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Case No: QB-2019-004270

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2019

Before :

MR JUSTICE WARBY

- -

Between :

United Kingdom Independence Party Limited	**Claimant**
- and -	
(1) Richard Braine	
(2) Tony Sharp	
(3) Jeff Armstrong	
(4) Mark Dent	
(5) Persons Unknown	**Defendants**

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- -

Christopher Loxton (**public access barrister**) for the **Claimant**
Jane Phillips (instructed by **DWF LLP**) for the **Fourth Defendant**
The First, Second and Third Defendants in person

Hearing date: 6 December 2019

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Mr Justice Warby :

1. On Friday 6 December 2019, I heard two applications by the claimants: (1) an application to continue until trial an interim non-disclosure order, or INDO, against these five defendants, first granted after a hearing without notice on 23 October 2019; and (2) an application for an order for seizure and search of the fourth defendant's computer. At the end of the hearing I announced my decision to refuse both applications, for reasons to be given later. This judgment gives those reasons. It also deals with the fourth defendant's application, supported by the other defendants, for the discharge of the original INDO, on the grounds of material non-disclosure.

The history in outline

2. This is a claim by the limited company responsible for UKIP, the political party, against a group of individuals including the Party's former Leader, Deputy Leader, General Secretary and Returning Officer ("Mr Braine", "Mr Sharp" and "Mr Armstrong") and a former member who has IT skills ("Mr Dent"). The allegations pleaded in the Particulars of Claim are of breach of directors' duties and fiduciary duties, breach of confidence, and conspiracy to injure by unlawful means. In the circumstances, it may not surprise anyone to learn that the general background is one of internal political strife. Much of the Particulars of Claim, and a good deal of the evidence before me, is devoted to some fairly elaborate explanations of the disputes, and UKIP's account of the rights and wrongs of them. I shall have to make some reference to some of this, by way of background, but it is some very particular events on 15 and 16 October 2019 which prompted the claim, and it is those which must be the main focus of my attention.

3. On 17 September 2019, UKIP opened applications for election to its National Executive Committee ("NEC"). The Leader, Deputy Leader (where there is one) and the General Secretary of the Party are members of the NEC. As General Secretary and Returning Officer for the election, Mr Armstrong was also an ex officio member. The Party Chairman, Kirstan Herriot, was also an NEC member, as was the Party Secretary, Adam Richardson, a barrister.

4. By the time of an NEC meeting fixed for 12 October 2019, disputes or differences had arisen over Mr Armstrong's conduct as Returning Officer, and in particular the way in which he had or had not vetted applications from candidates for election, and tested them against the eligibility criteria. There was evidently heated debate at that meeting about the correct interpretation of the party constitution, with Mr Richardson taking one position, and Messrs Braine, Sharp and Armstrong taking a different one. The background to this dispute appears to be a factional contest, in which Ms Herriot's side feared that members of the "Batten Brigade", that is to say supporters of Gerard Batten, former UKIP Leader, were being put up for the NEC, inappropriately in their view.

5. After the meeting of 12 October, by email of Tuesday 15 October 2019, at 1pm, Ms Herriot moved the NEC that a vote be taken by email, to remove Mr Armstrong from his position. NEC members voted in favour of the motion. Mr Armstrong did not accept the validity of this move, and sought to persuade an employee at UKIP's head office by the name of Ruth Purdie to send out an email to the UKIP membership as a whole, allowing all prospective NEC candidates to stand, on the footing that he remained Returning Officer.

6. Later that afternoon, Mr Braine sent an email to Ms Purdie and her manager, David Challice, announcing that he had suspended Ms Herriot from her position, and instructing the staff not to take her calls. He also purported, as Party Leader, to suspend Ms Herriot and all other NEC members, as NEC members and as directors of the claimant company. The suspensions were imposed pending a police investigation into a complaint made by Mr Armstrong that there had been unauthorised access to his emails.

7. By a further email, timed at 23:37 on 15 October 2019, Mr Braine confirmed to Mr Challice and Ms Purdie that he had given Mr Dent authority to visit the Party HQ the following day, with instructions to carry out three tasks, and asked them to supervise Mr Dent in carrying them out. Mr Braine gave an explanation:

> "As far as I can see, Kirstan and the NEC are attempting to interfere in a Party election … It is my duty to see that the Returning Officer can run elections fairly. That is why the steps below are necessary".

8. The steps were these:

> "1, Lock her out of the chairman@ukip.org account and gain control
>
> 2, Enable Ruth to send out the emails from UKIPS Mail Chimp Account
>
> 3, Do a Microsoft Office 365 Evidence scan of the chairman's account and other UKIP.org account to gain evidence, for use later."

9. On 16 October 2019, Mr Challice emailed Mr Dent indicating that he did not wish him to come, but Mr Dent arrived at the HQ, and was eventually admitted. He arrived early in the morning and spent several hours on the premises, leaving at around 11am. In the meantime, it appears that members of the NEC, unaware of their suspension or considering it invalid, passed a resolution to remove all authorisation to UKIP systems from Mr Braine and Mr Armstrong. According to UKIP's own evidence, notice of that resolution did not reach Messrs Braine and Dent until about 11am on 16 October 2019. Later, Ms Herriot, or one of her associates, reported Messrs Braine, Sharp, Armstrong and Dent to the police for fraud, computer misuse, and offences under the Data Protection Act 2018.

10. Overnight on Wednesday 16 October 2019 and Thursday 17 October 2019, someone using the pseudonym "B.B" sent an email, from the address no-reply@munge.cockington.com, to a number of members of UKIP's NEC, in the following terms (The grammatical errors are in the original):-

> "Subject: You're ukip emails
>
> On Wednesday we legally got all your ukip emails for years, ones from or to you or which you sent from outside of ukip to any one with a ukip email.

