Neutral Citation Number: [2024] EWHC 530 (KB)

Case No: KB-2021-003999

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 March 2024

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

Between :

MS JENNIFER WEBSTER	**Claimant**
- and –	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE & CUSTOMS	**Defendants**

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- -

Mr Tom De La Mare KC & Mr Yaaser Vanderman (instructed by **Mishcon De Reya LLP**) for the **Claimant**
Mr Julian Milford KC, Mr Rupert Paines & Ms Katherine Taunton (instructed by **HMRC**) for the **Defendant**

Hearing dates: 12th & 13th February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 8 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE COLLINS RICE

Mrs Justice Collins Rice:

Introduction

1. The Claimant, Ms Webster, was born and raised in the USA. She has been resident in the UK since 2000, becoming a British citizen in 2010. She renounced US citizenship in 2019 for reasons she says are connected to the subject matter of this claim.

2. Her claim complains about the transfer of some of her UK banking/investment data, between 2016 and 2020, from the Defendants ('HMRC') to the US tax authorities as part of a bulk data transfer arrangement. She says this is in breach of her legal rights as a data subject.

3. The precise nature of her claim, and the procedural consequences accordingly, are now put acutely in issue by an application by the Claimant to dispose of some of HMRC's defence. That application itself has some unusual litigation history, relating to the fact that this litigation has so far been financed, on the Claimant's side, by a funder who is said to be doing so on condition its identity remains undisclosed to the parties and the court.

Legal context

(a) The UK/US tax information regime

4. The Foreign Account Tax Compliance Act ('FATCA') is a piece of US legislation of 2010, aimed at combating tax evasion by US citizens holding bank or investment accounts in other countries. It puts duties on financial institutions outside the US to provide the US tax authorities with regular information about the accounts of US citizens, subject to heavy financial penalties for non-compliance. Some overseas financial institutions may be reluctant to accept US citizen investors because of this regulatory overhead; so some US citizens resident abroad may renounce their citizenship to make it easier to invest locally.

5. The UK and the US have an intergovernmental agreement (treaty) in place, the broad effect of which includes systematising FATCA compliance by UK banks and other financial institutions, and thereby relieving them of the risk of individual penalties. It requires the UK bodies to report the necessary information about US citizens' accounts to HMRC. HMRC then passes it to the US tax authorities on an annual automatic, aggregate basis, pursuant also to existing double-taxation treaties. And the US tax authorities pass back information on US citizens resident in the UK which is held by them. Similar bilateral treaties exist between the US and the larger economy nations within the EU.

6. The UK/US intergovernmental agreement is given domestic effect in this country by an Order in Council (the Double Taxation Relief (Taxes on Income) (The United States of America) Order 2002). That has the effect of placing statutory legal duties on HMRC, met by the annual bulk transfer of information about US citizens' UK banking and investment accounts to the US tax authorities. The annual information about US

citizens the banks have to pass to HMRC, and HMRC has to pass to the US tax authorities, are: (a) name, (b) address, (c) US tax reference, (d) account number, (e) name of financial institution, (f) account balance and (g) any interest accrued.

(b) Data protection law

7. Successive data protection regimes applied in the UK in the period of which the Claimant complains. The Data Protection Act 1998 governed the period up to 25th May 2018, and the Data Protection Act 2018 (and the General Data Protection Regulation) thereafter. Each is underpinned by EU law (including, post-Brexit, retained EU law). That EU law is in turn underpinned by the privacy rights derived from Article 8 of the ECHR.

8. Both regimes contain a set of statutory data protection principles, governing the processing of personal data. Those principles, among other things, require personal data to be processed fairly and lawfully; not to be processed in ways incompatible with the purposes for which they were obtained; and to be adequate, relevant and not excessive in relation to the purposes for which they are processed. Both, in particular, prohibit the transfer of personal data to foreign countries unless those countries ensure an '*adequate*' level of protection for the rights and freedoms of data subjects in general, or there are specified safeguards in place for the particular transfer.

9. Data subjects are given a number of specific statutory rights. In particular, they have a right, if they have suffered any damage or distress by reason of a breach by a data controller of its duties under data protection law, to compensation.

(c) Civil procedure

(i) Judicial Review

10. Section 31 of the Senior Courts Act 1981 provides as follows:

> **Application for judicial review**
>
> (1) An application to the High Court for one or more of the following forms of relief, namely—
>
> (a)a mandatory, prohibiting or quashing order;
>
> (b)a declaration or injunction under subsection (2); or
>
> (c)an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies,
>
> shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.
>
> (2)A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to—

> (a)the nature of the matters in respect of which relief may be granted by mandatory, prohibiting or quashing orders;
>
> (b)the nature of the persons and bodies against whom relief may be granted by such orders; and
>
> (c)all the circumstances of the case,
>
> it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.
>
> …

11. Applications for judicial review are governed by Part 54 of the Civil Procedure Rules. By CPR 54.1:

> (1) This Section of this Part contains rules about judicial review.
>
> (2) In this Section –
>
> (a) a 'claim for judicial review' means a claim to review the lawfulness of –
>
> (i) an enactment; or
>
> (ii) a decision, action or failure to act in relation to the exercise of a public function.

