restrictive measure(s) necessary to protect the engaged interest: ***JIH*** [21]. In breach of confidence/privacy cases, where this issue arises frequently, the Court may be confronted with a choice between anonymising the party (which may permit the confidential/private information sought to be protected to be identified in open court) and refusing anonymity (in which case, the confidential/private information would have to be withheld – at least initially – from any public hearing/judgment): see discussion in ***Khan -v- Khan*** [88]-[89]. The Court must consider whether it can fashion a procedure (for example the use of confidential schedules to witness statements and statements of case) that will properly protect the confidential/private information during the case management and trial phases of the litigation: ***Various Claimants -v- Independent Parliamentary Standards Authority*** [47]. If it can, then the applicant may fail to demonstrate that further derogations from open justice are necessary.

    ii) The second category consists of cases in which the anonymity order is sought on the grounds that identification of the party (or witness) would interfere with his/her Convention rights. In that case, the Court must assess the engaged rights and, if appropriate, perform the conventional balancing exercise from ***In re S***: ***RXG*** [25]; ***XXX*** [20]-[21].

35. The importance of parties (and witnesses) to civil proceedings being identified publicly was explained in the following paragraphs from ***Various Claimants -v- Independent Parliamentary Standards Authority***:

> [38] … [T]he names of the parties to litigation are important matters that should be available to the public and the media. Any interference with the public nature of court proceedings is to be avoided unless justice requires it: ***R -v- Legal Aid Board, ex parte Kaim Todner (A Firm)*** **[1999] QB 966, 978g**. No doubt there will be many litigants in the courts who would prefer that their names, addresses and details of their affairs were not made public in the course of proceedings. In ***Kaim Todner***, Lord Woolf MR explained (p.978):
>
> > "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 interest equal 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 parties may depend on their co-operation. 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… There can however be situations where a party or witness can reasonably require protection. In prosecutions for rape and blackmail, it is well established that the victim can be entitled to protection. Outside the 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 reasonable. There must be some objective foundation for the claim which is being made."

[39] The same point was made by Lord Sumption in ***Khuja -v- Times Newspapers Ltd*** **[2019] AC 161**:

> [29] In most of the recent decisions of this court the question has arisen whether the open justice principle may be satisfied without adversely affecting the claimant's Convention rights by permitting proceedings in court to be reported but without disclosing his name. The test which has been applied in answering it is whether the public interest served by publishing the facts extended to publishing the name. In practice, where the court is satisfied that there is a real public interest in publication, that interest has generally extended to publication of the name. This is because the anonymised reporting of issues of legitimate public concern are less likely to interest the public and therefore to provoke discussion. As Lord Steyn observed in ***In re S*** **[2005] 1 AC 593** [34]:
>
> > "... from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."
>
> "*What's in a name?*", Lord Rodger memorably asked in ***In re Guardian News and Media Ltd*** before answering his own question, at [63] ... The public interest in the administration of justice may be sufficiently served as far as lawyers are concerned by a discussion which focusses on the issues and ignores the personalities, but ([57]):

> "... the target audience of the press is likely to be different and to have a different interest in the proceedings, which will not be satisfied by an anonymised version of the judgment. In the general run of cases there is nothing to stop the press from supplying the more full-blooded account which their readers want".

cf. ***In re BBC***; ***In re Attorney General's Reference (No.3 of 1999)*** **[2010] 1 AC 145** [25]–[26] (Lord Hope of Craighead) and [56], [66] (Lord Brown of Eaton-under-Heywood).

[30] None of this means that if there is a sufficient public interest in reporting the proceedings there must necessarily be a sufficient public interest in identifying the individual involved. The identity of those involved may be wholly marginal to the public interest engaged. Thus Lord Reed remarked of the Scottish case ***Devine -v- Secretary of State for Scotland*** (unreported) 22 January 1993, in which soldiers who had been deployed to end a prison siege were allowed to give evidence from behind a screen, that "*their appearance and identities were of such peripheral, if any, relevance to the judicial process that it would have been disproportionate to require their disclosure*": ***A -v- BBC*** **[2015] AC 588** [39]. In other cases, the identity of the person involved may be more central to the point of public interest, but outweighed by the public interest in the administration of justice. This was why publication of the name was prohibited in ***A -v- BBC***. Another example in a rather different context is ***R (C) -v- Secretary of State for Justice (Media Lawyers Association intervening)*** **[2016] 1 WLR 444**, a difficult case involving the disclosure via judicial proceedings of highly personal clinical data concerning psychiatric patients serving sentences of imprisonment, which would have undermined confidential clinical relationships and thereby reduced the efficacy of the system for judicial oversight of the Home Secretary's decisions.