> If any one says we do not have them or did not get them legally they are lying, that is why we removed the Party Secretary.
>
> After two days our B.B. team will be reviewing the emails for evidence. Then the useful parts can find their way any where, even your neighbours, we know where you are. Think how much you will lose.
>
> We give you a chance. By Midnight on Friday 18, you must resign from ukip and all your positions you claim in ukip, sending the resignation to both membership@ukip.org and action@integritypurple.com , who do not have any connection but can verify for us. Then we won't do any thing.
>
> Once you betrayed the Party Leaders you don't deserve pity but we give you're choice.
>
> B.B".

11. It presently appears that there were four recipients of this email. On Friday 18 October 2019, UKIP prepared an application notice seeking "a prohibitive injunction to prevent breach of confidential information and trespass at [its HQ]" by any of the four individuals who are now defendants to this action, and "Persons Unknown". This was done before the issue of any proceedings, and without notice to any of the respondents. The application ("the Without Notice Application") was supported by the first witness statement of Ms Herriot, signed and dated 18 October 2019. The suggestion was that the pseudonym "B.B" stood for Batten Brigade.

12. The the application was heard by Lambert J, DBE, sitting in the Interim Applications Court on 23 October 2019. Adam Richardson, the (former) UKIP Secretary, acted as Counsel for UKIP. He submitted an undated skeleton argument, running to 11 pages. The Judge was persuaded by him that it was legitimate to proceed without notice and that an injunction should be granted against all five respondents, until a return date hearing, which she directed should be listed in the Media and Communications List.

13. The Judge's Order ("the Without Notice Order"), sealed the following day, was based upon the Model Order attached to the Master of the Rolls' Practice Guidance of 2011, [2012] 1 WLR 1003. The Without Notice Order prohibited the "use, publication, communication or disclosure" by Messrs Braine, Sharp, Armstrong and Dent, and "Persons Unknown", of "the Information", a term defined in a Schedule as "any information originating from or purported information concerning a data breach of" a list of 143 email addresses or accounts, each of them ending @ukip.org. A written judgment given the same day, [2019] EWHC 2832 (QB) ("the Without Notice Judgment"), explained the Judge's reasoning. It identified the causes of action relied on by UKIP at that stage as misuse of private information, breach of confidence, and breach of directors' duties.

14. The Without Notice Order contained a provision requiring each of the respondents to disclose the following information to UKIP within 48 hours of service of the order, and thereafter to confirm it in a witness statement:-

> "(a) a detailed list of information obtained on 16 October 2019 from the claimant's mail server and to whom such information has been disclosed. And
>
> (b) the date upon which such disclosure took place and the nature of the information disclosed."

15. Between 29 October and 4 November 2019, the four individual defendants filed short witness statements in compliance with that part of the order. They were all in identical or similar terms. Two examples will suffice. Mr Dent, on 29 October 2019, made a statement saying, "I, Mark Dent, obtained no information on 16 October 2019 from the Intended Claimant/Applicant's mail server." Mr Braine's statement, dated 30 October 2019, stated "I, Richard Braine, obtained no information on 16 October 2019 from the Intended Claimant/Applicant's mail server." On 4 November 2019, Ms Herriot made a third witness statement, addressing the defendants' evidence. She maintained that their contents were "clearly contradicted by" the evidence in her first witness statement, and what she said in her third statement. That statement included an analysis of the "unified audit log" of UKIP's IT database. She maintained that this showed that Mr Dent had obtained information from the server, that he had "not provided information he obtained as ordered" by Lambert J. Ms Herriot did not claim any IT expertise, and at that stage no expert evidence had been obtained by UKIP.

16. On 5 November 2019, the case came before Nicklin J, in the presence of Mr Sharp but in the absence of all the other defendants. The Judge adjourned the return date hearing, giving directions for the service of application notices, evidence and skeleton arguments. On 15 November 2019, UKIP filed the application notice which is now before me for decision. The application asks the Court to "Uphold the interim injunction preventing the Respondents disclosing confidential information and order that Mark Dent's electronic devices be seized and searched". In support of those applications, UKIP has filed further evidence: a witness statement from Mr Challice, and an expert report from Zain Ul-Haq, Head of Cyber at an organisation called Cyfor ("the Cyfor Report").

17. The Cyfor Report contained an analysis of the available data, including in particular the unified audit log. Mr Ul Haq's conclusions included this: "I have insufficient information to determine whether data was exfiltrated during the security event". Under the heading "Next Steps", the Cyfor report said, "Further work is required using the computer utilised by the unauthorised user; forensic examination of such a machine will identify user activities, including details of browser activities and *any downloads that have occurred*" (my emphasis).

18. On 16 November 2019, each of the first three defendants filed further witness statements and, on 22 November 2019, Mr Dent filed his second witness statement, in answer to the application. The first three defendants' statements all reiterate that they obtained no information from the UKIP servers, denied responsibility for the blackmail email, and provided reasons to believe that the email had come from another source. In summary, Mr Dent's statement confirms that he was given and acted on the instructions of Mr Braine that I have set out earlier in this judgment. But he says that he did all this openly, and with the co-operation and under the supervision of the staff; that Mr Braine had all the authority vested in him as party Leader, to empower him to give these instructions; and that he does not and never did hold any of the Information. He denies

responsibility for, or even knowledge of, the blackmailing email. The defendants maintain that UKIP's own expert's report provides no support for UKIP's case, but demonstrates that the case is false.

