Neutral Citation Number: [2017] EWHC 242 (QB)

Case No: HQ16X03479

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2017

Before :

SIR MICHAEL TUGENDHAT
sitting as a Deputy Judge of the High Court

- -

Between :

(1) HARMINDER BAINS
(2) LAURIE KAZAN-ALLEN
(3) VNP **Claimants**

- and -

(1) ROBERT MOORE
(2) K2 INTELLIGENCE LIMITED
(3) MATTEO BIGAZZI **Defendants**

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Guy Vassall-Adams QC & Lorna Skinner (instructed by **Leigh Day Solicitors**)
for the **Claimants**
Desmond Browne QC & Adam Speker (instructed by **Grosvenor Law**)
for the **Defendants**

Hearing dates: 31st January and 1st February 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Sir Michael Tugendhat
.....

Sir Michael Tugendhat:

1. This is the adjourned hearing of applications which came before Elisabeth Laing J on 5 December 2016. She resolved certain matters, but adjourned the remainder due to there being insufficient time for dealing with them. In relation to anything said at the hearing about the identity of the Second Defendants' clients (which is not included in this judgment) there are RESTRICTIONS ON REPORTING AS SET OUT IN PARA 21.

2. The Claim Form was issued on 5 October 2016 and has been amended by order of Elisabeth Laing J dated 28 November 2016. The brief details of the claim, which have not been amended, include the following:

> "The Claimants' claims arise from (a) the Defendants' activities from about 2012 which consisted of the First Defendant acting with and on behalf of the Second Defendant and/or Third Defendants', infiltrating the Claimants' anti-asbestos campaigners' network, obtaining their personal, private and/or confidential information and disclosing it to the Second and/or Third Defendants who were at all material times acting on behalf of clients with interests in the asbestos industry; and (b) the onward disclosure of that information by the Second and/or Third defendants to their clients".

The relief claimed includes (1) damages for breach of confidence and/or misuse of private information; (2) compensation pursuant to the Data Protection Act 1998 s13; (3) an injunction to restrain the Defendants from using and/or disclosing the said information; (4) further relief under the Data Protection Act 1998 with which I am now not concerned; (5) delivery up and/or destruction and/or permanent deletion of all documents containing the said information; and (6) account of profits.

3. The main issue before the court today is relief sought by an application notice dated 21 November 2016, namely a delivery up order to be made before service of the Particulars of Claim. There is also an application, made by notice dated 20 January 2017, for permission to amend the claim form again, in this instance to add as claimants four individuals. In respect of one of them, Professor O'Neill, the Second and Third Defendants have consented. In relation to the others the position is explained below.

4. It is necessary to set out in full parts of the draft order for delivery up. They are the following:

> "DEFINITIONS –
>
> 9. In this order:
>
> (a) References to "Project Spring" are references to the project which lasted between about June 2012 and October 2016 whereby the First Defendant allegedly engaged in espionage against the Claimants and the ban asbestos network under the direction of the Second and Third Defendants.

> (b) References to the Confidential Information are references to:
>
> (i) Any information provided by or derived from communications from the First Defendant pursuant to "Project Spring";
>
> (ii) The categories of information set out in Confidential Schedule 3 to this Order.
>
> (c) …;
>
> (d) References to "the Client" are references to any individual, company or other entity which, directly or indirectly, provided instructions or funding to the Second or Third Defendant pursuant to Project Spring, or which received any information from the Second or Third Defendant pursuant to Project Spring."

5. Confidential Schedule 3 lists nine categories of documents;

(1) Files and documents relating to the Rotterdam Convention Alliance (ROCA) including: (a) email communications between members of the mailing list of ROCA; (b) Minutes of Skype calls between members of ROCA.

(2) Files and documents relating to the 7th and 8th Conference of States Parties of the Rotterdam Conference (COP) including: (a) email communications relating to the COP; (b) Video and audio footage recorded at the COP; (c) notes of meetings held in preparation for, and, at, COP.

(3) Files and documents relating to the Asian Ban Asbestos Network (ABAN) including: (a) email communications relating to the ABAN; (b) records of meetings held by the ABAN (including Thailand, Bangladesh, Vietnam, Indonesia); (c) Records of interviews carried out with the members of ABAN; (d) Records of interviews with, and communications with Dr Tran of the Ministry of Health Vietnam.

(4) Files and documents relating to international conferences and meetings organised by the anti-asbestos campaign including: (a) the meeting of the Asbestos Diseases Awareness Organisation in Washington in 2012; (b) the International Mesothelioma Conference in Birmingham in May 2016.

(5) Files and documents protected by legal professional and/or litigation privilege of the Claimants or any of them or any individuals or organisations that each or any of them was acting on behalf of including: (a) email communications with and between legal representatives; (b) notes of meetings with solicitors and/or counsel; (c) records of the Claimants' funding arrangements; (d) documents recording advice received from legal representatives; (e) documents containing expert evidence including environmental assessments: (f) email communications concerning litigation strategies and negotiating positions.