36. Where a claim is made that a derogation from open justice is necessary to protect interests under Article 2/3, the following principles apply.

i) A positive obligation to take steps to protect life will arise when the evidence demonstrates that there is a "*real and immediate*" threat to life; "*a real risk is one that is objectively verified and an immediate risk is one that is present and continuing*". The test is not readily satisfied, and the threshold is high. For a threat to be "*real*" it must be objectively well-founded: ***Re Officer L*** [20].

ii) The rights guaranteed by Articles 2/3 are, in this context, unqualified. The Convention therefore requires that proceedings must be organised in such a way that the interests protected by those articles are not unjustifiably imperilled: ***RXG*** [25(ii)].

iii) Where there is a conflict between open justice (and rights protected by Article 10) and the unqualified rights guaranteed by Articles 2/3, there can be no derogation from the latter. But even in such a case, care must nevertheless be

taken to ensure that the extent of the interference with open justice is no greater than is necessary: ***RXG*** [25(vi)].

37. Applying the principles that have been developed under the *Venables* jurisdiction (see ***RXG*** [24]) which would apply by analogy, the Divisional Court in ***RXG*** [35] identified the following:

> "(i) Restrictions upon freedom of expression must be (a) in accordance with the law; (b) justifiable as necessary to satisfy a strong and pressing social need, convincingly demonstrated, to protect the rights of others; and (c) proportionate to the legitimate aim pursued: ***Venables*** **[2001] Fam 430** [44].
>
> (ii) The strong and pressing social needs which may justify a restriction upon freedom of expression, in principle, include: (a) the right to life and prohibition of torture under articles 2 and 3 (***Venables*** [45]-[47]; ***X (formerly Bell) -v- O'Brien*** **[2003] EMLR 37** [16]; ***Carr -v- News Group Newspapers Ltd*** **[2005] EWHC 971 (QB)** [2]; and ***A -v- Persons Unknown*** **[2017] EMLR 11** ("***Edlington***") [9], [35]); and (b) the right to a private and family life under article 8 (***Venables*** [48]–[51]; ***Bell*** [19]–[31]; and ***Carr*** [3]).
>
> (iii) The threshold at which article 2 and/or 3 is engaged has been described variously as: '*the real possibility of serious physical harm and possible death*' (***Venables*** [94]); '*a continuing danger of serious physical and psychological harm to the applicant*" (***Carr*** [4]); an '*extremely serious risk of physical harm*' (***Edlington*** [36]).
>
> (iv) In ***Venables*** ([87]–[89]) Dame Elizabeth Butler-Sloss P considered that the authorities of ***Davies -v- Taylor*** **[1974] AC 207** and ***In re H (Minors) (Sexual Abuse: Standard of Proof)*** **[1996] AC 563** provided helpful guidance as to the assessment of future risks to physical safety. She held that the test is not a balance of probabilities but rather that the evidence must '*demonstrate convincingly the seriousness of the risk*' and raise a real possibility of significant harm: a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm.
>
> (v) Where an applicant demonstrates, by cogent evidence, that there is a real and immediate risk of serious physical harm or death, then there is no question of that risk being balanced against the article 10 interests: ***Carr*** [2].
>
> (vi) In cases where articles 2 and 3 are not engaged and the conflict is between the article 8 and article 10 rights, neither right has precedence over the other. What is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case. The justifications for interfering with or restricting each right must be taken into account and a proportionality test must be applied: ***Edlington*** [28].
>
> (vii) The rights guaranteed by articles 2 and 3 are unqualified. Where the evidence demonstrates that there is a real and immediate risk of serious harm or death this cannot be balanced against any article 10 right, no matter how weighty. In that context, it should be noted that we would respectfully depart from the proposition articulated by Sir Geoffrey Vos C in ***Edlington*** [35]