19. It was a week later, on 29 November 2019, that UKIP issued a claim form against all the defendants, accompanied by lengthy Particulars of Claim. That was over a month after the application to Lambert J, and was the last day of the period allowed for by the Order made by her. The claim form identifies the claim as "a claim for breach of directors duties/fiduciary duties … breach of confidence and conspiracy to injure by unlawful means". It originally claimed "An injunction" but this was struck through for some reason. The Particulars of Claim contain a statement of truth by Ms Herriot, but are otherwise unsigned. They are long and discursive. They do claim "a prohibitive and mandatory injunction" as well as damages. The basis for that claim is set out in paragraphs [81-85] of the statement of case, which concludes that "the claimant has a reasonable apprehension that confidential information was taken and either has been or would be disseminated to person or persons unknown with the intention of causing harm." A further week passed between service of the claim documents and the hearing before me.

This hearing

20. At this hearing, UKIP is represented by Mr Loxton, who also appeared before Nicklin J. The only defendant represented before me is Mr Dent. He is represented by Ms Phillips. The other defendants have appeared in person, and I have heard brief supplementary submissions from them, they having agreed that Ms Phillips should go first, and generally adopting her submissions.

21. Ms Phillips resists both branches of the application, maintaining that there is no proper basis for any of the relief sought. She goes further, and applies (by means of her skeleton argument) for an order that the Without Notice Injunction be set aside on the grounds of material non-disclosure, submitting, more specifically, that the Judge was positively misled as to the law and the facts. In her skeleton argument, Ms Phillips summarises the position of her client as follows:

    (1) There were such serious defects in the manner in which UKIP obtained the Without Notice Order that it ought to be immediately discharged

    (2) UKIP's application discloses no basis in law or fact for either "upholding the interim injunction" or for the search and seizure of Mr Dent's (unspecified) electronic devices. There is no evidence of any wrongdoing by Mr Dent, nor indeed even of a threat of such wrongdoing.

    (3) In any event, there is no risk, imminent or otherwise, of Mr Dent publishing the Information, which he does not have.

22. The other defendants adopt those lines of argument

The issues

23. I find it convenient to address the issues in the following order:-

(1) Does the evidence presently before the Court justify the grant of

a) any interim injunction pending trial, restraining the defendants from using, disclosing, publishing or communicating any information?

b) a search and seizure order in respect of Mr Dent's computer?

(2) Should the Without Notice Order be set aside for material non-disclosure?

The current position

The threshold test

24. The first question is what standard the claimant's case must meet, in order to trigger the Court's discretion to grant an injunction. The skeleton argument for UKIP refers to two different tests: the conventional, *American Cyanamid* test, which requires the claimant to satisfy the Court that there is at least "a serious issue to be tried"; and the more exacting test prescribed by s 12 of the Human Rights Act 1998 ("HRA"), which has been described as "an enhanced merits test": *Brevan Howard Asset Management Ltd v Reuters Ltd* [2017] EWHC 644 (QB) [16] (Popplewell J).

25. Mr Loxton first sought to persuade me that this is not a case within s 12 HRA, so that his case needs only to satisfy the lower, *American Cyanamid* threshold. I consider that submission to be untenable.

26. Section 12 of the HRA applies "if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression": s 12(1)). That right is guaranteed by Article 10 of the Convention. It includes "freedom to receive and impart information and ideas without interference by a public authority". Section 12(3) prohibits the Court from granting relief so as to prevent publication before trial "unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

27. UKIP's argument is that, on the defendants' case, the relief sought would not, if granted, affect the defendants' exercise of their right to freedom of expression: because the defendants say they do not have any of the information the subject of the proposed injunction. They are therefore not asserting their Article 10 rights. This is a novel line of argument, and it must be said, a paradoxical one. UKIP's case is, and has to be, that the injunction sought *would* affect the defendants' rights; it is only on that footing that UKIP can justify asking for the order. It is impossible to see how a claimant could justify adopting, and asking the Court to adopt, simultaneously, two inconsistent positions: one (look at the defendants' case) for the purposes of deciding whether the application engages s 12, and the other (look at the claimant's case) in order to decide whether to grant the order sought. In addition, the second limb of the order sought is on any view one that would interfere with the Convention rights of Mr Dent; seizing his computer and inspecting its contents is the clearest interference.

28. Section 12(1) speaks of relief that "might" affect the right to freedom of expression. It is misconceived to try to test this by reference to the case for the defendant (a task that, by the way, could rarely if ever be undertaken on an application without notice). It seems to me that the Court has to approach the issue of whether s 12 is engaged by

reviewing the relief sought and taking a "worst case" approach. In any event, a claimant which contends that its case is strong enough to justify the grant of an order prohibiting a defendant from disclosing information cannot properly argue that the order it seeks is not capable of affecting the defendant's Article 10 rights. It follows that s 12(3) is engaged, and the Court can only grant the injunction sought if satisfied that UKIP is "likely" to establish that publication should not be allowed.

29. The meaning of the term "likely" in this context was authoritatively examined by the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253. The overall conclusion is encapsulated in the judgment of Lord Nicholls at [22]:

> "… the court is not to make an interim restraint order unless satisfied that the applicant's prospects of success at trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospect of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court that he will probably ('more likely than not') succeed at trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on Article 10 and any countervailing Convention rights."