(6) Files and documents relating to interviews with the victims of asbestosis and/or mesothelioma in the UK and abroad including: (a) video interviews conducted by VNP relating to ETEX'S asbestosis victims; (b) video interviews and notes taken by the First Defendant.

(7) Files and documents relating to interviews and/or meetings with anti asbestos activists and campaigners in India, Thailand, Bangladesh, Vietnam and Indonesia.

(8) Files and documents concerning the personal affairs of the Claimants.

(9) Files and documents concerning the financial affairs of the Claimants."

6. The draft Order contains exceptions, firstly in respect of legal professional privilege and, secondly, for responses which might incriminate the Defendants. Subject to these, the order sought is as follows:

> "DELIVERY UP AND DELETION
>
> 11. Subject to the savings of paragraph 13 below…the Second and Third Defendants shall, by 4pm on [date] 2017 deliver up to the Claimants' solicitors Leigh Day to be preserved and securely held by them:
>
> (a) Copies of the following containing the Confidential Information or any part of it as are in his custody or control including but not limited to:
>
> i. Any/or all hard copy documents;
>
> ii. Any/or portable/digital external storage media containing electronic copy documents;
>
> iii. One electronic copy of each document held electronically;
>
> iv. Any notes, reports, index or catalogue based on or derived from the Confidential Information.
>
> (b) Copies of all reports, communications, notes of meetings and audio or video recordings of meetings prepared for the purpose of Project Spring by the First Defendant and/or Second Defendant and/or Third Defendant which were provided to the client.
>
> (c) All time sheets for the period from 1 February 2013 to 1 October 2016 submitted by the First Defendant to the Second or Third Defendant.
>
> 12. Subject to the savings at paragraph 13 below… the Second and Third Defendants shall, by 4pm on [date] 2017 cause the

> Confidential Information to be permanently deleted from all devices and computer systems within their custody or control.
>
> 13. The Second and Third Defendant's solicitors be permitted to retain one hard copy and one electronic copy of the Confidential Information by the Second and Third Defendants to them to be held by them on the following terms:
>
> (a) It shall be held securely and treated as confidential;
>
> (b) It shall be used solely for the purpose of these proceedings;
>
> (c) It shall be destroyed or permanently deleted at the conclusion of these proceedings or at such earlier date as may be agreed with the Claimants' solicitors;
>
> (d) The Second and Third Defendant's solicitors shall confirm the destruction or permanent deletion carried out pursuant to sub-paragraph (c) above in a witness statement verified by a statement of truth".

7. The stance of the Second and Third Defendant's on these applications has been set out in correspondence and in the skeleton argument of the Second and Third Defendant's as follows:

> "a. the delivery up application… [these Defendants] have said that they are prepared to deliver up documents at this stage which were obtained or generated or created in the course of their relationship with [the First Defendant] which [1] referred to each of the Claimants, and if and only if they are arguably confidential and/or private information and/or [2] contain personal data about each of the Claimants
>
> b. [these Defendants] are prepared to consent to this limited form of order but not to an order in the terms sought…
>
> c. [these Defendants] would continue to submit to an interim injunction against communication or disclosure but only in a narrower form.
>
> d. the stance they take now remains the same as it was going to be (and the Claimants were informed it was going to be) before Elisabeth Laing J had there been time to hear this application.
>
> e. the Joinder Application…[these Defendants] consent to the joinder of Rory O'Neill but not to the other three individuals… none of the other three raise an arguable case that their private and/or confidential information has been misused and none of them put forward proper reasons to be joined in this litigation…"

8. Extensions of time have been given for service of the Particulars of Claim. The most recent extension of time is in paragraph 3 of the order of Elisabeth Laing J dated 28th November 2016. It provides for the Particulars of Claim in the claims against all Defendants to be served by 4pm 21 days from completion of delivery up by the Second and Third Defendants. By letter dated 23 November 2016 solicitors for the Second and Third Defendants had written that there appeared to be no reason why the Claimants could not plead their claims against these Defendants, and against the First Defendant, based upon the material they already had obtained, but indicated that they were willing to consent to an extension of time in the form which was ultimately given. It appears that no attention was directed to the judgment of the Court of Appeal in *Caterpillar Logistics Services (UK) Ltd v Huesca de Crean* [2012] EWCA Civ 156; [2012] ICR981. Stanley Burnton LJ, in a paragraph with which the other members of the court agreed, there stated:

> "73... [counsel for the claimant] told the judge that it was normal practice in claims for confidentiality injunctions for the service of particulars of claim to be deferred until after the application for an interim injunction has been dealt with. If that is the normal practice, I consider that it should be discontinued. Like Tugendhat J, I consider that it is in the interests of justice and the efficient and fair conduct of proceedings that the claimant's case be defined and pleaded as soon as possible, so that the defendant knows precisely what is the case against her, and so does the judge…"

9. The procedural history recounted in the Defendants' skeleton argument is as follows. The Claimants' originally issued proceedings against the First Defendant only, although they knew of the existence of the Second Defendant. They sought wide ranging interim orders against him by Notice dated 3 October 2016, to which he consented at a hearing before Sir David Eady on 12 October 2016. The Order was served on the Second Defendant on 13 October 2016, after the hearing, of which they had been given no notice. Following that order, the First Defendant delivered up, according to his witness statement dated 27 October 2016, all the information in his possession. Mr Meeran, solicitor for the Claimants, in his third witness statement, explains that the First Defendant disclosed "35,000 documents, comprising emails, word documents, texts and audio files. Based on his witness statement dated 26 October 2016, approximately 650 of these documents and correspondence were sent to [the Second Defendant]".

10. It is to be noted that paragraphs 11-13 of the draft Order come close to representing the entire non-monetary relief claimed in the Claim Form. It is true that delivery up under paragraph 11 is to be to the Claimants' solicitors, but that paragraph is not a conventional preservation order. It has not been suggested that the Defendants present a risk to the safe preservation of the documents in question so long as they are held by the Defendants. Moreover, paragraphs 12 and 13 of the draft Order would effectively prevent the Defendants from further using any of the information contained in the documents and provide for the permanent deletion sought in para (5) of the Claim Form. There is an advantage to a claimant in seeking, by interim application, relief which they also seek by way of a final order. On an interim

application the court may make the order after being satisfied to a lower standard than would be required at trial.

11. There are two Skeleton Arguments for the Claimants. The second was prepared for this hearing. The First Skeleton Argument was prepared for the hearing on 5 December 2016, but it is attached to the Second Skeleton Argument in order to avoid repetition of the basis for the Claimants' applications for delivery up which are contained in the First Skeleton Argument. It is said that when skeleton arguments were exchanged before the hearing on 5 December, it became clear that the Defendants' primary argument is that the scope of any order for delivery up should be limited in a particular way, and that part of the Defendants' argument is, it is said, addressed more fully in the Second Skeleton Argument.

12. The factual background is summarised for the Claimants in paras 9-15 to the Second Skeleton Argument. In summary, the Claimants are all heavily involved in the global campaign against asbestos and the associated litigation against the asbestos industry. The First Claimant is a solicitor, the Second Claimant is a campaigner and the Third Claimant is a barrister. Their primary objective is the prevention of asbestos-related disease through campaigning for international, regional and national bans on white (chrysotile) asbestos, and litigation to compensate victims of asbestos-related disease. White (chrysotile) asbestos is to be distinguished from other varieties popularly known as blue and brown asbestos, both of which are banned as hazardous substances under the Rotterdam Convention. White asbestos has also been banned in the European Union since 1 January 2005 but it is not banned throughout the world, the main markets being in the developing world including India, China, Thailand, Sri Lanka, Indonesia and Vietnam. The largest exporter of white asbestos is Russia, followed by China, Brazil and Kazakhstan. As is well known to lawyers, mesothelioma is a disease associated with other forms of asbestos, but the hazard the Claimants rely on in relation to white asbestos is cancer. The parties to this litigation respectively each say of their opponents that they are over-estimating or under-estimating the health risk of white asbestos. This is not a matter on which the court can express any view at this stage in the proceedings. Similarly, the court can express no view on the impact of an international ban on the peoples of the exporting countries, or the economic effects upon the peoples of the countries where it is still legal to import it.

13. The Claimants' account continues that, since 2012, the First Defendant portrayed himself as a journalist who wanted to expose wrongdoing by the asbestos industry. The First Defendant appeared highly credible and even made a number of short films about the dangers of asbestos, as well as taking steps to set up a charity which was to be called "Stop Asbestos". The Claimants allowed him into their inner circle and provided him with a large amount of confidential and legally privileged information, as well as access to their international network of campaigners and activists, who the First Defendant subsequently met and interviewed ("the Network"). The First Defendant also joined a number of internal e-mail lists for ban asbestos campaigns and even attended the Seventh Conference of States Parties of the Rotterdam Convention as an NGO delegate. As a consequence, the First Defendant has obtained an extraordinary amount of confidential, including legally privileged, information about the campaign against the asbestos industry and about current, and pending, litigation.