> that article 2 and 3 rights could be balanced against article 10 (a proposition later adopted by Sir Andrew McFarlane P in ***Venables -v- News Group Newspapers Ltd*** **[2019] 2 FLR 81** [43]): see further [25(vi)] above.
>
> (viii) However, where evidence of a threat to a person's physical safety does not reach the standard that engages articles 2 and/or 3, then the evidence as to risk of harm will usually fall to be considered in the assessment of the person's article 8 rights and balanced against the engaged article 10 rights. Whilst the level of threat may not be sufficient to engage articles 2 or 3, living in fear of such an attack may very well engage the article 8 rights of the person concerned…"

38. If an engaged right or interest, such as Article 8, falls to be balanced against a right protected by Article 10, then the Court must carry out the familiar parallel analysis from ***In re S*** [17]:

> "… First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test…"

39. However, where the Article 10 right is that protected by open justice, the Court starts from the position that significant weight is attached to free and open access to, and reporting of, court proceedings. In ***Rai***, giving the judgment for the Court of Appeal, Warby LJ explained the proper approach to assessing the engaged interests:

> [26] The central problem with Mr Rule's submissions on the law, so it seems to me, is that he focuses exclusively on the general methodology for resolving conflicts between Articles 8 and 10 that is prescribed in ***In re S*** [17], without regard to what Lord Steyn went on to say about the application of that methodology. Neither Article 8 nor Article 10 has priority *as such.* But where the open justice principle is engaged the weight to be attributed to the Article 10 right to impart and receive information is considerable. Lord Steyn made this clear at a number of points in his judgment in ***In re S***, beginning at [18], where he identified "*the general rule*" that "*the press, as the watchdog of the public may report everything that takes place in a criminal court*", adding that "*in European and in domestic practice, this is a strong rule. It can only be displaced by unusual or exceptional circumstances*".
>
> [27] This does not mean that a fact-sensitive approach is not required. As Lord Steyn went on to say, "*The duty of the court is to examine with care each application for a departure from the rule by reason of rights under article 8.*" The "*strong rule*" referred to by Lord Steyn reflects the fact that not all kinds of speech are of equal value. The jurisprudence shows there is a hierarchy or scale, with political speech towards the top end, via what Baroness Hale has called "*vapid tittle-tattle*", down to hate speech (to the extent this is protected by the Convention). Speech involving the communication to the public of information about what takes place in a criminal court ranks high in this scale of values. The fact-sensitive investigation must start with that recognition. The point is reflected in

paragraph [30]-[31], where Lord Steyn emphasised the importance of the freedom of the press to report the progress of a criminal trial without restraint, and at [37], where Lord Steyn approved the Convention analysis of Hedley J at first instance, in these terms:

> "Given the weight traditionally given to the importance of open reporting of criminal proceedings it was… appropriate for him, in carrying out the balance required by the ECHR, to begin by acknowledging the force of the argument under article 10 before considering whether the right of the child under article 8 was sufficient to outweigh it."

As appears from ***In re S*** [11], Hedley J had begun by recognising "*the primacy in a democratic society of the open reporting of public proceedings on grave criminal charges and the inevitable price that involves in incursions on the privacy of individuals*".

[28] In my judgment, none of the later authorities relied on by Mr Rule serves to undermine or qualify the authority of these passages from ***In re S***, or to refine or add to what was said by Lord Steyn in a way that helps the argument for the appellant. On the contrary, the cases relied on contain several reaffirmations of the same approach.

(1) In ***A Local Authority -v- W*** **[2006] 1 FLR 1** [53], Sir Mark Potter P observed that Lord Steyn, having identified the methodology with its "*intense focus*", had "*strongly emphasised the interest in open justice as a factor to be accorded great weight in both the parallel analysis and the ultimate balancing test*".

(2) In ***A -v- BBC*** [56]-[57], Lord Reed said:

> "It is apparent from recent authorities at the highest level ... that the common law principle of open justice remains in vigour, even when Convention rights are also applicable … the starting point in this context is the domestic principle of open justice … Its application should normally meet the requirements of the Convention".

