Case No: QB-2021-000083

Neutral Citation Number: [2021] EWHC 1028 (QB)

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

Royal Courts of Justice
The Strand
London WC2A 2LL

Date: Monday 1st March 2021

Before :

THE HONOURABLE MRS JUSTICE TIPPLES

- -

Between :

EMILIE OLDKNOW OBE

Applicant/ Claimant

- and -

DAVID EVANS
(sued as a representative of all members of the Labour Party except the Applicant/Claimant)

Respondent/ Defendant

- -
- -

William Bennett QC and **Felicity McMahon** (instructed by **Patron Law)** for the **Applicant/Claimant**
Anya Proops QC and **Zac Sammour** (instructed by **Greenwoods FRM)** for the **Respondent/Defendant**
Jacob Dean (instructed **by Carter-Ruck)** for **Unite the Union**

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JUDGMENT
(approved)

- -

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Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

THE HONOURABLE MRS JUSTICE TIPPLES:

Introduction

1. On 8 January 2021, the Claimant, Emilie Oldknow OBE, issued a Part 8 claim form against David Evans, sued as a representative of the Labour Party.

2. The details of claim state, first: "The Claimant had been defamed in the report prepared by the Labour Party titled 'The work of the Labour Party's Governance and Legal Unit in relation to antisemitism, 2014 - 2019' ("the Report") and a 12 page media briefing ("the Media Briefing")".

3. Second, the details of claim state that: "The Claimant wishes to either through [the] Pre-Action Disclosure Protocol pursuant to CPR 31.16, or under the principles established in the case of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, order the Defendant to disclose the identity or identities of those responsible for the documents in point 1 and any relevant documents pertaining to the leak."

4. Third, the evidence relied on in support of the claim is contained in the witness statement of Mark Lewis, together with Exhibits ML1 and ML2. Mark Lewis is a solicitor and partner in the firm of Patron Law Limited. He is the Claimant's solicitor and the Claimant has authorised him to make a witness statement on her behalf.

5. I heard this claim on 22 and 26 February 2021. It is necessary for me to set out in some detail the relevant background and evidence, before I explain the outcome of the claim.

The Claimant's application

6. On 8 January 2021 the Claimant also issued an application notice ("the Claimant's application") seeking an order that:

> "(1) The respondent/defendant shall within seven days of the date of this Order disclose to the applicant:
>
> a. the identity or identities of those responsible for the disclosure of the Report and the Media Briefing to persons other than Labour Party officials; and
>
> b. any documents within its control which are relevant to the issue of responsibility for publication of the Report and Media Briefing to individuals outside of the Labour Party including, in particular, any emails

> or other correspondence evidencing their disclosure to persons other than Labour Party officials."

7. Mr Lewis' witness statement explains that the Claimant is the Assistant General Secretary and Chief Operating Officer of the trade union Unison. Further, for over 14 years, the Claimant was an employee of the Labour Party, first as its Regional Director for the East Midlands and, between 2012 and 2018, as its Executive Director for Governance, Membership and Party Services.

8. Paragraphs 11 and 12 of Mr Lewis' witness statement say this in relation to the Report:

> "[11.] The Report was prepared by senior officials within the Labour Party with a view to it being submitted as evidence to the EHRC, but was ultimately not submitted because the Party's lawyers concluded that it would be inappropriate to do so [ML2/20-27]. An article published by the Guardian reports that, on 11 April 2020 the Party's director of governance and legal, Thomas Gardiner, wrote to the then General Secretary, Jennie Formby to say that the Report was deliberately misleading and relied on improperly obtained private correspondence [ML2/28-31].
>
> [12.] The Report contains the detail of private conversations between individual Labour Party officers and officials (including Ms Oldknow) using the WhatsApp messaging service. It also contains extracts from work emails and other messages. These communications are relied on in the Report to build a one-sided and factional picture of the role of certain individuals in the party, and to blame them both for the antisemitism crisis and failure to properly deal with complaints of antisemitism and to suggest that these individuals were actively working to undermine the Party under Jeremy Corbyn's leadership."

9. Mr Lewis' witness statement, under the heading "Disclosure of the Report and the Media Briefing" then continues as follows:

> "[13.] In April 2020, the Report was deliberately disclosed to journalists and the world at large.
>
> [14.] Initially Ms Oldknow believed that this took place on 17 April 2020; however, my firm has now seen tweets and articles published as early as 13 April 2020, which indicate that it had been disclosed by that date and perhaps as early as 11 April 2020 [ML2/20-27 and 31-34].
>
> [15.] Before the Report was disclosed, the Media Briefing was circulated to journalists [ML1/853-864]. It seems likely that it was created by, or in conjunction with, those who took the decision to leak the Report. The Media Briefing is primarily focused on Ms Oldknow and reproduces material – including WhatsApp messages – from the Report in order to make a number of seriously defamatory allegations against her, as set out in the letter before claim.

> [16.] Although she is aware of rumours, Ms Oldknow does not know which individual or individuals disclosed the Report and Media Briefing, or how this was done.
>
> [17.] The disclosure of the Report generated significant press coverage. I exhibit some examples of this coverage at [ML2/36-69].
>
> [18.] The Labour Party has admitted that the disclosure of the Report constituted a data breach and has self-reported the matter to the ICO. [ML2/70-73]
>
> [19.] On 13 April 2020, the Leader and Deputy Leader of the Labour Party issued a joint statement in respect of the Report announcing that the Party would commission its own investigation into the circumstances of its creation and disclosure. This investigation, led by Martin Forde QC with three Labour Party Peers, is described as the "Forde Inquiry". It was initially suggested that this investigation would report in July 2020 [ML2/74-76]. However it has not yet reported as at the date of this witness statement."

10. The basis of the Claimant's application is explained at the start of Mr Lewis' witness statement in these terms:

> "[5.] Ms Oldknow wishes to bring claims against the persons responsible for publishing the documents outside the Labour Party. Whilst she believes the Labour Party may well be ultimately responsible for the wrongs in issue, the Party's case appears to be (although this had never been clearly explained) that the documents were leaked by persons employed by or connected with the Labour Party who were on a "frolic of their own".
>
> [6.] The Labour Party have, however, refused to identify who those individuals are. Ms Oldknow therefore requires disclosure in order to be able to pursue her claims. Even if she is entitled to sue the Labour Party for the wrongs committed against her, she would also want the chance to sue other tortfeasors, including the chance to sue them instead of suing the Labour Party."

11. The Claimant's evidence therefore is that she believes that it is the Labour Party who may well be ultimately responsible for the wrongs in issue.

12. Then the basis for the Claimant's application is set out at paragraphs 29 and 30 of Mr Lewis' witness statement;

> "[29.] Whether or not the Labour Party is responsible in law for the disclosure of the Report and the Media Briefing is a central issue in all the causes of action which Ms Oldknow relies upon. The Party has said it is not responsible in law, but has not explained why given that it was responsible for the preparation of the Report and, to the best of Ms Oldknow's knowledge, the documents were deliberately disclosed to the press and others by individuals within Labour Party. Ms Oldknow does not know who disclosed the Report and the Media Briefing, or how; the Labour Party holds all the information and documents relevant to this key issue."

13. Paragraph 30 states that: "The Labour Party knows what its case on this issue is, because it says it has told the ICO and Forde Inquiry." The reference to the ICO is to the Information Commissioner.

14. The Claimant maintains her application is urgent because, in this case, the limitation period for defamation claims expires on or around 11 April 2021, and she needs the information sought to bring any claim or claims before that time limit expires.

15. The Labour Party is an unincorporated association and that is why, David Evans, as the General Secretary of the Labour Party is sued as a representative respondent on behalf of all members of the Labour Party except the Claimant. For convenience, and unless otherwise indicated, I shall refer to the Defendant as "the Labour Party" in this judgment.