14. As a result of a tip-off in September 2016 the Claimants realised that throughout this period the First Defendant was in fact working for the corporate intelligence organisation the Second Defendant (formerly Kroll Associates), and was providing information through the Second Defendant to the asbestos industry. In a witness statement served pursuant to the Order of Sir David Eady dated 12 October 2016, the First Defendant admitted working for the Second Defendant and identified the Third Defendant as his project director. He admitted that, in the course of his work on the ban asbestos campaign (which the Defendants called "Project Spring"), he was paid £330,000 as a salary and £130,000 as expenses. He was also paid £3,000 by the First Claimant and £6,500 by the Second Claimant to meet expenses in setting up Stop Asbestos, which sums have since been repaid.

15. The Claimants further state that the Defendants have obtained, amongst other things, highly confidential and sensitive information about the campaigning strategies of the ban asbestos movement, their contacts and allies in governments and international organisations, their funding arrangements, their litigation strategies, the campaign that seeks to add white asbestos as a hazardous substance under the Rotterdam Convention, the campaigns and the prospects for national bans in various Asian countries and the inner workings and plans of the World Health Organisation and UNEP on white asbestos. They are particularly worried that in the same timescale of Project Spring, a number of Asian countries that appeared close to imposing national bans have since pulled back from doing so. These matters, as I understand it, are set out by way of background. There has been no exploration as to how these worries about past setbacks in the campaign might be addressed by any relief which the court could grant to the three or more Claimants in this action.

16. The Claimants also express a further concern, alleging that what they refer to as "the asbestos industry" has for many years been willing to vilify, intimidate and harass its critics. The Second Claimant claims to have been the subject of misinformation and intimidation herself. The Claimants have a particular concern that, as a result of the activities of the Defendants, the identities of activists in the developing world have made their way into the hands of the industry, such individuals being particularly vulnerable to threats and intimidation. I should add at this point that the Defendants have made corresponding allegations about the behaviour of some such activists. The Claimants make no claim for harassment or intimidation against the Defendants in the present proceedings. This is another topic upon which the court can express no view at this stage.

17. The Claimants go on to state that their primary purpose in these proceedings is to recover as much as possible of the confidential information which was supplied by the Defendants to the asbestos industry and to find out precisely to whom that information was supplied so that they can properly gauge the nature of the potential misuse of it and take appropriate steps to protect or regain autonomy in respect of it. In addition, they seek permanent injunctions prohibiting any further use of the information, damages and costs. I observe that it is not surprising that the Claimants' purposes are expressed in this order. This claim differs from most claims for breach of confidence brought before the court by individuals or companies. Although the claim form refers to personal information of the individual Claimants, it is not a claim in respect of their intimate private lives, or their finances. The other category of claims for breach of confidence that regularly comes before the court are claims in

respect of commercially valuable information relating to manufacture, trade and employment. The Claimants do not pursue their activities, the subject of this action, for profit. Their claims thus have that in common with claims brought before the court by public authorities. There has been no discussion before me as to how any damages might be assessed.

18. The Claimants assert that the Defendants do not appear to have any defence to these claims, or any entitlement to retain the private and confidential information obtained as a result of the activities which they do not deny. However, the Claimants recognise that, at this stage of the proceedings, the Second and Third Defendants do contend that the material of which delivery up is sought in the draft Order is not confidential or private or personal information in respect of which the individual Claimants have title to sue. Indeed, Mr Browne goes further, and submits that much of the information sought by the Claimants is expressed by them to be information relating to third parties and is not even arguably information in respect of which any duty of confidence which may be owed by the Defendants could be said to be owed to these individual Claimants.

19. The Claimants address the title to sue issue in paragraphs 85 and 86 of the First Skeleton Argument. They refer to *Industrial Furnaces v Reaves* (1970) RPC 605. The plaintiffs in that action succeeded at the trial in respect of their claim for misuse of confidential information and other claims, and their entitlement to an injunction and delivery up of material containing confidential information. In argument about the form of the order, counsel for the defendants in that action suggested that a number of the documents of which delivery up was sought might well contain confidential information of the Defendants which would thus be placed in the hands of the plaintiffs. Graham J was not moved by that submission, saying, at p628:

> "If a wrongdoer includes material of his own and adds it to material which he has taken from the plaintiffs in my judgment he cannot complain if equity demands that when he has been found out he should deliver up the documents, even though they may now contain information of his own."

20. The Claimants rely on the citation of that case in *Imerman v Tchenguiz* [2009] EWHC 2024; [2010] 1 FCR 14 at para [52]. Neither of these two cases, nor any further submission of the Claimants in their Skeleton Arguments, addresses the question whether, or in what circumstances, a claimant is entitled to an order for delivery up of the confidential information, not of a defendant who is a wrongdoer, but of third parties.

21. On 5 December 2016 Elisabeth Laing J delivered an extempore judgment. The sole issue addressed in that judgment was the question whether or not the Second and Third Defendants should be required to disclose to the Claimants the identity of their client. She held that they were entitled to such an order, and they have made disclosure accordingly. The identity of the names disclosed is subject to an anonymity order, and to an order that I made in the course of the hearing under the Contempt of Court Act 1981, restricting reporting of the proceedings before me.