(3) In ***Khuja*** [23], Lord Sumption pointed out that

> "… in deciding what weight to give to the right of the press to publish proceedings in open court, the courts cannot, simply because the issues arise under the heading 'private and family life', part company with principles … which have been accepted by the common law for many years … and are reflected in a substantial and consistent body of statute law as well as the jurisprudence on article 10 …"

40. Media reports of proceedings in open court may well have an adverse impact on the rights and interests of others, but, ordinarily, "*the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public*": ***Khuja*** [34(2)]. More widely, "*courts do not exist in a vacuum. Their decisions are properly*

subject to criticism in the press and in Parliament. That cannot happen if the key facts are not publicly known": ***AG -v- BBC*** [57].

(3) Submissions

41. Ms Newbegin, on behalf of the Claimant, submitted that the orders seeking anonymity (and further orders to enforce the anonymity), are necessary and should be granted for:

    i) the proper administration of justice, including the need to ensure that the proceedings do not defeat the purpose for which they have been brought;

    ii) the protection of the Claimant's Article 2 right to life; and

    iii) the protection of the Claimant's Article 8 right to respect for his private and family life and correspondence.

42. In respect of the first ground, Ms Newbegin submits that, as the Claimant is seeking to protect the confidentiality of Confidential Information, the Court must adopt suitable measures to ensure that his claim is not frustrated by putting this material into the public domain during the proceedings. Ms Newbegin argues that the use of confidential schedules to statements of case and other measures that the Court conventionally adopts to protect confidential information during the proceedings would, on their own, be insufficient. The only effective way of protecting the confidentiality is for the Court also to anonymise the Claimant (and the Defendant). She seeks to distinguish the case of ***Various Claimants -v- Independent Parliamentary Standards Authority*** and argues that the Court will be unable to fashion appropriate procedures to safeguard the confidentiality of the information the Claimant seeks to protect during the process because, she contends, there will be a need for extensive reference to the Confidential Information at all stages of the litigation. She argues that, without anonymity, the parties would be "*severely limited in their ability to put their cases before the Court*". With the orders she seeks, Ms Newbegin submits that "*the parties will be able to put their arguments fully before the Court and the Judge will be able to give an open judgment…*" (albeit she suggests that there may be need for a separate private judgment). The media reporting available in the public domain has not destroyed the confidence in the material that the Claimant is seeking to protect.

43. As to the second limb of her argument, Ms Newbegin submits that the evidence from the Claimant himself and, importantly, the report from Dr NTE demonstrates that there is a risk to the Claimant's life were the Confidential Information to be made public. At the hearing, Ms Newbegin stressed the importance of Dr NTE's report, particularly in paragraphs 12.4 and 12.5 and his conclusions in paragraphs 13.3, 13.8, 13.9, 13.12, 13.15, 13.17 and 13.18.

44. Ms Newbegin referred me to the decision in ***General Medical Council -v- X***, in which the defendant doctor was anonymised in an appeal brought by the GMC seeking to challenge the sanction decision of the Medical Practitioners Tribunal ("MPT") which had ordered the defendant to be suspended for 12 months. I have considered this decision carefully. It does not establish any new principles, but is an example of the application of established principles to the facts of the case. The Defendant had faced proceedings for misconduct before the MPT. Evidence before the tribunal from three separate forensic psychiatrists established that the defendant was suffering from a

depressive episode of moderate severity, and was at "*significant and continuing risk of committing suicide*" and that "*the risk of suicide was a high one*". The MPT considered that the evidence was "*compelling*" and directed that its proceedings should be held in private. The MPT imposed a sanction of 12-months' suspension. The GMC appealed the sanction decision. The appeal against sanction was dismissed, but the Court was required additionally to consider whether publication of the sanction decision should also be anonymised. Applying the principles from ***Re Officer L***, Soole J held that the defendant should be anonymised. He explained his decision in [164]-[173]. He concluded that there was a "*real and immediate risk of suicide*" if the sanction decision identified the defendant and that the evidence "*demonstrates the true gravity of that risk*". The most recent and agreed expert opinion was "*of real and immediate continuing risk*". The Judge considered the fact that various 'trigger events' had occurred without incident, but he concluded:

> "… it is relevant that at each stage this matter has in fact proceeded without identification of Dr X. In the context of both sexuality and the findings of sexual misconduct, that is the critical matter"

Overall, Soole J concluded that "*publication of [the sanction decision] in the proposed form would constitute a breach of Dr X's right to life under Article 2*"

45. Ms Newbegin submits that the Claimant is in a similar position to Dr X in terms of the evidence of risk of suicide.

46. Finally, even if the Court were not satisfied that the evidence demonstrated a credible threat to engage Article 2, Ms Newbegin submits that the evidence demonstrates that there would be an interference with the Claimant's Article 8 rights if the orders he seeks were not to be granted. In her skeleton argument, she submitted that the Claimant's Article 8 rights "*encompass not only [his] health but also encompasses [his] right to practise his profession … and the right to his professional reputation.*". Further, none of the Confidential Information is in the public domain. Ms Newbegin argues that, pursuant to s.6 Human Rights Act 1998, the Court has a duty to protect the Claimant's Article 8 rights. She acknowledges that the Court has the same duty in respect of the engaged Article 10 rights (of both the Defendant and the public generally), but she submits that the restrictions sought would permit the hearing to remain in public "*whilst also protecting the confidential nature of the documents*". Finally, she submits that the Court must also have regard to the Article 8 rights of the patients, details of whose treatment is included in the confidential information. Although anonymised, she argues that "*by naming the parties to the litigation, the patients and their extremely intimate personal health information becomes identifiable*".

47. Mr Hyam QC, on behalf of the Defendant submits:

i) The restrictions sought by the Claimant are not necessary. The Court can adopt measures that will properly protect the confidential information during the pendency of the proceedings that will involve significantly fewer derogations from open justice than the comprehensive restrictions sought by the Claimant. He argues that the detail of the Confidential Information could be protected by appropriate measures in the proceedings. In open court, the public and media would know that the Claimant (who could be identified) was seeking to prevent

the disclosure of the Confidential Information by the Defendant (which could also be identified).

ii) The situation confronting the Court is very different from the typical breach of confidence/breach of privacy claim because of the extent of the information that is already in the public domain.

iii) The amount of material already in the public domain would mean that the reporting restriction sought by the Claimant would effectively curtail any reporting of the case for fear that publication of details of the case would lead to the jigsaw identification of the Claimant by reason of the pre-existing media coverage. If that is right, then the Claimant is effectively asking the Court to hear and determine his claim in circumstances of complete anonymity with, effectively, a ban on any meaningful reporting of the case. The Claimant's evidence comes nowhere near justifying such a course.

iv) The Claimant's evidence as to the alleged threat to his Article 2 rights is very far from being "*clear and cogent*". Mr Hyam QC referred and relied upon the points made by the Defendant's solicitors in their letter of 12 July 2022 (see [20] above).

v) As regards Article 8, with proper measures being adopted, the interference with the Claimant's Article 8 rights would be limited, but the restrictions he sought would have a very significant impact on open justice. There is a significant public interest in (a) the fact that the Claimant is bringing these proceedings to prevent the Defendant from making the proposed disclosure; and (b) that he has sought anonymity in these proceedings. The reporting restrictions sought by the Claimant would effectively curtail reporting of what is a matter of significant public interest.

(4) Decision

48. By these proceedings, the Claimant seeks to restrain the Defendant from disclosing the Confidential Information. As such, and although it is brought on several legal bases, the claim is relatively straightforward. Ultimately, it is likely that the Court will have to adjudicate whether the Claimant can establish a legal ground upon which to restrain the Defendant's proposed disclosure and, if there so, whether this is outweighed by other considerations. In that respect, the claim has no novel or unusual features.

49. Courts are well used to having to deal, in the context of breach of confidence claims, with the need to protect the confidentiality that is being asserted. That is done by measures ranging from the use of confidential schedules to statements of case and witness statements (with access to the confidential schedules being limited only to the parties) to conducting proceedings in private. In cases of particular sensitivity, further limitations may be required, for example the parties may agree further restrictions in the form of "confidentiality clubs". In many confidentiality cases it is not necessary to anonymise the parties. It is only in cases where identifying the party will harm the administration of justice that such a step is necessary.