30. Mr Loxton's second submission is that this is a case for the flexible operation of the statutory standard. If UKIP cannot show a probability of success at trial, its prospects of success are nonetheless "sufficiently favourable" to justify the imposition of an order, on the particular facts of the case. Mr Loxton points to passages from the judgment of the Court of Appeal in *ABC v Telegraph* [2018] EWCA Civ 2329*,* which highlight the passages in *Cream Holdings* at [22] and emphasised that there can be "no single, rigid standard governing all applications for interim restraint orders". There will be cases where it is necessary for a court to depart from the general approach identified above, where "a lesser degree of likelihood will suffice." Lord Nicholls went on to identify circumstances where this may be so, including those

> "… where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

31. These submissions of Mr Loxton are understandable in the light of the manifest weaknesses in UKIP's evidential case, to which I shall come in more detail. But it is hard to see any other justification for them. I am not persuaded that there is anything about this case that warrants the grant of an injunction in favour of the claimant even if it cannot establish, on the evidence now before the Court, that success at trial is more likely than not. The two examples given by Lord Nicholls are inapposite. This case has been on foot for some six weeks or more already. There have been two rounds of evidence, and I have a lever arch file of documents. The central issues on this application are nonetheless clear and uncomplicated.

32. At the heart of the application is the question of whether it has been shown to the appropriate standard that the defendants, unless restrained, may disclose the allegedly confidential information. I needed no more time to hear or to give proper consideration to the evidence or the submissions on that issue. Nor has it been established that the potential harm, if there were a disclosure, would be "particularly grave". The threatened harm identified in the Particulars of Claim is that the information "would be used as 'evidence' to discredit political opposition". Lord Nicholls' examples were non-exhaustive, but I have not been given any other basis on which to conclude that I should depart from the general rule in this case. Even if I were to do so, I would conclude that the prospects of success are not sufficiently favourable to justify the grant of any of the relief now sought.

Application of the threshold test in this case

33. A claimant seeking an INDO must show that there is a threat or risk of unlawful conduct, infringing the claimant's rights, which merits an order restricting the defendant's freedom of expression. It is one thing to establish that an act would or might be unlawful, if carried out. It is another to show that there is a real and credible threat to carry out that act, or a sufficient risk of that taking place. As Eady J observed in *A v B* [2005] EWHC 1651 (QB) [2005] EMLR 36 [14], "As a preliminary step, it is for the Claimant to demonstrate that an actionable publication is about to take place." The claimant must establish a sufficient basis for concluding that the defendant is or may be responsible for the threatened publication.

34. The hearing of this application took place on the assumption that UKIP would be able to show at a trial that the access Mr Dent obtained to the UKIP headquarters, and to its server, was unauthorised and wrongful. Ms Phillips did not concede the point, far from it: her skeleton argument identified some features of the Particulars of Claim which suggest that Mr Dent's had authority to access the systems, and it is of course the defendants' case that this was so. But Ms Phillips agreed that the application of the somewhat complex provisions of UKIP's constitution to the facts of this dispute were not matters that I could resolve, or needed to resolve, at this hearing.

35. Although several causes of action are relied on in the Particulars of Claim, it is sufficient to address the claim in breach of confidence. If that is sound (to the extent necessary at this stage), it is sufficient for UKIP's purposes. If breach of confidence cannot get the Party home on this occasion, I fail to see how any of the other causes of action could do so.

36. Ms Phillips is critical of the Particulars of Claim, and with some justification, but she does not submit that the information at issue contains nothing that is confidential in character, nor does she dispute that someone gaining access to it without authority would come under a duty to maintain confidentiality in the information. That is a realistic stance. "Correspondence" is one of the matters expressly protected by Article 8(1) of the Convention and, although that principally reflects the law of personal privacy, this right can be relied on by corporations in an appropriate case. At all events, corporate correspondence folders would seem on the face of it to be a repository of at least some confidential information.

37. The submissions of the parties have not covered the question of whether such rights of confidence as exist in relation to the email folders are enforceable by UKIP, as distinct

from the individual account holders; but there are cases in confidence and privacy which a company can sue on behalf of staff: see, for instance, *Ashworth Hospital Authority v MGN Ltd* [2001] 1 WLR 515 [52] (affd [2002] UKHL 29 [2002] 1 WLR 2033), *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB) [2005] EMLR 31. Any issue as to whether UKIP can sue in respect of confidential information held in the email accounts of individuals with @ukip.org addresses would have to be resolved at a trial.

38. As I have indicated, this is not a case in which it could realistically be argued (at least, not on the evidence now available) that the public interest would justify the carrying out of the blackmail threat. There has been no suggestion that the email accounts contain information of such importance to the public interest that the public interest in the observance of duties of confidence would be outweighed or should be overridden. The demand for prompt resignation addressed to several senior UKIP figures would appear to be unwarranted, and the threat to disclose email correspondence appears on the face of things to be plainly illegitimate.

39. Thus it is that the central questions are whether UKIP can show a sufficient likelihood of establishing at a trial (1) that the individual defendants are responsible for the blackmailing email and (2) that the email represents a credible threat by them, or someone else, to disclose the (ex hypothesi) confidential information, to the detriment of UKIP's rights. Mr Loxton has submitted that his client's case satisfies the normal s 12(3) standard, and is more likely than not to succeed at trial. As I have indicatd, however, in my judgment, the application falls short on both these counts, even if the more flexible standard were applied.

40. I start with the pleaded case. In my judgment, the Particulars of Claim allege, clearly enough for present purposes, unauthorised and wrongful access to UKIP's server by Mr Dent, on the instructions of the other individual defendants. The difficulty comes when the pleader(s) seek to grapple with what Mr Dent did, by way of the acquisition of information. I have already quoted the high point of the pleaded case; the most that is alleged is a "reasonable apprehension" that confidential information was taken and has been or would be disclosed. That, at least in the circumstances of this case, is not enough. UKIP's case, verified by Ms Herriot's statement of truth on 29 November 2019, is that certain allegedly confidential information (which is not identified) was *either* "viewed or downloaded". It is conceded that they cannot say which, "as the C's version of Office 365 does not differentiate."