Letter before claim

16. On 29 June 2020 the Claimant's solicitor sent a detailed 14-page letter of claim to the Labour Party. This was a letter of claim pursuant to the Pre-Action Protocol for Media and Communications' Claims. The first paragraph of the letter said that: "This letter is sent as a letter of claim pursuant to the Protocol in respect of your libels, misuse of confidential information, invasion of privacy, breach of contract and breaches of the Claimant's data protection rights". The letter then referred to the Report and the Media Briefing and continued by stating that the Claimant: "holds the Labour Party responsible for the publication of the documents and the consequences thereof".

17. The letter then says: "Your actions are both jointly and severally liable with those others who share responsibility for the publication of the documents. We understand that you are aware of the identity of those who leaked the documents". The Labour Party was then invited to disclose that information.

18. The next paragraph says that the Claimant's solicitors understand that the leakers include two people, who are named, and the Labour Party is asked to confirm if that is their knowledge. The letter then says that the leaking was at the behest of three other individuals identified in the letter, and asks the Labour Party to confirm "whether or not that is so, setting out in each case whether the leaking was at the behest of the named individual without their prior knowledge". The Labour Party has not provided any such confirmation to the Claimant's solicitors in subsequent correspondence. Mr Bennett QC, Counsel for the Claimant, in his most recent skeleton argument says those names were derived from rumours (although the letter does identify that as the basis of the Claimant's solicitor's understanding).

19. The letter then continues by setting out in considerable detail the Claimant's claims against the Labour Party. At paragraph 60 under the heading "Remedies", the Claimant sought on an urgent basis, amongst other things "confirmation as to what steps the Labour Party have taken to ascertain who within the Party is responsible for the publication of the Report and [the Media Briefing] to journalists and the public at large, and if it is now known which individual(s) is/are responsible, who they are"; very substantial damages and aggravated damages to the Claimant for the harm and distress she has suffered as a result of the Labour Party's action; a retraction by the

Labour Party in open court of all allegations that had been paid, and payment of her costs.

20. The Labour Party has responded to this letter, but not in terms that the Claimant considers to be acceptable.

The Labour Party's response to the Claimant's application

21. On 8 January 2021, the Claimant's solicitors served a Part 8 claim form, application notice and evidence in support on the Labour Party's solicitors, Greenwoods. The covering letter said that: "We invite your client to either consent to the application or indicate that they do not oppose it. They are either the wrongdoers vicariously liable for the wrongdoing or mixed up in the wrongdoing. There can be no justification for opposing the application given that they have asserted that they know who has leaked the Report."

22. On 20 January 2021, the Labour Party's solicitors emailed the Claimant's solicitors seeking their permission to disclose the application, together with the covering letter, to: "any person who may be implicated in the wrongdoing were (the Claimant's) application acceded to". The Claimant's solicitors immediately responded stating: "that appears to be sensible as they might consent to the provision of the money information."

23. On 3 February 2021, the court listed the Claimant's application for hearing before a Judge on 22 February 2021.

24. The Labour Party's solicitors did not provide a substantive response to the Claimant's application until 15 February 2021, when they wrote a detailed four-page letter to the Claimant's solicitors setting out their client's position.

25. The letter starts by referring to the various letters of claim the Labour Party has received from Patron Law Limited, not only from the Claimant but from seven other individuals as well, in relation to the leaking of the Report. In relation to the Claimant's application, the letter then apologises for the delay in responding but says the issues raised are "complex and difficult" and that the application "was made at a time when our client was still seeking to close off its investigation into the leak" and that the application "necessitated notifications being sent to affected individuals". The letter then says that the Labour Party has "conducted a careful and extensive investigation into the circumstances of the leak" and that that investigation had recently concluded, and a final report was sent to the ICO a few days earlier. I was informed by Miss Proops QC, Counsel for the Labour Party, on instructions that this final report was sent to the ICO on 9 February 2021.

26. The letter then says:

> "Having reported to the ICO, our client can now confirm that, following that careful and extensive internal investigation, it is satisfied that the Leak was not authorised by our client and that, in all the circumstances, it cannot be held legally responsible for it. Our client has confirmed this to the ICO in its final report to

the ICO. Our client agrees that, consistent with your client's application for *Norwich Pharmacal* relief, it is an innocent party in respect of the Leak."

27. Paragraph 7 of the letter then turns to the issues raised by the Claimant's application. Paragraphs 7 to 15 of the letter explains the Claimant's position in these terms:

"[7.] Turning to the issues raised by the Application, it seems to us and our client that there are strong arguments that, without some form of disclosure, Ms Oldknow will likely suffer real prejudice because she will remain entirely in the dark on the question of who is responsible for the Leak, and so will not know the identity of the proper defendant(s) to her threatened claim. It will ultimately be for the Court to weigh up all interests in play, but as matters currently stand, our client takes the view that it is likely that the Court will be inclined to order at least some form of disclosure, albeit likely not in the very wide form contemplated by the Application.

[8.] In particular, our client does not accept that your client is entitled to the relief sought in paragraph 1(a) of the draft order attached to the Application. At most, we consider that your client will be entitled to disclosure of documents and information relevant to the question of responsibility. She is not, to our mind, entitled to an order requiring our client to express views as to the question of ultimate responsibility for civil and (potentially) criminal wrongs.

[9.] This is the focus of paragraph 1(b) of your draft order. The wording of that paragraph is, however, manifestly overbroad. In the event that the Court is minded to grant your client relief of the sort sought by the Application, our client's position will be that the interests of justice favour disclosure of a far narrower category of documents than is sought in paragraph 1(b).

[10.] That said, our client is quite properly reluctant to prejudge the issue, and indeed it remains a possibility that it will revise its position in light of submissions made by the affected individuals.

[11.] As matters currently stand, our client proposes to approach the Application on the basis that it will relay the following to the Court:

a. following its investigations, it has concluded that the Leak was unauthorised and it is not legally responsible for it (i.e., it is an innocent party);

b. it is in a position to provide information/documents relevant to the circumstances of, and events surrounding, the Leak;

c. it sees the force of Ms Oldknow's claim that she must be entitled to some form of *Norwich Pharmacal* relief;

d. however, at the same time, it is conscious of the fact that the provision of such information/documents to Ms Oldknow would seriously affect the rights of a number of third party individuals, all of whom have been notified in respect of the Application;

e. it is naturally and properly reluctant to act as the arbiter of the competing rights and interests in play, and so has proceeded on the basis that the Court should itself determine the Application;

f. that said, subject to the position adopted by the affected individuals, it does not intend actively to resist the Application, subject to the question of the extent and shape of the relief sought;

g. in circumstances where the Court is minded to grant Ms Oldknow's Application in principle, we consider that the options open to the Court will be to order that our client:

(i) provide a narrative account of the circumstances and events surrounding the Leak, based on its investigations; and/or

(ii) disclose the contemporaneous documents within its possession relevant to the circumstances and events surrounding the Leak; and/or

(iii) disclose any non-privileged forensic IT analysis relevant to the circumstances and events surrounding the Leak; and/or

(iv) some combination of options (i)-(iii) above.

[12.] As matters currently stand, our client considers the proportionate approach is likely to be option (i) above. The other options appear to our client to pose a far greater risk of unjustified intrusion into Article 8 third party rights and/or duties of confidence owed by our client.

[13.] Whatever the position adopted by the court, our clients considers that it will be for your client Ms Oldknow to analyse that information and to decide, for herself, the identity of the person or persons whom she considers responsible for the disclosure of the Report.

[14.] As you are aware, we have written to various affected individuals because, having reviewed the background, it was clear that they would be named in that narrative as appearing in the documents above. We will update you on any responses provided if we are able to do so.

[15.] You are in any event invited to comment on our client's proposed approach to the shape of any relief which may be granted in this case, as outlined above in paragraph 12."

28. Late on the afternoon of 17 February 2021, the Labour Party's solicitors wrote to the Claimant's solicitors saying that: "We have now received confirmation from legal representations from the third parties affected by your client's application that we may now contact your firm." Then, based on what was described as "this development", the Labour Party asked the Claimant to agree to an adjournment to the first open date after 14 days, with a timetable for the service and filing of evidence. The Labour Party said it wanted to: "… file witness evidence setting out in detail its position in

relation to the various potential options it has set out by way of potential disclosure." The proposed timetable then included provision for the Claimant and the third parties to file evidence in reply.