22. I gratefully adopt a number of passages in that judgment. In paras 5 and 6 the judge said that the First Defendant:

> "…used his status as a journalist as a form of cover, acting on the pretext that he was interested in making a documentary about the dangers of asbestos to win the trust and confidence of the Second Claimant and to use that in order to get private, personal and confidential information from her, and that he would use her to vouch for him with others in the network, including the First and Third Claimants. That in turn would enable him to get such information about them and the network from others. In particular, the First Defendant got information on the further pretext that he wanted to set up an anti-asbestos charity called "Stop Asbestos". As a result of this, over the course of four years from 2012, the First Defendant obtained a large amount of personal, private and confidential information and other information, ranging from information about health to sensitive information about the funding, aims and strategies of the Network, including litigation strategies."

23. While I gratefully adopt that part of the Judge's judgment, I note that she did not have to address, and did not address, the question of to whom (i.e. whether to the Claimants or to third parties) any duty of confidence in respect of that information was owed. Neither she, nor I were, or am, making findings of fact. Rather, these observations are to the effect that there is a case which is sufficiently arguable to entitle the Claimants to interim relief, subject to the court being satisfied as to other matters.

24. On the same basis, at paragraph 18, the Judge said that:

> "I have been shown some of the e-mails which indicate the extent to which the First Defendant and the Second Defendant were engaging in a sophisticated and conscious process of manipulating, particularly I think, the Second Claimant, in order to enable the First Defendant to insinuate himself into her confidence, so that he in turn could get confidential information from her; and I would be amazed if the client was not aware of that strategy. So it seems to me pretty clear, on the limited information I have, that the client must have been involved in wrongdoing and that is an inference I am prepared to draw on the material I have seen."

25. On the same basis, the judge said at paragraphs 28-29:

> "… It is absolutely clear that the First Defendant was using his status as a journalist as a way of insinuating himself into the confidence of the Claimants, but in order to get from them information which they and he understood was sensitive and confidential… It does not matter what the purpose of the investigation was. What the investigation has resulted in is the obtaining by the First Defendant, and then by the Second Defendant and the Third Defendant of sensitive and confidential information about the Claimants."

26. Mr Browne submits that, the order sought is in an action which has already been commenced, and, since it is not simply a preservation order, the jurisdiction which the court is being asked to exercise is the jurisdiction to grant an interim mandatory injunction. Accordingly, the principles to be applied are those summarised by Chadwick J, as he then was, in *Nottingham Building Society v Eurodynamics Systems* [1993] FSR 468 at 474 and approved and adopted by the Court of Appeal in *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354 at page 366:

> First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense described by Hoffmann J [in *Films Rover Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670].
>
> Secondly in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving any status quo.
>
> Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able establish this right of trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less would be the risk of injustice if the injunction is granted.

27. The Human Rights 1998 section 12 is also material, because the order that the court is being asked to make on this application is an order which would affect the exercise by the Second and Third Defendants, and, for that matter, the third parties and their clients, of their Convention right to freedom of expression. As many judges have remarked, including the Vice-Chancellor, a few months after that Act came into force, in *Imutran Ltd v Uncaged Campaigns Ltd* [2001] EWHC Ch 31 at para 18:

> "it must be borne in mind that the courts emphasised the importance of freedom of expression or speech long before the enactment of Human Rights Act 1998. See Halsbury's Laws of England (4th ed.reprint), Vol 8(2) paragraph 107 and cases there cited".

28. The HRA section 12 provides:

> "(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression…"

29. In *Cream Holdings v Bannerjee* [2005] 1 AC 253 at para 22 it was held that "likely" in this context means more likely than not. The Convention right to freedom of expression is set out in Article 10:

> 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

30. Consequently, submits Mr Browne, the issues on the application for delivery up which I must determine are, first, whether the Claimants would be likely to succeed at trial in obtaining such an order (or whether there is a high degree of assurance that at trial they would do so, depending upon which test is applied), and, if so, secondly, what would be the scope of such an order, in particular whether it would be wider in scope than the offer which the Second and Third Defendants have already made, both in correspondence, and in their Skeleton Argument, as set out above.

31. Mr Vassall-Adams submitted that it was immaterial which test was applied (*Cream Holdings* or *Zockoll*) since the Claimants could, he said, satisfy either of them.

32. In my judgment, this is a case of a mandatory interim injunction, which requires the higher test to be satisfied, namely a high degree of assurance, but in the event the outcome of this application would be the same on either test.