41. That way of putting the matter appropriately reflects the Cyfor Report, which contains an "Office 365 Timeline" of the various log entries, with comments. A representative illustration of the forensic conclusions drawn is to be found at paragraph 6:

> "I am unable to determine whether the above activities were 'view' events, using the web interface, or whether the mailbox export was downloaded to the user's computer; these activities are not considered separate actions, as recorded by Office 365 audit logs."

42. This is not enough to show that success at trial is likely, in any sense, either against the named defendants, or against Persons Unknown. The defendants are correct in their submission that the claimant not only falls short of pleading a sufficient case, it also

(and by the same token) falls short evidentially. UKIP has not pleaded as a fact, because it lacks an evidential basis to assert, that Mr Dent acquired any of the allegedly confidential information. It follows that he cannot be accused of passing that information to the other named defendants, or to Persons Unknown, and the Particulars of Claim contain no such averment. It follows, further, that the case against the other named defendants and Persons Unknown lacks a sufficient foundation in the pleaded case or the evidence. Without acquisition of the allegedly confidential information there can be no credible threat by anyone to make wrongful disclosure of that information.

43. The matter goes further than this, for several reasons. First, there is contemporary email correspondence that shows that when the accusation initially made against these defendants was put to Messrs Braine and Dent by Mr Challice it was swiftly denied. On 18 October 2019, Mr Challice sent Ms Herriot and Mr Richardson an email report on the events of that day ("the Challice Report"). He reported that Messrs Braine and Dent had arrived at UKIP HQ at 10.30am, and sought to enter the building. Mr Challice asked Mr Braine if he was aware of the blackmail email. He reports that "Richard [Braine] looked a bit shocked and said: 'No, I had no idea of this'", then called over Mr Dent. Mr Challice then put it to Mr Dent that the blackmailing email had come from a Cockington address, and that this is where Mr Dent lived. Mr Dent repliled "I don't live in Cockington. I live in Livermead." When it was put to him that this was the same electoral area, Mr Dent turned to Mr Braine and said "More disinformation. They're still at it."

44. In addition, Mr Dent has now not only served two witness statements in which he denies acquiring the information complained of. He has also, in his second statement, provided some additional evidence that strongly supports the view that, on a true analysis, the expert report provided by Cyfor proves that no such information was obtained by him, or anybody else. He says, correctly, that the Cyfor report discloses no evidence that he downloaded elements of UKIP's database or systems, or that any data was downloaded. He points out, correctly, that the logs produced and discussed by Ms Herriot and Mr Ul-Haq contain no reference to any attempt, successful or otherwise, to download any data. As I put to Mr Loxton in the course of the hearing, it is not just a case of Cyfor being unable to say one way or the other whether a download occurred. The report, following examination of all the available data, contains no indication that a download occurred or might have occurred.

45. Mr Dent takes the matter further, as he goes on to assert that "if data had been downloaded it would have recorded the phrase 'download to computer' on the logs", which it does not Mr Dent fairly disclaims expertise, but he is a McAfee Certified Security Specialist, and his evidence is that

> "… it is common knowledge within the IT industry that the logs provide a definitive guide to what actions have been undertaken to a system. … I have my own Office 365 Email Platform and out of interest downloaded files from my system on 12 November. I exhibit a screen shot **[MD1-08]** from my own MS 365 'activity log' that clearly records "*Download files to computer*"."

That evidence was filed on 22 November 2019, two weeks before this hearing, and remains unchallenged.

46. There is other evidence, and there are other considerations, that were not before the Court at the Without Notice hearing. Among the points are these. Mr Braine's second witness statement says (and UKIP has not denied) that the Party had received two spoof or hoax emails in the month prior to the events with which I am now concerned. Mr Sharp's second statement makes the point that UKIP had nothing concrete on which to base a contention that the defendants were responsible for the blackmailing email. On the contrary. There were multiple reasons to doubt that this was the case. The evidence now shows or suggests that the email was sent to a number of private email addresses; in other words, the blackmailer(s) were not using the @ukip.org addresses which had allegedly been attacked. Mr Braine, who is alleged by UKIP to have been behind an attack on UKIP's email systems, had driven through the night from Wigan to UKIP HQ in Newton Abbott on 18 October 2019, to seek help with access to the UKIP system. That made no sense, if the suspicions entertained by Ms Herriot were well-founded. After the blackmailing email, there had been no more such emails, nor any other evidence that the defendants were behind the first and only one. By the time the matter came before the Court on 23 October, five days had passed since the deadline set in that email, and the threat it contained had not been carried out.

47. I would add the following. First, Mr Braine's instructions to Mr Dent were given in writing, openly, and shown to UKIP HQ staff. It is inherently unlikely that a person intent on blackmail would act in such a way. Secondly, there is no obvious match between the instructions given to Mr Dent, and the information which the blackmailer(s) threatened to disclose. The instruction was to obtain "evidence" which, against the background of the dispute then under way, appears to have been evidence of misconduct by Ms Herriot, not the entire contents of the UKIP email server. It does not appear, from the evidence, that Ms Herriot is one of the four individuals said to have received the blackmail email (and UKIP has confirmed she was not). Thirdly, the email itself has features, including the numerous grammatical errors that seem to me to be of some significance. I have available, as UKIP did, a number of examples of the writing of Messrs Braine and Dent, in the form of emails. They are not indicative of a person who does not know the difference between "your" and "you're", or believes that "anyone" is two separate words.