29. On 17 February 2021, Carter-Ruck, as solicitors for the third parties (who are not named), contacted the Claimant's solicitors and provided them with a bundle of the correspondence between them and the Labour Party's solicitors. This correspondence was redacted to remove any names.

30. The Claimant refused to agree to an adjournment and, at 10am on Friday 19 February 2021, the Labour Party issued an application (returnable by 22 February 2021, and made on short notice) seeking an order in these terms. First, that the hearing of the Claimant's application be adjourned for the first available date after 14 days with a time estimate of half a day. Second, that by 4.30 pm on Wednesday 24 February 2021, the Labour Party is to file and serve a witness statement dealing with: (i) the categories of documents that it holds that fall within the scope of the relief sought in the Claimant's application; (ii) the likely implications of ordering disclosure of each category of those documents; (iii) any other matters it considers relevant to the Claimant's application. Third, that by 4.30pm on 3 March 2021 (i) the Claimant shall be at liberty to serve witness evidence in reply, and (ii) any other person who considers themselves likely to be affected by the Claimant's application shall have permission to file witness evidence in reply, on an anonymised basis.

31. That application was supported by the evidence contained in the First witness statement of Alexandre Samuel Barros-Curtis dated 19 February 2021. Mr Barros-Curtis is the Labour Party's Executive Director of Legal Affairs, a post he has held since 22 June 2020.

32. At paragraph 11 of his witness statement, Mr Barros-Curtis explains that following publication of the Report, the Labour Party commenced an urgent internal investigation into the circumstances which led to the leak. He says that the Labour Party also commissioned an independent review, led by Martin Forde QC, to look at a wide range of issues, including (but not limited to) issues pertaining to the generation and leak of the Report. He also explains that the Labour Party notified the relevant regulator, the ICO, which has also commenced an investigation.

33. Mr Barros-Curtis then sets out in paragraph 12 what steps the Labour Party has taken in relation to its internal investigation, together with the challenges it has faced in progressing its investigation. He identified the challenges as including complaints received by the Labour Party, which needed to be considered and answered. First, there were complaints from some of the employees affected by the investigations as to the manner in which they were conducted. Second, there were complaints from significant third-party supporters of the Labour Party as to the manner in which its investigations were conducted." He then explains that:

> "In the latter part of 2020, the Party decided to instigate disciplinary proceedings against certain employees in connection with the Leak. Those proceedings were relevant to the ongoing investigation and were expected to produce additional evidence for the Party to consider. The Party was required to follow a fair process

> in respect of those proceedings. The process also depended upon co-operation from the employees in question. This also delayed matters."

34. Paragraph 12.2.4 Mr Barros-Curtis says this:

> "The evidence obtained by the Party in the course of its investigations was complex. It required careful consideration. There is, contrary to what Ms Oldknow may suppose, no "smoking gun" document (or group of documents) which shows demonstrably and beyond any doubt that a particular individual was the source of the Leak. There is, for example, no email from any Labour Party account which sends the Report (or a draft of the Report) outside of the Party's systems."

35. Then at paragraph 13, Mr Barros-Curtis continues as follows:

> "The Party concluded that it could take its internal investigation no further by around mid-January 2021 … The reason for this is that the disclosure of this information might, to an informed observer (which Ms Oldknow is), go some way to disclosing the identity of person(s) that the Party suspected of involvement in the Leak. This would, in effect, give Ms Oldknow what she is seeking on her Application, which would make redundant the adjournment and the evidence that the Party wishes to place before the Court".

36. That is important evidence, which is at the heart of this application, and is not in dispute. This is because Mr Barros-Curtis, on behalf of the Labour Party, cannot be sure which individual or individuals were responsible for the leak of the Report and the Media Briefing which the Claimant is complaining about.

Carter-Ruck's clients

37. On the morning of 19 February 2021, the Court was contacted by Carter-Ruck in relation to the hearing of the Claimant's application on 22 February 2021. The email from Carter-Ruck said that they represented five individuals formally employed by the Labour Party who had been told by the Labour Party's solicitors that they will be affected by the relief which is sought by the Claimant's application. They said that the Labour Party's solicitors had invited their clients to intervene on an anonymous basis, i.e. on the basis that their identities were not disclosed to the Claimant, nor to the public in open Court. To disclose their identities would pre-empt the outcome of the Claimant's application and thwart the purpose of their intervention. They explained that the Claimant intended to oppose their application to intervene.

38. The events which led to this email began on 4 February 2021. This was when the Labour Party's solicitors sent an email, to the five individuals who are now represented by Carter-Ruck informing them of the Claimant's application, together with the Labour Party's position on the application. I do not know whether this email was sent to any more than five people. The letter said this:

> "As matters currently stand, the [Labour] Party's position on the application is as follows:

> [1.] The party has now concluded its internal investigation into the Leak (commenced by Jennie Formby when General Secretary of the Party), which it believes was reasonably and appropriately thorough. Having carefully considered the evidence, it has come to the view that the Leak was not authorised. It has also reached a clear view as to who was responsible for the Leak.
>
> [2.] The Party is therefore, at this point, in a position to provide the disclosure sought by Ms Oldknow.
>
> [3.] As matters currently stand, the Party does not intend actively to resist the application before the Court, save in respect of the breadth of the documentation being sought by Ms Oldknow. Instead, it takes the view that, if there are arguments to be made that the requested information/documents should not be disclosed, those arguments should be made by the affected individual(s) ("the Affected Individuals") whether (i) through their own application aimed at injuncting the Party from adopting a neutral position on the Application or (ii) by intervening in the proceedings on an anonymised basis."

39. The letter then continues by saying: "You are one of the Affected Individuals. Accordingly, the purpose of this letter is to put you on notice of both the Application and the Party's position on the Application and, by extension, to give you an opportunity to take action in respect of the same, should you choose to do so." The letter concludes by informing the recipient that the hearing date of the Claimant's application is on 22 February 2021.

40. Carter-Ruck wrote to the Labour Party's solicitors on 10 February 2021. The names of Carter-Ruck's clients have been redacted from the copy of the letter provided to the Court, and the opening sentence of the letter says this: "For obvious reasons, neither the content of this letter nor the fact of our instruction is to be disclosed to any third party, including but not limited to Patron Law or their clients, without our clients' express consent." The letter then made a number of requests, including why it had taken the Labour Party the best part of a month to inform their clients of the Claimant's application.

41. Page 2 of the letter says this;

> "As your client is well aware, each of our clients has always strenuously denied disseminating the Report (or any confidential information deriving from it) outside the Labour Party, let alone the leak to the media which is the principal focus of the legal claims threatened by Ms Oldknow (and others) and the principal pretext of Patron Law's pending Application.
>
> Your client is also well aware that our clients cooperated fully and willingly with the various investigations into the leak and took part in full interviews, including with Morag Slater. They did so on the express understanding that their confidentiality, privacy and data rights would be properly respected.
>
> Our clients have never been provided with any report or conclusions of the various investigations into the Leak.

> In the circumstances, it simply beggars belief that the very first occasion upon which your client apparently proposes (falsely) to assert that our clients were responsible for the leak is in response to this Application by Patron Law."

42. The Labour Party's solicitors responded to this letter on 15 February 2021 and said that, as they saw it, there were competing interests between, on the one-hand, the claimant's "interest in accessing information/documents which are likely to assist her in vindicating her fundamental privacy and data protection rights, insofar as they may be engaged in the Leak", and, on the other hand, the interests of Carter-Ruck's clients which in their view would "likely be affected if the Claimant's application were to be acceded to, as they would feature in any disclosure that was affected." The Labour Party's solicitors then said this:

> "Our client takes the view that the question of how the balance is to be struck in respect of those competing interests which arise from the Application is one for the Court to resolve. precisely because it wants to avoid an outcome where it could be accused of having unfairly and, for alleged self-serving reasons, be perceived to have favoured one side or the other. It has notified your clients of the Application for exactly that reason."