50. I reject the Claimant's submission that refusing to anonymise the parties this will risk destroying that which he is seeking to preserve. On the facts of this case, I am satisfied that risk either does not exist, or has been significantly exaggerated.

51. The starting point is that information about the Claimant has already been published in media reports. His claim is a discrete challenge to the proposed disclosure by the Defendant of two documents.

52. The proceedings are still at a very early stage. Although the Defendant's position has, to an extent, been foreshadowed in the evidence filed on the Anonymity Application, it is only once a Defence has been served that the issues in dispute will emerge clearly. At this stage, I am somewhat sceptical that a fair resolution of the claim is likely to require a prolonged examination of the Confidential Information. The principal ground on which the Defendant contends that it ought not to be restrained from disclosing the information is that it is under a duty to disclose the documents. As matters stand, I am not persuaded that the resolution of that issue is likely to require a detailed examination of the contents of the relevant documents. But even if it does, the Court can adopt procedures (short of anonymity) to protect the contents from coming into the public domain (see [34(i)] above). Ultimately, and to the extent necessary, the Court can conduct that part of a hearing, at which submissions need to be made as to the contents of the relevant documents, in private.

53. There is something of a paradox at the heart of the Claimant's submissions. An order for anonymity, on its own, would not secure the objective that the Claimant seeks to achieve. Ms Newbegin submitted that anonymity would permit the Court to conduct the proceedings in open court. That submission is untenable in light of the pre-existing media coverage about the case. For example, as soon as the Claimant was identified by his role in the context of this dispute, the existing publicity would immediately identify him by name and undermine totally the anonymity order. It was for this reason that the Anonymity Application had to be heard in private.

54. At several points, both in the evidence submitted on his behalf and in his submissions, the Claimant has identified his object to be principally the protection of the confidentiality of the Confidential Information. Yet, this would not be achieved by an order anonymising the parties. The only way of maintaining the confidentiality of the contents of these documents is to withhold them from the public in the proceedings. Anonymisation cannot achieve this because, if the contents of the relevant documents were revealed, the pre-existing media publication would immediately identify the parties and defeat the anonymisation.

55. I rather suspect that the Claimant and his advisors have recognised this, hence they have sought additionally a reporting restriction on prohibiting disclosure of "*any information that may lead to the subsequent identification of the Claimant or the Defendant*". I accept Mr Hyam QC's submissions that, in the particular circumstances of the pre-existing media coverage of the Claimant, such a reporting restriction would, for all practical purposes, effectively curtail any reporting of the proceedings. On the particular facts of this case, the anonymity order (coupled with the reporting restriction order), which are usually intended as a less significant derogation from open justice and supposed to *permit* more information to be published about proceedings, would end up effectively prohibiting any media reporting of the case at all.

56. In my judgment, the Claimant has failed to establish that an anonymity order is necessary to preserve that which he is seeking to protect in these proceedings. The Court can adopt various measures during the proceedings to ensure that this does not happen. If he is successful in his claim, and is granted an injunction, then providing the protective steps I have identified are deployed, the proceedings will not destroy the value of the injunction.

57. I can state my conclusions as to the submissions on Article 2 quite shortly, albeit that I have explained my reasons in more detail in the judgment handed down in private. The evidence relied upon by the Claimant – in both his own witness statement and the expert report of Dr NTE – falls a long way short of demonstrating that, were the parties in these proceedings not to be anonymised, there is a real and immediate risk that the Claimant would attempt to commit suicide. In contrast with the "*compelling and overwhelming*" evidence in ***GMC -v- X***, here the evidence does not demonstrate that the Claimant is at any real and immediate risk of suicide and that, overall, the evidence is unconvincing and, in places, unclear and contradictory.

58. For the reasons I have set out, in the judgment handed down in private the evidence presented by the Claimant, including the expert report of Dr NTE, does not demonstrate convincingly that there is a real and immediate risk of significant harm to the Claimant (arising from the risk of a suicide attempt) if the Court were to refuse to grant the anonymity order he seeks. The evidence has not demonstrated the seriousness of the risk objectively or convincingly. On the contrary, in my judgment the evidence shows that the risk is remote. As such, the threshold to engage Article 2 is not met.