33. Mr Browne further invites the attention of the court to the first witness statement of Mr Meeran, made on 4 October 2016 at para 35. Mr Meeran set out the concerns of the Claimants which were repeated in their Second Skeleton Argument and are cited above. He went on to say:

> "All of the people whose trust [the First] Defendant has betrayed will want to know what information he has provided and to whom. The Claimants feel they cannot properly advise their colleagues around the world about what steps they should be taking to mitigate the harm arising from the Defendant's conduct without a clear and complete picture of what he has done".

34. Mr Browne submits this is not a legitimate purpose of the present litigation. The Claimants were not (at this stage of the proceedings at least) purporting to advance claims on behalf these of unidentified colleagues. Further, the purpose identified by Mr Meeran falls foul, he submits, of the warning given by the Court of Appeal in *McPhilemy v Times Newspapers* [1999] EMLR 751 at 773-4:

> "As with all actions, libel actions should by proper case management be confined within manageable and economic bounds. They should not descend into uncontrolled and wide ranging investigations akin to public inquiries, where that is not necessary to determine the real issues between the parties".

35. Further, Mr Browne submitted that claims for the benefit of unidentified colleagues, and relief that is sought in the draft order (with its definition of Confidential Information in para 9 and in Confidential Schedule 3), is not consistent with the claim form and the Claimants' First Skeleton Argument. In para 49 of that Skeleton Argument the three grounds for relief relied upon were set out in the following order namely: (1) breach of statutory duty contrary to the Data Protection Act 1998, which is addressed in paras 50-55; (2) breach of confidence, which is addressed in paras 56-72; (3) misuse of private information which is addressed in paras 73-76. Mr Browne submitted that information relating to such matters as campaign strategies and litigation on behalf of sufferers from asbestos-related diseases was not "personal data" within the meaning of the Data Protection Act 1998 (a submission upon which he did not enlarge before me), and that in any event the general rule is that none of the three grounds of claim can be brought on behalf of third parties, but must be brought if at all, by the person whose data is in question, or to whom the relevant duty is owed. In support of this proposition he cited the well known passage in *Fraser v Evans* [1969] 1 QB 349 at 361B:

> No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. ..But the party complaining must be the person who is entitled to the confidence and to have it respected. He must be a person to whom the duty of good faith is owed. It is at this point that I think Mr Fraser's claim breaks down. There is no doubt that Mr Fraser himself was under an obligation of confidence to [his client]. The contract says so in terms. But there is nothing in the contract which expressly puts the [client] under any obligation of confidence…It follows that they [the client] alone have any standing to complain if anyone obtains the information surreptitiously or proposes to publish it.

36. Mr Browne referred to cases in which that principle has been applied, including *OPA v MLA* [2015] EMLR 4; [2014] EWCA Civ 127 at paras 32 and 38 – 47, in which the court upheld the submission that the claim on behalf of a child was rightly struck out, because third parties cannot bring an action which does not relate to them, or is in respect of private information which they do not own (the Supreme Court overturned the decision of the Court of Appeal, but not on this issue: [2016] AC 219).

37. The type of case in which, in *Fraser v Evans,* it was envisaged that Mr Fraser's claim might have succeeded (namely if there had been mutual obligations of confidence

between himself and his client) is exemplified in a number of cases, one of which is to be found in the Second and Third Defendants' Skeleton Argument, namely *Ashworth Security Hospital v MGN Ltd* [2002] 1WLR 2033; [2002] UKHL 29. In that case the hospital sued to prevent publication of patients' records.

38. Next Mr Browne submits that the form of the draft Order fails to comply with the requirement that such an order must properly identify the information referred in it. The principle is set out in *Thomas v Mould* [1968] 2 QB 913, and explained by Laddie J in *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 360 lines 20-25:

> "unless the confidential information is properly identified, an injunction in such terms is of uncertain scope and may be difficult to enforce… Secondly, the defendant must know what he has to meet. He may wish to show that the items of information relied on by the plaintiff are matters of public knowledge. His ability to defend himself will be compromised if the plaintiff can rely on matters of which no proper warning was given. It is for all these reasons that failure to give proper particulars may be a particularly damaging abuse of process".

39. Mr Browne submits that para 9 (i) of the draft Order is impermissibly wide, as it is not tied to the Claimants, and does not require the information to be arguably confidential or private to the Claimants. Thus it is not relief in a form which the Claimants could obtain at the end of a trial.

40. Turning to the confidential Schedule 3, Mr Browne submits that paras (1), (2), (3) and (4) do not refer to the Claimants and the information or documents are not limited to those in respect of which a duty of confidence or privacy was owed to the individual Claimants. Secondly, para (5), while it does refer to the Claimants, is impermissibly wide in referring to "files or documents protected by legal professional and/or litigation privilege of…any individuals or organisations [other than the Claimants]". Legal privilege can only be claimed by a client, not by the lawyer, and none of the Claimants can have title to sue in respect of files or documents expressed this widely.