43. The letter continued by setting out the Labour Party's proposed approach to the application which had also been set out in the solicitor's letter to the Claimant's solicitors dated 15 February 2021, and which I have set out above.

44. Carter-Ruck responded the next day, complaining on behalf of their clients that they had not been provided with any explanation identifying on what basis the Labour Party had reached the "clear view" that the so-called "Affected Individuals" were responsible for the Leak. The letter continued by stating that:

> "It is no answer to your client's duty to assist the Court in balancing the competing interests at play that your client takes a neutral view on the outcome of the application; indeed on the face of it, your client appears to be simply seeking to wash its hands of its responsibilities by attempting to throw the burden on to the Court."

45. On 17 February 2021, the Labour Party's solicitors responded to Carter-Ruck with their proposals for an adjournment, which I have set out above. On the same day Carter-Ruck gave permission to the Labour Party's solicitors to tell the Claimant's solicitors of Carter-Ruck's involvement on behalf of the third parties.

The Claimant's "compromise" position

46. Over the weekend of 20/21 February 2021, the Claimant revised her position in relation to the relief sought on her application. Before the start of the hearing on Monday 22 February 2021, Mr Bennett produced a revised order entitled "Claimant's Proposed Compromise Order". I shall refer to this as the Compromise Order.

47. The Compromise Order invites the Court to dismiss the Labour Party's application for an adjournment, but invites the Court to grant the relief in relation to the Claimant's application for *Norwich Pharmacal* relief and/or disclosure under CPR Part 31.16.

48. The Compromise Order is in different terms to the relief sought in the claim form, and in the application notice dated 8 January 2021. Notwithstanding that, the claimant did not see the need to make any application to amend the claim form.

49. Paragraphs 3 to 5 of this draft Compromise Order provide as follows:

> "[3.] By 4pm on Monday 1 March 2021 the Respondent shall disclose to the Applicant:
>
> (a) The identities of the persons it reasonably believes disclosed or caused to be disclosed [the Report] and/or [the Media Briefing] to members of the media ("the Leak").
>
> (b) A narrative account of the circumstances in which the Report and the Media Briefing were disclosed or caused to be disclosed to members of the media.
>
> (c) …
>
> (d) Such documents as, having regard to the narrative account referred to in (b) above, are reasonably necessary in order for the Applicant to be able to form her own view as to the identity of the person or persons responsible for disclosing or causing to be disclosed the Report and Media Briefing to members of the Media and how they did so ("the Responsibility Question"). The Respondent is permitted to make redactions to such documents so as to remove information that is irrelevant to the Responsibility Question.
>
> "Reasonably necessary" does not impose an obligation to disclose every document which goes to the relevant issues, it imposes an obligation to disclose sufficient documents so that the Applicant may fully understand how the leak happened and to understand how those responsible executed the leak.
>
> The Respondent may redact such parts of the documents to be disclosed which contain confidential or private information which is not necessary to the Applicant knowing the identities of the persons responsible for the Leak and understanding how they brought about the Leak.
>
> [4.] The Applicant has liberty to apply to the Court in the event that she considers the information and documents disclosed to her pursuant to paragraph 3 of this Order are insufficient to enable her to identify the person or persons responsible for disclosing or causing to be disclosed to the media the Report and/or Media Briefing and/or insufficient to enable her to understand how they disclosed or caused to disclose the Report and the Media Briefing to the media. Such liberty to apply shall be further to the Application Notice dated 8 January 2021.
>
> [5.] The information and documents disclosed pursuant to paragraph 3 of this order may be used by the Applicant solely and exclusively for the purpose of these and any connected legal proceedings brought by her concerning the Leak."

50. The Labour Party objects to paragraph 3(a) of the Compromise Order. It had points in relation to the rest of the order, but these were points of detail and not really directed to the substance of Mr Bennett's compromise proposal.

51. It is important to note that in relation to the reformulation set out in the Compromise Order, Mr Evans - who is the Respondent- is required to disclose to the Claimant "the identities of the person it reasonably believes disclosed or caused" (underlining added) the leak of the Report and the Media Briefing. The words "reasonably believes" are new. Further, the word "it" would appear to be a reference to the Labour Party, but the Labour Party is an unincorporated association, and it is not clear who "it" is actually referring to.

The hearing: Monday 22 February 2021

52. That, therefore, was the state of play at the outset of the hearing on Monday 22 February 2021. At the hearing, the Claimant was represented, as I have mentioned, by Mr William Bennett QC, leading Ms Felicity McMahon. The Labour Party was represented by Miss Anya Proops QC, leading Mr Zac Sammour.

Standing – the five "Affected individuals"

53. The five unnamed individuals represented by Carter-Ruck sought permission to address the court through Counsel, Mr Jacob Dean. They wished to do so without disclosing their identities. I decided they did not have any standing to do so on an anonymised basis, and did not permit Mr Dean to address the Court on the substance of the Claimant's application. I said that I would provide reasons on this issue in my judgment.

54. Mr Dean accepted that he was unable to refer me to any rule in the Civil Procedure Rules, or identify any other jurisdiction which would permit the Court to allow a person, who was not prepared to be named, to intervene in an application. Rather, he referred me to the overriding objective at CPR Rule 1.1(2)(a) and (d), and also directed my attention to CPR 31.19(3) and 31.19(6) (which he sought to rely on by way of analogy, as circumstances where the Court can withhold disclosure of a document) and CPR 40.9. In my view, none of those provisions provided any assistance in the present circumstances. Ms Proops submitted that it would be fair to permit Mr Dean to address the court on behalf of his unnamed clients, but was unable to identify any jurisdictional basis upon which this would be permitted. Mr Bennett submitted that it was completely at odds with the open justice principle to hear from Mr Dean on the basis he proposed.

55. The difficulty that individuals in the position of Mr Dean's clients face has been considered in some of the authorities: see, for example, *Golden Eye International Ltd v Telefonica UK Ltd* [2013] EMLR 26 CA at paragraph 6. In that case, Lord Justice Patten noted that, applications of the type made by the Claimant in this case can give rise to: "Wider and more fundamental issues such as whether the relief is excessive, a disproportionate invasion of the users' Article 8 and data protection rights, or is unjustified by the evidence or the status of the claimants." Given the nature of such applications, the judge has to consider these matters unaided by any adversarial

argument. In that case at first instance, Arnold J had directed that the application and evidence in support be served on the consumer rights group, Consumer Focus, who then instructed counsel to make representations on behalf of third parties affected by the application, which the judge described as "important submissions both about the form of the order and as to whether it should be granted at all".

56. Alternatively, if the Respondent informs a third party of the application (as has happened here), then the Respondent can offer to place before the Court any "worthwhile reason the [third party] wants to put forward for not having his or her identity disclosed": see *Totalise Plc v Motley Fool Limited* [2002] 1 WLR 1233 at 1240H at paragraph 29.

57. In any event, in relation to this case the Labour Party's solicitors placed all the correspondence from Carter-Ruck, written on behalf of the third parties, before the Court. I have read that correspondence, and it clearly identifies numerous points their clients wish to make in relation to the Claimant's application. I therefore did not see any basis to permit Mr Dean to intervene in the application on Monday 22 February 2021 on behalf of individuals who, for understandable reasons, did not wish to be identified.

Norwich Pharmacal relief: jurisdiction

58. I will turn first of all to the Claimant's application for *Norwich Pharmacal* relief. This was the main focus of the Claimant's submissions as it is only on this basis that she can seek the identity of the alleged wrongdoers.

59. There is a very helpful summary of the *Norwich Pharmacal* jurisdiction in the recent decision of *Collier v Bennett* [2020] 4 WLR 115, Saini J, at paragraphs 31 to 41. His summary refers to all the key and recent cases in this area, many of which I have been referred to in Counsel's skeleton arguments.