48. Mr Loxton has sought to persuade me that the Court can draw an inference that the email of instruction does not provide the full picture, and that Messrs Braine and others were or may have been discussing the matter "offline" in ways that are not apparent. He has submitted that the Cyfor report suggests that there may be other evidence to link the defendants with the acquisition of the information which the blackmailer(s) threatened to disclose. The reason that evidence to that effect is not available is, according to the Cyfor report, that UKIP's Office 365 licence did not afford it access to the relevant metrics. This, with respect, is speculation and Micawberism. At this stage of the case, UKIP has no solid foundation for its inferential case, and is suggesting or hoping that something might turn up.

49. I would add that the application for an order for inspection is seriously deficient. Orders for the seizure and search of electronic devices are intrusive, and require clear justification and adequate safeguards. The high point of the evidence is the statement in the Cyfor report that "A forensic examination of the computer used by 'mark dent@ukip.org' **will** be able to determine the user's activities, and attribute said activities to an individual" (emphasis added). An earlier passage puts it lower, at "may".

But on either view, the prospect that something useful might emerge from this intrusive order is speculative at best. The Cyfor report identifies no reason to think that the user's activities, once identified, would show or suggest a download of the data at the centre of this case. UKIP prepared no draft of the order it was seeking against Mr Dent, so I cannot tell quite what form of inspection it had in mind or what safeguards, if any, it would have proposed.

50. UKIP's case has, throughout, been founded on the coincidence of two central events: Mr Dent's visit to the Party HQ and his access to the server, coupled with the blackmailing email. It does indeed, on the face of it, seem highly unlikely that these two events were entirely coincidental. The terms of the blackmailing email suggest clearly that the person(s) unknown responsible for the email must have had some information about what had taken place at UKIP HQ, and about the removal of the Secretary. It is not hard to see why, at first blush, Ms Herriot and others suspected, as I accept they did, that Mr Dent had gained unauthorised access to computer files and that he had probably, in the course of that activity, conducted one or more downloads that lay behind the blackmail email.

51. However, UKIP plainly should have given thought to the possibilities that Mr Dent had not gained access to the email data referred to in the blackmail email, and that the email was a spoof, or hoax, a communication sent by someone who did not in fact have access to the allegedly confidential information. I have outlined some of the chief features of the case, as it now appears, that strongly suggest that this is the true position. As I shall explain, UKIP had in fact recognised and considered these possibilities before applying to the Court, but without fully or (in my judgment) sufficiently investigating them and disclosing its internal deliberations to the Judge. I shall refer in the next section of this judgment to the information they had available, which was of some real significance. There were in my judgment some important oversights, in the course of investigating those suspicions and putting UKIP's case before the Court at the Without Notice hearing.

52. More importantly for present purposes, however, the conclusion on all the evidence as it now stands before me must be that the prospects of UKIP establishing at a trial that any of the defendants to this claim obtained, and then threatened to disclose, confidential information derived from UKIP's email database are slender in the extreme, or worse. It seems to me arguable that the Particulars of Claim fail to disclose a reasonable basis for a claim and/or that the claim has no real prospect of success at a trial.

Discharge for material non-disclosure?

Legal framework

53. Section 12(2) HRA prohibits the Court from granting an INDO against a respondent who is not present or represented, unless all practicable steps have been taken to give notice, or there are compelling reasons to proceed without notice. The Master of the Rolls' Practice Guidance emphasises, at para 21, that "Failure to provide advance notice can only be justified, on clear and cogent evidence". An example of a compelling reason is "that there is a real prospect that were a respondent or non-party to be notified they would take steps to defeat the order's purpose … for instance, where there is convincing evidence that the respondent is seeking to blackmail the applicant." That

was the basis on which UKIP justified applying without notice in this case, on the footing that the respondents were or might be the blackmailers.

54. The Practice Guidance goes on (at para 30), to summarise the duty of an applicant without notice:

> "Particular care should be taken in every application for an interim non-disclosure order, and especially where an application is made without-notice, by applicants to comply with the high duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case."

55. Aspects of these points, including the notions of "material" and "significant", need some elaboration. I take the legal principles relating to disclosure of factual matters from my judgment in *YXB v TNO* [2015] EWHC 826 (QB) [19-20], omitting internal citations. They are as follows:-

> "19 …
>
> ii) The duty requires the applicant to make a full and fair disclosure of those facts which it is material for the court to know … Put another way, disclosure should be made of "any matter, which, if the other party were represented, that party would wish the court to be aware of" ...
>
> …
>
> 20. …
>
> i) The duty applies to facts known to the applicant and additional facts which he would have known if he had made proper inquiries before the application."

56. As to the law, as I said in *Birmingham City Council v Afsar (No 1)* [2019] EWHC 1560 (QB) (again, omitting internal citations):

> "22. … the authorities are clear: there is a "high duty to make full, fair and accurate disclosure … and to draw the court's attention to significant ... legal and procedural aspects of the case" … The duty is owed by the lawyers also. "It is the particular duty of the advocate to see that … at the hearing the court's attention is drawn by him to … the applicable law and to the formalities and procedure to be observed" …
>
> 23 … Unsurprisingly, it has been held that the duty of full and frank disclosure requires a party, that applies without notice for an interim injunction to restrain freedom of expression, to draw the Court's attention not only to s 12(2) HRA, but also to the requirements of s 12(3), identifying the statutory threshold for the grant of any such relief …."