41. Mr Browne submits that para (6) of the draft Order does not relate to any of the Claimants and para (7) expressly refers to persons other than the Claimants. Paras (7) to (10) are too vague. Neither the Claim Form, nor any of the Claimants' Skeleton Arguments, set out a case on the basis of which the documents which do not contain personal information relating one of the Claimants, or which do not contain information in respect of which a duty in confidence is owed to the Claimants, can be the subject to an order for delivery up to the Claimants or their solicitors at their suit. The cases cited in the Claimants' First Skeleton Argument, in particular *Industrial Furnaces v Reaves*, do not provide any support for the proposition that the Claimants are entitled to delivery up of documents in respect of which a duty of confidence is owed to third parties.

42. Finally, in the Skeleton Argument for the Second and Third Defendants, (and notwithstanding the fact that these Defendants consented to the order giving an extension of time for service of the Particulars of Claim), it is submitted that delivery up of the material sought in the draft Order is not necessary in order for the Claimants to plead a claim against the Second and Third Defendants. According to the

Claimants' evidence, between 300 and 650 of the 35,000 documents of the First Defendant were passed to the Second Defendant. None of these documents was passed to the Clients, who, instead, received approximately 20 reports.

43. In the course of his submissions towards the end of the first day of the hearing Mr Browne referred me to text books on the issue of title to sue. First, he referred to Toulson and Phipps on Confidentiality (3rd edition 2012) para 3-001, at page 50, which includes a list of 10 'core principles of the law of confidentiality' including:

> (10) As a general rule an action for breach of confidentiality may be brought only by a person to whom the duty in question is owed, but exceptionally an action for protective relief may be brought by someone having responsibility to protect the welfare of that person".

44. The footnote to that paragraph includes references to *Fraser v Evans* and a number of case illustrating the exception, including *Green Corns Ltd v Claverley Group Ltd* [2005] EMLR 31, which is one of the cases included in the original joint bundle of authorities provided to the court. He also referred to *The Law of Privacy and Media* 3rd edition edited by N.A Moreham and Sir Mark Warby paras 4.60 - 4.61.

45. In his reply starting at midday on the second day of the hearing Mr Vassall-Adams for the first time argued that the Claimants had title to sue in respect of information confidential or private to persons other than the named Claimants on the basis of the "responsibility to protect" exception referred to in *Toulson and Phipps*. He submitted there were two categories of documents sought in the draft Order. The first category is those documents in respect of which the Defendants owed a clear duty to one or more of the Claimants to respect their duty of confidentiality or the Claimants' private lives. Examples of this he submitted were interviews which the First Defendant conducted with the Claimants. He pointed to the record of such an interview which took place on the 13 August 2012 which is contained in exhibit RM5C to the 3rd witness statement of Mr Meeran made on 21 November 2016. This is a twenty-eight page report headed "Interview with LKA on 13th August and subsequent research". The subsequent research takes up a substantial part of the report. The part that relates specifically to the interview includes the following:

> "I believe I have established a good relationship with LKA… for a first meeting, I think LKA has given me a huge amount of information, which I have been further able to build on and contextualise this week by researching her leads. She's begun to tell me about her background and the origins of her campaign against asbestos. As discussed, I resisted pushing too hard in this area because I did not want to give her the impression my interest was already focused on her… she has invited me to a number of events I could attend in the coming weeks and months. Not all of these are open to the media or the public and she's asked me to email a formal request to her, explaining my interest etc, which she can pass on to others because I will need their approval too. See section "Upcoming Events" below. She has also suggested people I should meet and other areas to research."

46. The section headed "the LKA network" includes at least eleven names, including two who are the subject of the application to be joined as additional claimants, namely Professor O'Neill (about whom there is no dispute) and Mr Flanagan. It is on the basis of documents such as this that I arrived at the conclusion which was expressed by Elisabeth Laing J in terms with which I have agreed, as stated above.

47. However, Mr Vassall-Adams accepted that there is another category of documents which for the first time, he sought to argue were ones which these Claimants were entitled to sue for on the basis of the "responsibility to protect" exception. He showed me examples in the papers. In response to a question from the bench he stated that he had been unable to find a case similar to the present case. He submitted that *Ashworth* line of cases are examples of the jurisdiction, but do not set out limits to it. Other examples are set out in *Toulson and Phipps* at para 3-182.

48. After Mr Vassall-Adams had completed his reply Mr Browne rose to protest at this new way of seeking to justify the application before the court. Not only had he received no notice of this way of putting the case before, but, he submitted, it is clearly not included in the Claim Form.