60. At paragraph 35 of the Judgment, Saini J said this:

> "[35.] Based principally upon the above case law (and specifically upon the way in which more recent cases have refined and explained the original tests), I suggested to the parties, and they accepted, a broad formulation of a workable and practical test under CPR r 31.18 as follows: (i) The applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person ("the Arguable Wrong Condition"); (ii) The respondent to the application must be mixed up in so as to have facilitated the wrongdoing ("the Mixed Up In Condition"); (iii) The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued ("the Possession Condition"); (iv) Requiring disclosure from the respondent is an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction ("the Overall Justice Condition")."

61. He continued by explaining that:

> "[36.] The Arguable Wrong, Mixed Up In, and Possession Conditions each raise threshold hurdles and one does not get to the Overall Justice Condition unless the applicant overcomes those three hurdles. However, certain matters which arise in relation to the Arguable Wrong Condition, such as the strength of what has been established as a good arguable case, will feed into the Court's assessment when considering the Overall Justice Condition."

62. Saini J then set out a number of particular points which "require emphasis when applying these conditions". The second of these points was that the court has to be "vigilant in guarding against "fishing exercises" in what is regarded as an exceptional jurisdiction". He then referred to the decision of Flaux J (as he then was) in *Ramilos Trading Limited v Buyanovsky* [2016] EWHC 3175 (Comm) at [62] where he held:

> "[62.] As that analysis [in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] QC 1675 at [139]-[140]] demonstrates, the *Norwich Pharmacal* jurisdiction remains an exceptional jurisdiction with a narrow scope. The court will not permit the jurisdiction to be used for wide-ranging disclosure or gathering of evidence, as opposed to focused disclosure of necessary information: see the judgment of Rimer J in *Axa* [*Equity and Law Life Assurance Society & Ors v National Westminster Bank PLC* [1998] PNLR 433]… Furthermore, it is impermissible to use the jurisdiction as a fishing expedition to establish whether or not the claimant has a good arguable case or not. This emerges from the decision in *Norwich Pharmacal* itself, particularly in the speech of Lord Cross of Chelsea, in the passage where he approves the *Post* case to which Rimer J refers in *Axa* as cited at [23] above. I agree with Rimer J in *Axa* that Lord Cross was approving the whole of the passage he cited from the *Post* case, including the statement that bills of discovery could not be used: 'to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendant."

63. Then at paragraph 40 of his judgment, Saini J continued as follows:

> "[40.] Third, in relation to condition (iv), the Overall Justice Condition, the principles to be derived from the authorities generally, including the factors relevant to the exercise of the court's powers were considered by the Supreme Court in *The Rugby Football Union v Consolidated Information Services Limited* [2012] 1 WLR 3333, [2012] UKSC 55 (Lord Kerr) at [15]-[17]. I will not set out that lengthy extract which is now well-known. Lord Kerr's summary is helpful but not intended to cover every possible factor which might go to the Overall Justice Condition. It is not intended to be used as a form of statutory check-list."

64. Saini J observed that it was unnecessary for him to resolve the issue which was raised before him as to whether the court is conducting some form of discretionary exercise in applying the Overall Justice Condition. He then said "it is simply a heavily fact specific judicial assessment of whether the remedy is required to do justice."

65. There is one other case which I should refer to at this stage which is *Arab Satellite Communications Organisation v Saad Al Faqih* [2008] EWHC 2568 (QB), a decision of Underhill J, as he then was. The claimant was an intergovernmental organisation based in Saudi Arabia. It alleged that on numerous occasions transponder space on its

satellites had been used to broadcast programmes created by the defendants, and the claimant sued the defendants for trespass. The first defendant was a prominent dissident, and the second defendant was an unincorporated association and, for all practical purposes, there was no distinction between them. The defendants denied responsibility but said that satellite services were arranged by "sponsors". The claimant applied to the court for the defendants to identify the names, addresses and contact information of the sponsors. The Master ordered the defendants to disclose to the claimant "the identity of any person who was, or may have been, involved in any way in arrangements for the broadcasting the defendants' material via the claimant's satellite insofar as the identity of any such person is known to the defendants". The defendants appealed that decision and the focus of the appeal was on the words "or may have been". Without those words, the order simply directed the defendants to tell the claimant of the identity of any person who, to his knowledge, had been involved in any way in the arrangements to broadcast via the claimant's satellites (paragraph 17). However, the judge held that words "or may have been" clearly extended the meaning of the order and he did not think "that it is right in principle that a party should be ordered to make a judgment about who 'may' have done such-and-such a thing" (see paragraph 18). The defendants' appeal was allowed.

66. The claimant's cross-appeal was to remove the words "the claimant's" before the word "satellites" so that the defendant was required to identify those persons who have arranged to broadcast his material on other satellites which achieved by another route the effect of the words "may have been" (paragraph 19). The judge dismissed the cross-appeal and, in doing so, made a number of points which are of relevance to the present application: see paragraphs 19 to 26. The most relevant passages from the judgment are as follows:

> "[20]. The starting point is to appreciate that the effect of the order sought will not be, as such, to identify the person or persons who are responsible for the alleged trespass. What it will do is to compel the defendant to identify a group of people which, at best, may include the culprit…
>
> "[21]. …I must proceed therefore on the basis that although the order may give the claimant a list, may be a short list, of possible culprits, the actual culprit may not be on it and, even if he is, it will not be possible to pick him out from the others on the list.
>
> "[24]. …The uncertainty as to whether the information sought will in fact lead to the identification of the wrongdoer means that the circumstances in this case are significantly different from those of a classic *Norwich Pharmacal* case, where the information required to be given is generally simply a name, which it is accepted that the party from whom it is sought knows and which is self-evidently that of the wrongdoer. If the claimant in this case was to get, say, half a dozen names, an action against any one of them would be essentially speculative: indeed, for the reasons I have already given, that would be so even if he got only a single name. *Norwich Pharmacal* does not give claimants a general licence to fish for information that will do no more than potentially assist them to identify a claim or a defendant…

> [25]. No doubt the limits of the *Norwich Pharmacal* jurisdiction are not set in stone … and I do not say that an order could not in principle be made to identify a small pool of potential wrongdoers - in particular perhaps where the claimant could show that once he had the names in question, he would be able, from other information, to "sort the sheep from the goats". But such a case would certainly be at the very limits of the jurisdiction and the court would wish to be very fully satisfied that 'there is no substantial chance of injustice to the persons so named' (see per Lord Reid in *Norwich Pharmacal* itself at 176D)."

67. I am grateful to Mr Dean for drawing this case to my attention.

The Labour Party's position

68. The Labour Party accepts in its skeleton argument that all the threshold conditions in respect of pre-action disclosure under CPR 34.16 and *Norwich Pharmacal* relief are met in this case. However, notwithstanding that concession, it is of course for the Claimant to satisfy the court to exercise its powers which, in a case of *Norwich Pharmacal* relief, is accepted to be an exceptional and intrusive jurisdiction: see *Collier v Bennett* at paragraph 34.

69. The Labour Party says the outcome of the *Norwich Pharmacal* application turns on the exercise of the Court's discretion and the consideration of the various factors identified by the Supreme Court in the *Rugby Football Union v Consolidated Information Services Limited* [2012] 1 WLR, 3333 paragraphs 15 to 17, per Lord Kerr. In *Collier v Bennett*, Saini J observed that Lord Kerr's summary was not intended to cover what he described as "the Overall Justice Condition" and is not available to be used as a statutory checklist.