57. The means by which these duties are to be performed are not prescribed, but the Practice Guidance says this (at para 30):

> "The applicant's advocate, so far as it is consistent with the urgency of the application, has a particular duty to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared personally by her or him and lodged with the court before the oral hearing; and that, at the hearing, the court's attention is drawn to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed"

58. And, as I said in *Birmingham CC v Afsar* [24],

> "… it is well recognised that the applicant's skeleton argument is a convenient vehicle for the discharge of this duty [of full and frank disclosure]. It is common practice for the skeleton argument to contain a distinct section headed (for instance) "What the respondent might say". Sometimes the evidence also deals separately with the duty of full and frank disclosure. This helps concentrate the minds of the applicant, the applicant's legal team, and the Judge on the facts and arguments that would or might be put forward by the absent respondent."

59. As for the consequences of a breach of duty, I take the following points from *YXB v TNO* [19-20], where the source authorities are identified:

(1) Non-disclosure of material facts on an application made without notice may lead to the setting aside of the order obtained, without examination of the merits. It is important to uphold the requirement of full and frank disclosure.

(2) If material non-disclosure is established the court will be "astute to ensure" that a claimant who has obtained an injunction without notice and without full disclosure "is deprived of any advantage he may have gained".

(3) The rule in favour of discharge also operates as a deterrent to ensure that those who make applications without notice realise the existence and potential consequences of non-disclosure.

(4) The discretion to continue the injunction, or to grant a fresh one in its place, is necessary if the rule is not "to become an instrument of injustice"; it is to be exercised "sparingly", but there is no set limit on the circumstances in which it can be exercised.

(5) But the court has a discretion to set aside or to continue the order. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided. The answer to the question whether the non-disclosure was innocent is an important, though not decisive, consideration.

Application of principles

60. In support of her application to discharge, Ms Phillips makes three main points. First, that UKIP wrongly invited the Court to adopt and apply the *American Cyanamid* test, in a case where s 12 HRA was plainly engaged. The application of the correct test would have led, it is submitted, to the refusal of the application. Secondly, it is said that UKIP was guilty of material non-disclosure of fact, in several respects. Thirdly, it is argued that the Order sought and granted was far too wide and unspecific.

61. The third point has some, but limited merit. Some criticisms can properly be made of the breadth of the definition of Information in the Without Notice Order. It could be said that there was an insufficient evidential basis for restraining the use of all 143 accounts, when only 4 individuals received the blackmail email. Further, the accounts protected from access include those of the first and second defendants, for reasons that are unclear. The Order proceeds on the assumption that everything within every UKIP email account is confidential, which would seem to be too broad. These however are points of detail, and not matters that in my judgment could justify setting aside the Without Notice Order. However, there is merit in all Ms Phillips' other submissions on this aspect of the case.

62. Mr Richardson's detailed skeleton argument recorded (at para 5.11) that UKIP was "acutely aware of their duties in relation to an application for an interim injunction without notice". It stated that the applicant had attempted to give a full picture of the nature of the disputes between the parties "and any representations the Respondents may make". However, the skeleton, and the note of the hearing which Mr Richardson very properly made afterwards, make it clear that the application was advanced to the Court on a false legal basis, as the defendants submit. And although the supporting evidence contained some items of "full and frank disclosure" these were scattered here and there throughout the witness statement of Ms Herriot; and the defendants have identified a number of respects in which the disclosure of material facts was deficient, or non-existent.

The law

63. Mr Richardson's skeleton argument identified the relevance of Articles 8 and 10 of the Convention, and addressed the competing claims of each. But the application was explicitly made on the footing that the only merits test which had to be satisfied on the interim application was the *American Cyanamid* test. The argument was that there was a serious issue to be tried; UKIP could not be adequately compensated in damages; whereas damages would be an adequate remedy for the respondents, should they ultimately succeed (Skeleton argument para 5.15). There was no reference to s 12(3) HRA. Indeed, the matter goes beyond this, as there was no mention of s 12 at all; and so the skeleton failed to draw the Judge's attention to the important threshold requirement of s 12(2). The record shows that, despite this, the Judge applied the correct tests. The Without Notice Order recites that the Judge considered s 12, HRA, and explains why she concluded that s 12(2) was satisfied. The judgment also shows that the Judge concluded that UKIP was "likely" to succeed at trial. On the material before the Judge that finding is entirely understandable. But the fact remains that UKIP was guilty of a serious breach of duty in failing to draw the attention of the Court to what was probably the single most important point of law in the case.

64. The omission is all the more striking, when it is noted that the skeleton argument cited a passage one of the more recent decisions on INDOs in the context of confidential information, *ABC v Telegraph Media Group Ltd*, a case said to have "similar features" to the present case. Paragraphs [7-16] of the judgment in *ABC* set out the "principles of law which must guide us", citing Article 10, section 12(3) and *Cream Holdings.* This part of the judgment was not drawn to the Judge's attention at the Without Notice hearing. *ABC* was cited only for what it says, in paragraph [22], about how to strike the balance between confidentiality and the public interest. That, on the facts of the case, was hardly the main point at issue. It was right to address the question of whether there could be a public interest in the threatened disclosure; but any argument that it would be in the public interest to carry out the blackmail threat in this case would, at least on the evidence available to me, be very weak. I should make clear that, although in the circumstances the failure to cite s 12(3) is remarkable, it has not been suggested and I do not consider that it was deliberate.

The facts

65. Ms Phillips has made the following points:

(1) It is now known, from a copy document disclosed by UKIP, that the blackmailing email came to Ms Herriot's attention by means of an email from UKIP member Neil Hamilton, and (importantly) that he wrote to Ms Heriot and others, that he considered that the email "may be a spoof". Ms Heriot's first witness statement did not disclose this. Instead she put in evidence a different version of the text of the blackmail email, embedded in an email sent by her to "David" (presumably Mr Challice) in which she drew attention to Mr Dent's alleged lack of sincerity. No reference was made in her statement to the possibility that the document was a spoof.