49. In my judgment, the submissions for the Second and Third Defendants on the issue of delivery up as sought in the draft Order are to be preferred. The way the argument progressed illustrates why it is so important in interlocutory proceedings that there should be Particulars of Claim served by the Claimant in accordance with the timetable set out in the CPR 7.4, or such extended period as is necessary, that necessity being the subject of proper consideration. Judges should not be asked to make consent orders for extension of time in claims for breach of confidence without a proper explanation of why it is necessary.

50. Mr Vassall-Adams may well be right, I express no view one way or the other, that the *Ashworth* line of cases, such as they now are, are examples, and do not set a limit to the circumstances in which claimants may advance claims for third parties. But if the law on title to sue for breach of confidence or misuse of private information is to be developed in the way that Mr Vassall-Adams submits, it is essential that it should be on the basis of a properly pleaded Particulars of Claim. There have been repeated warnings in the authorities of the dangers of seeking to resolve new points of law in interlocutory proceedings, and it may be that if the law is to be extended in the way that is submitted it would be better done at a trial. The service of Particulars of Claim is not a technical procedural requirement. It is the means through which the law seeks to give effect to the human right to a fair trial, recognised both at common law, and more recently by Article 6 of the ECHR.

51. Having regard to *Fraser v Evans,* I am far from satisfied that the Claimants are likely to succeed at trial in respect of information which is not the subject of a duty of confidentiality owed specifically to one of them. I am unable on the papers before me to identify paragraphs of the draft Order which include only information of that kind.

52. Further, in my judgment the information already available to the Claimants is sufficient to enable them to draft Particulars of Claim. It may well be that, if they do produce such a draft, in the course of the proceedings leading up to any trial, they will be a need to amend or re-amend it, perhaps by applying to join further claimants. That is not uncommon in complicated actions, not only in the field of breach of

confidence, but also in commercial fraud and other cases where multiple individuals may be affected by the wrong doing of multiple defendants acting together.

53. Accordingly, I do not think it would be right to give the Claimants a further opportunity of producing a revised draft Order. In my judgment, the order for delivery up should be in terms that reflect the offer made by the Second and Third Defendants, who have not sought to resile from that offer while making these submissions they have made and which I have accepted.

54. I turn now to the outstanding application for permission to join, as additional claimants, (1) Sugio Furuya, Secretary General of the Japan Ban Asbestos Network and a co-ordinator Asian Ban Asbestos Network, (2) Domyung Paek, Professor of Occupational Health and the Environmental Medicine at the School of Public Health, Seoul National University, and, (3) John Flanagan, Training and Information Officer for the Merseyside Asbestos Victim Support Group.

55. It has been agreed that the applications of Mr Paek and Mr Flanagan be adjourned. The Claimants seek relief from their undertakings given to the court not to disclose the information that has been delivered up to them by the First Defendant for the limited purpose of showing documents to the proposed new claimants. Mr Browne objects, arguing that, unlike Professor O'Neill, who was able to set out, in a witness statement, the information that he claims is confidential to him and was provided to the First Defendant, the remaining proposed Claimants have not been able to do that.

56. In his witness statement dated 16 January 2017, Mr Furuya describes meetings between himself and the First Defendant in November 2012, and their attendance together at a conference that lasted two days, but which was not open to the public. He describes explaining to the First Defendant, (but not the details of what he explained), relating to the situation in Asia and each individual country, and introducing many Asian anti-asbestos activists to him, and how the First Defendant was able to hear the opinions and future plans of the participants. He also explained the Russian situation to the First Defendant he gave similar evidence in relation to other meetings in November 2013 and subsequently.

57. In a witness statement dated 12 January 2017 Mr Domyung Paek also describes meetings and other interactions between himself and the First Defendant in and since 2013. Mr Flanagan gives similar evidence about his interactions with the First Defendant in a witness statement dated 18 January 2017.

58. While recognising the force of Mr Browne's submission that the contents of these witness statements are less than what would be desirable for the drafting of a claim to be made by these three Claimants, it seems to me that the contents of the witness statements do show that it is more than speculative that these Claimants could, if their recollection was prompted by seeing documents, formulate a claim with a sufficient prospect of success to go forward against the Second and Third Defendants.

59. Accordingly, in my judgment it is in the interests of justice that the Claimants should be released from their undertaking in terms to be settled in the form of an order, so as to permit the Claimants' solicitors to show to these individuals documents already disclosed by the First Defendant, and to be disclosed by the Second and Third Defendants pursuant to their offer. And I shall grant permission to Mr Furuya to be

joined. If he is in fact unable to plead Particulars of Claim, he should not take advantage of this permission, or, if he does, his claim may be struck out at a later stage.

60. In summary, the application for the delivery up order succeeds, but only to the extent of the delivery up to which the Second and Third Defendants have already consented (and not otherwise), and the Claimants shall be released from their undertaking to the extent, and for the purpose, set out in the preceding paragraph.