70. As for the Claimant's application for pre-action disclosure, Ms Proops submits that the authorities emphasise the need for the court to take a "big picture" view and to ask the general question "does the request for pre-action disclosure further the overriding objective in this case or not?": see *Carillion PLC (in liquidation) v KPMG LLP* [2020] EWHC 1416 at paragraph 68. She says that it is trite that disclosure pursuant to CPR 31.16 or *Norwich Pharmacal* is limited to that which is necessary and proportionate, and it is for the Claimant in this case to identify with specificity the documents or information that are said to be properly disclosable. Ms Proops then says that it is difficult in the extreme to see how the Claimant's application for any documents relevant to an issue as broad as "responsibility for publication of the Report" could ever meet those requirements. In her submission, the Court will inevitably wish to consider five factors, which she identified at paragraph 26(a) to (e) of her skeleton argument as:

> "(a) The possible impact of any disclosure or relief on third party privacy and data protection rights; (b) The impact that disclosure or relief may have on any ongoing regulatory investigation, and the public interest in maintaining the efficacy and confidentiality of such investigations; (c) The public interest in protecting the confidentiality of internal investigations undertaken by an employer into suspected wrongdoing committed by employees; (d) The costs of disclosure, including any necessary redaction exercise; and (e) The broader impact that granting the relief sought may have on the Party (which, given the

> Party's position as the official opposition to the government, is a matter of high public importance)."

71. Ms Proops says the extent to which those factors are engaged on the Claimant's application is a question for evidence and, on that basis, she invited the Court to adjourn the case on Monday in order that her client could file evidence in relation to these matters.

The Claimant's position

72. The Claimant's position is that the Court should grant her the relief sought in the form of the Compromise Order and that there is no need for any adjournment. This is a case where it is plain the Court has jurisdiction to make the orders sought (so much so the position has been conceded by the Labour Party), and the Court's discretion to do so should be exercised in her favour.

73. In any event, the Claimant says she is willing to be "pragmatic in regard to the scope and nature of the documents and information sought" and Mr Bennett submits that the Compromise Order meets the Labour Party's concerns. First, the requirement on the Labour Party to disclose the identities of those persons "it reasonably believes" to have brought about the leak is not, in the circumstances, onerous. Second, the Claimant has agreed to accept documents that are no more than "reasonably necessary" to understand what happened. Mr Bennett maintains this will "control the volume of documents and permit the Labour Party to exercise discretion as to the value of documents to be disclosed", which he says solves the Labour Party's belated concern about the scale of potential disclosure, and disposes of the need for any adjournment. As to the position of the third parties, Mr Bennett submits that the disclosure process should not be "bedevilled by third parties obstructing it, demanding approval of disclosure lists, because rational third parties are aware of them and accept the protection of the collateral undertaking". In addition to that, Mr Bennett submits that the wrongdoers will be protected by the way justice is administered. They will only be found to be liable to the Claimant if she proves a her case against them.

Identity of the alleged wrongdoers

74. The position on the evidence is that the Claimant has a claim against the Labour Party, which she was able to articulate in considerable detail eight months ago in her Pre-Action Protocol Letter. Further, in that letter her solicitors named two individuals who they understood were "leakers" and three further individuals, who they understood knew about the leak before it happened. The evidence of Mr Barros-Curtis is that there is no document or group of documents "which shows demonstrably and beyond any doubt, that a particular individual was the source of the leak". That evidence is provided by Mr Barros-Curtis following an extensive internal investigation, which has included the commissioning of expert forensic IT analysis and advice, commissioning a third party investigator to undertake a fact-finding exercise, and conducting an extensive internal analysis of documents concerning the activities of a number of Labour Party employees and former employees. Further, that investigation took place over many months and concluded in mid-January 2021.

75. Nevertheless, on 4 February 2021, the Labour Party's solicitors were able to write to the five individuals considered to be affected by the Claimant's application in order to tell them, having considered the evidence, the Labour Party has come to "the view the Leak was not authorised" and that the Labour Party had "also reached the clear view as to who was responsible for the Leak". The Labour Party then said that it did not intend to actively resist the application before the Court requiring it to provide the identities of those responsible for the Leak.

76. However, matters have moved on and that is no doubt as a result of the correspondence the Labour Party has received from Carter-Ruck, who act for the five recipients of the letter dated 4 February 2021.

77. The Labour Party now says that - and I read here from paragraph 11 of Ms Proops' skeleton argument – that:

> "… as matters currently stand, the ICO is continuing to investigate the circumstances of the Leak, and that the Party is also waiting for the Forde review to report. Such views as the Party has arrived at on the question of who specifically was responsible for the Leak are necessarily subject to review in light of: (a) the outcome of the ICO's investigation; (b) the outcome of the Forde Inquiry; and (c) any further relevant evidence that comes to light."

78. It is in that context that Ms Proops, on behalf of the Labour Party, resists any order that her client should be required to express its views as to "the question of ultimate responsibility for civil and (potentially) criminal wrongs". Mr Bennett, for the Claimant, maintains that this is exactly what the *Norwich Pharmacal* jurisdiction was designed to achieve as "ultimately it will be for the court to determine whether in fact the wrongdoers are liable in civil law. The [Claimant] will be under the normal obligation to only use the information imparted for the purposes of the envisaged claims" (see paragraph [11] of his skeleton argument dated 19 February 2021).

79. The position appears to me that, as a result of its own internal investigation, the Labour Party has formed its own view as to who is responsible for the Leak of the Report and the Media Briefing. It seems to me that the letter of 4 February 2021 was written in the terms it was because at that time the Labour Party, and its advisers, understood that, as a result of the internal investigation and the view formed by the Labour Party as to which individuals were responsible for the Leak meant that, as a result of the Claimant's application, it would be required to identify those individuals. However, the Labour Party does not know for sure whether, having formed that view, it has correctly identified the individual or individuals responsible.

80. Further, as I mentioned earlier, the Labour Party is an unincorporated association, and for convenience I have referred to the Defendant as the Labour Party in this judgment. However, there is no evidence before me as to which members or employees of the Labour Party have formed this view as a result of the internal investigation. I would assume that it includes Mr David Evans or Mr Barros-Curtis, but there is no means of telling on the evidence.

81. As against that, those who the Labour Party has identified as being responsible deny any involvement in the leak, and take issue with the basis on which any such views as to their suspected involvement have been formed by the Labour Party. The fact that the Labour Party has attributed them with responsibility is therefore hotly contested. This is not a point for me to resolve, and it would be impossible for me to do so. However, it seems to me that it does give rise to a real risk that if the Defendant, as a representative of the Labour Party, is ordered to name any individuals, as sought by the Claimant, individuals who are innocent of any wrongdoing could be identified as a result (a concern which is referred to by Lord Reid in *Norwich Pharmacal* itself at page 176B-D). Further, I do not see how the issues which arise from this dispute can

be resolved in the context of this application by the filing of evidence, as suggested by Ms Proops on behalf of the Labour Party. Rather, either the Claimant establishes that she is entitled to the relief sought, or she is not.

82. On top of that, the Claimant's own evidence is that she believes the Labour Party may well be ultimately responsible for the wrongs in issue, and a very detailed letter before claim was sent to the Labour Party many months ago. That in itself, means the Labour Party accepts that it is not an entirely disinterested party and cannot present itself as such in relation to the Claimant's application, a situation which is recognised in these terms at paragraph 30 of Mr Barros-Curtis' witness statement.

83. In this context, after the hearing had concluded on Monday, I requested further submissions from the parties in relation to the exercise of the *Norwich Pharmacal* jurisdiction in the present circumstances and in particular (a) whether it mattered that the Labour Party does not know for sure who was responsible the leak; and (b) the risk that innocent persons will be identified. The parties filed skeleton arguments on 25 February 2021 and the matter was listed for further hearing on 26 February 2021.

84. Further, on 24 February 2021, an application was issued by Unite the Union for permission to intervene in the Claimant's application in order to "represent the interests of five of its members who have been informed by the Respondent that they are individuals affected by the [Claimant's] application". That application was supported by the witness statement of Adam James Tudor, a solicitor and partner at Carter-Ruck, dated 23 February 2021. Mr Dean, on behalf of Unite, filed detailed submissions running to some 22 pages in opposition to the Claimant's application, and the Compromise Order.