59. The claim based on the Claimant's Article 8 rights must also be rejected. My reasons are as follows.

60. Ms Newbegin contended that Claimant's Article 8 rights "*encompass not only [his] health but also encompasses [his] right to practise his profession … and the right to his professional reputation.*" These may all be dimensions of the Article 8 right, but the latter two are not a justification for anonymity and/or reporting restrictions in this case. These proceedings do not concern the Claimant's right to practise his profession, nor do they threaten his professional reputation. Whether the Claimant is successful in obtaining an injunction to restrain the threatened disclosure by the Defendant will be resolved by application of the relevant legal principles engaged by the claim to the relevant evidence. To the extent that the Claimant may be exposed to media or other criticism for bringing proceedings by which he seeks to prevent this disclosure, then that is "*price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public*" (see [40] above). It is not a justification for any reporting restrictions or other derogations from open justice.

61. My task is to carry out the balancing process between any identified Article 8 rights of the Claimant, against the Article 10 rights (as embodied in the open justice principles) (see [38] above).

62. The only engaged Article 8 right identified by the Claimant is that arising from the claimed detrimental impact that public reporting of these proceedings will have on his mental health. Although I have held that the evidence does not demonstrate a threat sufficient to engage Article 2, it is recognised in the authorities I have cited above that a threat to health may still engage a person's Article 8 rights.

63. However, for reasons similar to those that have led me to reject the Claimant's case on Article 2, I not satisfied that the Claimant has demonstrated that any adverse impact on his mental would be caused to him by the proceedings continuing, in the normal way, without the benefit of anonymity reporting restrictions. Reports of these proceedings (as distinct from criticism of his decision to bring them) are not likely to publish anything significant beyond what is already in the public domain as a result of the historic reporting. There is likely to be further media coverage. The fact that the Claimant finds himself at the centre of what he regards to be unwelcome publicity has little (if anything) to do with these proceedings and it is not reports of the proceedings that will pose a threat to his Article 8 rights. In my judgment, analysed properly, the Claimant has not demonstrated that a refusal of anonymity and reporting restrictions in this case will interfere with his legitimate Article 8 rights. As such, there is nothing to weigh in the balance against the principles of open justice.

64. Even were I to be wrong about that, and if I had accepted that the Claimant's health could be said to be impacted by a refusal of the anonymity order and reporting restrictions, I would have nevertheless have refused to grant the Anonymity Application because any interference that the Claimant could establish to his Article 8 rights would have been significantly outweighed by the Article 10 right.

65. The extent of the interference in the Article 10 rights resulting from the anonymity order and reporting restrictions would be profound. Not only would it have prevented identification of the Claimant as someone who was bringing a claim to restrain disclosure of the Confidential Information that a Health Authority wanted to disclose, by reason of the extensive existing media coverage, the reporting restriction would have effectively prohibited any meaningful reporting of the case at all. In effect, and in combination, the orders sought by the Claimant would have been tantamount to the Court sitting in private and shielding the entire proceedings from public gaze. Put simply, the Claimant has failed to demonstrate that the balancing of competing rights could justify such an outcome. He has not discharged the burden of demonstrating that such a derogation from open justice is necessary by clear and cogent evidence. In my judgment there is likely to be significant public interest in this case, for the reasons identified in Ms Slingo's witness statement (see [16] above). In that respect, the Claimant's identity is of central importance to the public interest in any reporting and it is not outweighed by any countervailing consideration. The Court should only interfere with free and open reporting of these proceedings if a compelling justification has been established. The Claimant has failed to do so.

66. For these reasons the Anonymity Application is refused. As was the case in ***Various Claimants -v- Independent Parliamentary Standards Authority***, there is justification for a limited order made under CPR 5.4C preventing third party access to any confidential schedule to a statement of case or witness statement. Later in the proceedings, the Court will address (when the time comes) whether it is necessary for any part of any court hearings to take place in private so as to protect the confidential material the disclosure of which the Claimant is seeking to prevent.