(2) The email had been sent to Mr Hamilton's private email address, and not his UKIP address. The failure to reveal Mr Hamilton's email to Ms Heriot meant that was not disclosed to the Court either.

(3) UKIP's case at the Without Notice hearing was that the blackmail email had been sent "to several NEC members" (Skeleton Argument para 1.18). The claimant did not disclose to the Court at the Without Notice hearing and still has not disclosed, the full extent of the circulation of the blackmail email. The picture that now emerges is that it was sent to four NEC members, not more. The impression conveyed to the Court at the Without Notice hearing was materially different.

(4) Although the Challice Report was in the evidence before the Court at the Without Notice hearing, no attention was drawn to it, as should have been done.

(5) There was a failure to draw attention to the significant fact that the blackmail deadline had passed without the threat being carried out.

66. Ms Phillips also submits that there was a failure to disclose important facts relating to Mr Richardson, whom she suggests was playing an uncomfortable and possibly improper role as advocate and potential witness. It is of course no part of my function to oversee the professional conduct of Counsel. Ms Phillips submits that this dual role

is problematic when it comes to the discharge of the duty of full and frank disclosure, and that it "clearly had an effect, or at the very least the perception of an effect, upon the way in which the case was presented to the court" in the absence of the defendants. As I made clear at the hearing, I do not propose to make any findings about Mr Richardson's professional position. What I will say is that there is some force in Ms Phillips' related submission, that the chronology put before the Court was somewhat tendentious.

67. Mr Loxton has submitted that there is nothing of real significance in the Neil Hamilton email, and that the other documents to which Ms Phillips has drawn attention were disclosed to the Judge, in the sense that they were in the papers before her. He has also said that the Judge was not "hoodwinked" and, a number of times, that nothing was withheld from the Judge "that would have made a material difference to the outcome" (or words to that effect). With respect, submissions to this effect fail to acknowledge or engage with the well-established requirements for applications without notice that I have summarised above. The duty is not limited to not "hoodwinking" the Judge, or avoiding misrepresentations that would change the outcome. Nor is the duty discharged by putting a document in a bundle. The obligation is to disclose that which, if present, the defendants would have wanted the Court to know; and it extends to drawing attention to the most important features of the evidence or law that could undermine the application.

68. In my judgment, there was in this case a significant failure to make full and frank disclosure of some important matters of fact. Ms Phillips' first point takes on greater significance in the light of Mr Braine's evidence of previous hoax emails. But all five of Ms Phillips' points have some force. I have assessed them in the context of what in my judgment was an unsatisfactory approach to the critical issues, of the credibility of and responsibility for the blackmail email. Ms Herriot's witness statement and Mr Richardson's skeleton argument should have contained a clearer account of the reasons for and against the conclusion, urged on the Court, that Mr Dent had obtained confidential information and that the defendants and Persons Unknown were responsible for the blackmail email. As I have noted, in a departure from best practice, the witness statement did not deal with "full and frank disclosure" compendiously, in a distinct section, but piecemeal. The same is true of the skeleton argument. Whether as a result or not, there were some significant flaws.

69. Ms Herriot's email to Mr Challice on 17 October 2019 said that "I'm not able to confirm ... yet" that the email was from Mr Dent. The following day, she said in para 42 of her witness statement that it was "currently unclear what damage Mr Dent has done and what data, personal or otherwise, he may be in possession of". But she then went on, in paragraph [55], to speak of a "data breach" which "took place at the command" of Messrs Braine, Armstrong, Sharp and Dent". Of this she said, "I can only conclude that the person sending the email is either one of them or an agent of them". Mr Richardson's skeleton argument said that the blackmail email "was believed to have originated from Mark Dent though this has not been proven", and acknowledged that UKIP "does not know what was taken and what has been done with it". But it went on to treat the acquisition of information as an established fact, asserting that "the point of origin is clear." Neither Ms Herriot nor Mr Richardson drew attention to the factors pointing in the opposite direction that I have mentioned as being present in the evidence before the Court, or the other material available to them.

70. I add that although there is no evidence of any expert's report prior to the Cyfor report dated 15 November 2019, and I do not know when it was that UKIP first instructed IT experts to examine its systems to establish the true position, there is an email in the evidence dated 16 October 2019, in which Mr Richardson asks Ashley Johnson of iQual, "Is it possible to create activity logs in office365 globally for UKIP.org so we can see what Mark Dent actually did?". That is seven days before the Without Notice hearing, and it shows at least that at this early stage UKIP was alive, rightly, to the importance of expert analysis. I have not identified any reference to this in the skeleton argument or the note of the hearing. It is unclear when Mr Ul Haq was instructed, and how long he took to prepare his report. It is not clear why no expert's report was obtained in time for the hearing on 23 October 2019.

71. It does not follow from my conclusions that the right course is to set aside the original Without Notice Order. For the reasons given in the previous section of this judgment, UKIP has failed to show that the interim injunction should be continued. The defendants do not need to rely on the Court's discretion to refuse continued relief by way of a sanction for past failures. And, at least on the defendants' case, the Without Notice Order has had no practical impact on them, as they were in no position to do what the Court had restrained them from doing. In my judgment the most just and proportionate course is to order UKIP to pay its own costs of the Without Notice Application, and any costs incurred by the defendants as a consequence of that application. I am prepared to hear argument on the matter, but the outcome of the application before me means that the starting point at least must be that UKIP will have to pay the defendants' costs of the application initiated by the Notice dated 15 November 2019.