Further hearing: Friday 26 February 2021

85. At the start of the hearing on Friday 26 February 2021, I gave Unite the Union permission to file the written submissions prepared by Mr Dean dated 25 February 2021. I provided my reasons at the time, and I allowed those submissions to be filed as they identify the arguments against the Claimant's application, which are helpful in the present context when the Labour Party is prepared to provide the Claimant with some of the information sought, and its stance in relation to this application cannot be described as neutral.

86. Turning now to the further submissions I received. Mr Bennett submits that the Claimant is not asking the Labour Party to disclose the identities of those it merely suspects of wrongdoing. Rather, it is seeking disclosure from the Labour Party of the identities of persons "it reasonably believes" disclosed or caused to be disclosed the documents to members of the media and, on the basis of the evidence, the Labour Party clearly has "a reasonable belief" as to who executed the leak. Mr Bennett refers in particular to the Labour Party's solicitors' letter to the "Affected Individuals" dated 4 February 2021 and its thorough internal investigation.

87. Mr Bennett accepts that there is a risk that the Labour Party might be wrong in relation to its identification of the wrongdoers. However, he says that the risk that presents to any person identified who is innocent is acceptable for three reasons. First, the Claimant will only receive information or documents which enable her to form her

own view about the wrongdoing. Second, it may be that the material will not merit the commencement of a claim against any of Carter-Ruck's clients. Third, if the Claimant decides not to pursue a claim, there will be no harm to the innocent persons. Their name and the material provided will not be made public as the Claimant and her advisers will be bound by the collateral undertaking set out in paragraph 5 of the Compromise Order.

88. Ms Proops submits that the Labour Party is not aware of any authority that directly addresses the position in which it finds itself on this application. She submits that there is no decided case in which a potential defendant was ordered to disclose the identity of persons that it believed, but did not know for certain, were responsible for the particular wrong alleged. However, Ms Proops further submits that the Court's *Norwich Pharmacal* jurisdiction does extend to making such an order. Further, Ms Proops submits that the only relief the Court should grant in this case is that set out at paragraphs 3(b) and (d) of the Compromise Order. This is because, and I quote:

> "This relief would provide [the Claimant] with the factual information she requires in order to make up her own mind as to the identity of the wrongdoers. Armed with that factual information, [the Claimant] would be in a position to issue a claim against the persons she (and not the Party) thinks are responsible for leaking the Report. This approach would eliminate the risk of innocent persons being subject to claims on the basis that the Party had wrongly concluded that they were responsible for the leak of the Report."

89. The detailed written submissions I received from Mr Dean on behalf of Unite the Union made a number of points. I will set out the central points here, although a number of other points were made which I have also considered. First, Mr Dean submits that the Claimant's application is fundamentally flawed and, if an order is made against the Labour Party, it is almost certain that innocent parties will be identified and that the resulting harm to them is inevitable. Secondly, the evidence before the court is no higher than that the Labour Party suspects the third parties. Thirdly, if the information sought can be obtained during a litigation process which the applicant can begin on the information presently available to it, then the exceptional *Norwich Pharmacal* jurisdiction is not available because the relief is not necessary (see *Ashford Hospital Authority v MGN Limited* [2002] 1WLR 2033 at paragraphs 36 and 57; *Mohamed v Secretary of State for Foreign Office* [2009] 1WLR 2579 at paragraphs 93 and 94). This is because, if the Claimant sues the Labour Party, it is inevitable that the documents now sought will all be disclosable under CPR Part 31.16. Further, the impending expiry of the limitation period is no answer to this point as the limitation period can be extended (see section 32A of the Limitation Act 1980) and, in any event, there is no limitation problem in relation to claims in privacy and data protection, which each have a limited period of six years. Mr Dean made a number of substantive criticisms of the Compromise Order.

Conclusion: Norwich Pharmacal relief

90. There was no dispute that the Claimant has a claim against the person or persons who wrongfully leaked the Report and the Media Briefing for defamation, invasion of privacy and breach of data protection, once that person or those persons have been identified. There may be other causes of action as well. It was not suggested to me

that the Claimant did not have a good arguable case in respect of any such claims. Likewise, there was no dispute that the Labour Party was mixed up in the wrongdoing so as to have facilitated it. The Labour Party accepts that, but maintains it is not responsible for any wrongdoing.

91. However, the more controversial issue is whether the Labour Party is able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued. This is what Saini J described as the "Possession Condition" in *Collier v Bennett*.

92. The first point is that I do not find it at all satisfactory that, on the eve of the hearing, the Claimant shifted her ground so that the relief now sought at paragraph 3(a) of the Compromise Order is for disclosure of the identities of the persons the Labour Party "reasonably believes" were responsible for the leak of the Report and the Media Briefing. That relief goes beyond the standard form *Norwich Pharmacal* relief sought in the claim form, and no application to amend was advanced by the Claimant, and no objection raised by the Defendant. However, I did notice that this was a point mentioned by Mr Dean in his written submissions.

93. The second point is rather more fundamental. The essential purpose of *Norwich Pharmacal* relief is for the defendant to identify, or provide information identifying, wrongdoers based upon his or her own knowledge. It is not the purpose of *Norwich Pharmacal* relief to identify who the defendant "reasonably believes" is a wrongdoer. This is simply an expression of the defendant's own views, based on whatever information is available to the defendant to form such views. And, as Underhill J explained, in the *Arab Satellite* case a party should not be ordered to make a judgment about who "may have" done such-and-such a thing. Likewise, I do not think it is right in principle that a party should be ordered to make a judgment identifying who he "reasonably believes" did such-and-such a thing. To my mind, a request such as this smacks of fishing and, as was said in the passage from *Post's* case (a 19th century decision the Supreme Court of Massachusetts) approved by Lord Cross of Chelsea in *Norwich Pharmacal* at 196G: "It is also clear that a bill for discovery cannot be used to enable the plaintiff to fish for information of any causative action he may have against other persons than the defendant" (recently cited by Flaux J in the *Ramilos* case). Further, this is not even a situation where the information provided would allow the Claimant to sort the "sheep from the goats", which Underhill J contemplated as a possibility, albeit one at the outer limits of the *Norwich Pharmacal* jurisdiction in the *Arab Satellite* case.

94. It is therefore not surprising that this aspect of the relief sought by the Claimant, as formulated in paragraph 3(a) of the Compromise Order, was opposed by the Labour Party. Mr Bennett, for the Claimant, maintained that this opposition was misplaced as the Labour Party has completed a thorough internal investigation, formed a clear view as to who is responsible, and therefore there is no difficulty in complying with the order sought. I disagree. The situation in this case is that there are no less than three investigations which have arisen as a result of the leak of the Report and the Media Briefing in April 2020. The Labour Party's own internal investigation concluded earlier this year. However, there is an on-going investigation with the ICO and the third inquiry, namely the independent review chaired by Martin Forde QC, is on hold pending the outcome of the ICO's investigation.

95. The situation is far from straightforward and, whatever conclusions the Labour Party has reached in its internal investigation, it is possible that those conclusions could be modified or changed as a result of the ICO's investigation or the Forde inquiry. Further, it is plain from Mr Barros-Curtis' evidence that the Labour Party's own internal investigation has faced a number of challenges, and the issues which have arisen are no doubt acutely sensitive. Indeed, it is clear from the response that the Labour Party has received to its solicitor's letter dated 4 February 2021, addressed to the five "Affected Individuals", that the Labour Party's view as to which individuals are responsible for the leak is highly contentious.

96. In my view, if the Labour Party is required to identify individuals in accordance with paragraph 3(a) of the Compromise Order, it will be doing no more than identifying a list of who it "reasonably believes" or considers to be the culprits. It appears that more than one individual falls within the ambit of the Order, as it appears from the evidence that the letter of 4 February 2021 was sent to at least five individuals. This means that, as Underhill J pointed out in the *Arab Satellite* case, the actual culprit or culprits may not be on the list and, even if they are, it will not be possible to pick them out from the others on the list. There is therefore no certainty that the information sought will lead to the identification of the wrongdoer or wrongdoers. Therefore, when analysed on this basis, I do not see that an order in the terms sought in paragraph 3(a) of the Compromise Order will be able, or be likely to be able, to provide the information necessary to enable the ultimate wrongdoer, being the individual or individuals who were actually responsible for leaking the Report and Media Briefing, to be pursued. In my view, this threshold condition is not satisfied.

97. Further, I think the position is even more stark, when one turns to the relief sought by the Claimant at paragraphs 3(b) and (d) of the Compromise Order. The Labour Party is willing, in principle, to comply with this part of the Order but contends there should be a timetable for evidence to set out, amongst other things, the "likely implications" of disclosing the documents, and that any person affected by the application should be permitted to file evidence as well. This approach seems to me to be quite wrong, and highlights the problems with the Claimant's application. First of all, I do not see that the Labour Party's approach will put the Claimant in any better position than the Labour Party itself. If the Labour Party does not know who the wrongdoers are, then the Claimant will not know who they are from reading the Labour Party's narrative account together with the documents it intends to provide. The provision by the Labour Party of a narrative account, together with a selection of documents to enable the Claimant to form her own view as to the identity of the individuals responsible for the leak is not a focused request for information which will, or is likely to, lead to the identification of wrongdoers. Rather, it seems to me that it is an advance request for disclosure which again smacks of a fishing expedition so that the Claimant can cast around to identify potential defendants. Further, properly formulated *Norwich Pharmacal* relief does not result in the Defendant, having identified any documents to be disclosed, serving any such documents on unnamed third parties, with directions that they can then serve evidence in answer (it would appear on an unnamed basis).

98. Therefore, the information and documents sought by the Claimant in paragraphs 3(b) and (d) of the Compromise Order go well beyond the information contemplated by Lord Reid in *Norwich Pharmacal* and the case law which has developed that

jurisdiction since 1973. I am not satisfied that an order in these terms will be able, or be likely to be able, to provide information and documents necessary to enable the ultimate wrongdoer to be pursued. In my view, this threshold condition is not satisfied in respect of paragraphs 3(b) and 3(d) of the Compromise Order.

99. That is sufficient to dispose of the Claimant's application for *Norwich Pharmacal* relief. However, in case the conclusions I have expressed above are wrong, I should consider the Overall Justice Condition (as identified by Saini J) and, in doing so, I remind myself that the overall purpose of the remedy is to do justice, which involves a careful weighing of all relevant factors. The authorities have identified various factors as being relevant and these are set out by Lord Kerr in paragraph 17 of the *Rugby Football Union* case which I have considered.

100. The points I have set out above are all relevant in this context. This is particularly so as the facts of this case are a very long way indeed from the *Norwich Pharmacal* case, where the Commissioners of Customs & Excise were in possession of the document which identified the wrongdoer, and there was no remedy available at all for patent infringement without the identification of the wrongdoer by the Commissioners. In that case, and it is worth repeating it, Lord Reid said at page 176B-D this:

> "Protection of traders from having their names disclosed is a more difficult matter. If we could be sure that those whose names are sought are all tortfeasors, they do not deserve any protection. In the present case the possibility that they are not is so remote that I think it can be neglected … But there may be other cases where there is much more doubt … The court will then only order discovery if satisfied that there is no substantial chance of injustice being done."

101. There is a real risk that the order sought by the Claimant in the form of the Compromise Order will reveal the names of innocent persons and, as I have explained above, there is no basis for the Claimant to identify who the wrongdoers are from the information and disclosure she is seeking from the Labour Party. This consequence will, it seems to me, have the very real potential to cause harm to any innocent person, as they will then find themselves threatened with legal proceedings, which they will have to defend. It cannot be overlooked that any such proceedings in this case are likely to be high profile and, defending any proceedings will take time, and inevitably involve expense if lawyers are instructed (and part of such costs will inevitably be irrecoverable if proceedings are dismissed) together with the stress which is commonly associated with any litigation. I do not consider it is sufficient, as Mr Bennett does, for paragraph 5 of the Compromise Order, together with the collateral undertaking contained in CPR Part 31.22, to be regarded as solving these issues.

102. Further, the Labour Party's desire for an adjournment on the basis advanced by Ms Proops, simply serves to reinforce the potential injustice to any innocent persons affected by this Order. The fact the Labour Party wishes to put in a witness statement explaining the "likely implications" of ordering disclosure of the various categories of documents sought by the Claimant, in the circumstances of this case, is, in my view, indicative that any such disclosure may give rise to issues concerning confidentiality, privacy rights under Article 8 and data protection rights, and any such rights of innocent third parties could be adversely affected. These are, of course, the very factors identified by Lord Kerr at (vii), (viii) and (ix) in the *Rugby Football Union*

case. Again, I do not consider the answer to this is Mr Bennett's proviso in paragraph 3(d) of the Compromise Order. The disclosure sought by the Claimant is, in my view, a fishing exercise which cannot be corrected by a proviso in the order permitting the Defendant to redact "confidential or private information which is not necessary to [the Claimant] knowing the identities of the persons responsible for the leak and understanding how they brought about the leak."

103. There are several other points which could be made in relation to the drafting of the Compromise Order, and the concerns to which they give rise. These were, to my view, powerfully set out in Mr Dean's written submissions which I found helpful. However, to the extent I have not covered these points above, there is no need for me to deal with all of them in this judgment.

104. The Court recognises the strong public interest in allowing the Claimant to vindicate her legal rights. However, for the reasons already explained, this does not extend to the Labour Party being ordered to identify those who it "reasonably believes" were responsible for the leak or providing a narrative account of the circumstances of the leak, together with a selection of documents "reasonably necessary" for the Claimant to form her own view as to who was responsible. An order in these terms simply permits the Claimant to fish for information. It will not identify the wrongdoer or wrongdoers so that the Claimant can thereafter pursue her cause of action and vindicate her legal rights.

105. The Claimant's claim for *Norwich Pharmacal* relief is dismissed.

Pre-action disclosure: CPR Part 31.16

106. I can deal with the second limb of the Claimant's application much more briefly.

107. The pre-action disclosure application cannot obtain answers to questions. It can only seek disclosure of documents. The Claimant's original request for documents was far too wide, which she recognised by putting forward a revised formulation in the Compromise Order.

108. The Claimant now seeks more limited disclosure on the basis set out in paragraph 3(d) of the Compromise Order. These are the documents which, having regard to the narrative account the Claimant is seeking from the Labour Party, will enable her to form her own view as to the identity of the individual or individuals responsible for the leak of the Report and the Media Briefing.

109. Pre-action disclosure is governed by CPR Part 31.16 which provides:

> "(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where–
>
> (a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to –

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs."

110. The required approach to this rule is set out, by reference to the notes to *Civil Procedure 2020* Volume 1 at paragraph 31.16.4, and also at paragraphs 71 to 74 of *Collier v Bennett*. There are jurisdictional thresholds presented by heads 3(a) to (d) of rule 31.16. It seems to me that the thresholds in subparagraphs (a) to (c) are satisfied. However, I do not consider that in this case disclosure before proceedings have started is desirable under (d) for any of the reasons set out there. Further, disclosure is not necessary to fairly dispose of the anticipated proceedings. This is because in June 2020 the Claimant wrote a very detailed pre-action protocol letter to the Labour Party, and had sufficient information to do so. Second, disclosure will not assist the dispute to be resolved without proceedings. Rather, the disclosure is sought by the Claimant in order to try to identify those who are responsible for the leak so she can sue them. Pre-action disclosure in these circumstances will not save costs. In any event, even if I am wrong about (d), I would not as matter of discretion allow the pre-action disclosure now sought by the Claimant in paragraph 3(d) of the Compromise Order. She is not permitted to such relief under the *Norwich Pharmacal* jurisdiction, and I do not see that she should be entitled to fish for information and documents under this rule either. The Claimant's claim for relief under CPR Part 31.16 is also dismissed.

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