12. Part 54 provides that applications for JR are to be filed '*(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose*' (CPR 54.5(1)). JR proceedings must be commenced by way of the issue of a claim form in the Administrative Court, and by way of an application for permission. The permission stage is a distinctive feature of JR procedure. In considering whether to grant permission for JR, the authorities enjoin the Administrative Court to hold in mind that JR is a remedy of last resort. If there is another route by which the decision can be challenged, which provides an adequate remedy for the claimant, that alternative remedy should generally be used before applying for judicial review. Examples of alternative remedies include internal complaints procedures, review mechanisms, regulatory decisions and appeals (statutory or non-statutory). If the Court finds that the claimant has (or had) an adequate alternative remedy, it will generally refuse permission to apply for judicial review.

13. By CPR 54.3(2), '*a claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone*'.

(ii) Media and communications claims

14. Media and communications claims are governed by Part 53 of the Civil Procedure Rules. CPR 53.1 provides as follows:

...

(2) A "media and communications claim" means a claim which—

(a) satisfies the requirements of paragraph (3) or (4); and

(b) has been issued in or transferred into the Media and Communications List.

(3) A High Court claim must be issued in the Media and Communications List if it is or includes a claim for defamation, or is or includes—

(a) a claim for misuse of private information;

(b) a claim in data protection law; or

(c) a claim for harassment by publication.

…

(iii) Transfers of claims within the High Court

15. CPR 30.5 provides as follows:

Transfer between Divisions and to and from a specialist list

(1) The High Court may order proceedings in any Division of the High Court to be transferred to another Division.

(2) A judge dealing with claims in a specialist list may order proceedings to be transferred to or from that list.

(3) An application for the transfer of proceedings to or from a specialist list must be made to a judge dealing with claims in that list.

…

16. Practice Direction 54A provides, at paragraph 13.1, that in relation to this power to transfer proceedings between Divisions of the High Court, and to and from a specialist list, a court will consider whether a claim '*raises issues of public law to which Part 54 should apply*' in deciding whether a claim is suitable for transfer to the Administrative Court.

Litigation history

(a) Pre-action correspondence

17. On 11th November 2019, the Claimant sent HMRC a letter headed '*Pre-Action letter in respect of proposed claim for Judicial Review – Automatic Exchange of Information of*

Financial Accounts under FATCA', and opening with '*Please treat this letter as a pre-action letter under the Judicial Review Pre-Action Protocol*'.

18. It set out five proposed grounds of incompatibility between the bulk data transfers which had included the Claimant's information, and data protection law. It indicated a conditional intention to commence judicial review proceedings (potentially on a protective basis, bearing in mind the requirement for JR claims to be issued promptly and in any event within three months of the decision complained of – here, HMRC's 'decision' of 13th September 2019 to reject the Claimant's request for confirmation that it would not gather, retain or report her data to the US authorities pursuant to the FATCA regime). It sought confirmation she would be expected first to exhaust her regulatory remedies by way of a complaint to the Information Commissioner's Office, and copied in the ICO by way of making such a complaint.

19. The letter is a substantial and detailed one, but explained that '*Ms Webster's key concern, the heart of the matter really, relates to the lack of necessity and proportionality of the UK FATCA regime*'.

20. HMRC responded by letter of 28th November 2019. It included this passage:

> *Alternative Remedy*
>
> In *St George's, University of London v Rafique-Aldawery* [2018] EWCA Civ 2520, Lady Justice Nicola Davies observed at paragraph 18:
>
> > *…as the courts have made clear, judicial review is a remedy of last resort in circumstances where an alternative, albeit not identical, remedy exists.*
>
> In *El Gizouli v Secretary of State for the Home Department* [2019] EWHC 60 (Admin) the position of judicial review as a remedy of last resort and alternative remedies was considered in the context of alleged breaches of the DPA 2018. Lord Burnett and Mr Justice Garnham observed at paragraph 162:
>
> > *There can be little doubt that if a data subject issued judicial review proceedings when enforcement was available to him either directly under the [Data Protection Act 2018] or via the Information Commissioner, he or she would very likely be met with a successful alternative remedy argument. The remedies available in judicial review proceedings, even if that preliminary obstacle were overcome, would necessarily be fashioned with an eye to those provided in the statutory regime.*
>
> It is not for HMRC to advise the proposed claimant on the scope of her remedies, nor for HMRC to speak on behalf of the ICO or any other government department. However, should the proposed claimant have a justified complaint then it is HMRC's strong view that the broad scope of the remedies available under the DPA 2018

> and the ICO's powers will be provide her with the necessary regulatory and legal remedies.
>
> HMRC considers that the proposed claimant must exhaust all alternative remedies under the under the DPA 2018 prior to issuing a claim for judicial review. This includes pursuing a complaint under section 165(1) of the DPA 2018. It also includes exhausting any legal claims the proposed claimant could bring under section 167 of the DPA 2018.

21. Section 165 provided a right for data subjects to complain to the ICO '*if the data subject considers that, in connection with personal data relating to him or her, there is an infringement of the GDPR*'.

22. Section 167 provided as follows:

> **Compliance orders**
>
> (1)This section applies if, on an application by a data subject, a court is satisfied that there has been an infringement of the data subject's rights under the data protection legislation in contravention of that legislation.
>
> (2)A court may make an order for the purposes of securing compliance with the data protection legislation which requires the controller in respect of the processing, or a processor acting on behalf of that controller—
>
> (a)to take steps specified in the order, or
>
> (b)to refrain from taking steps specified in the order.
>
> …

23. HMRC's letter also conveyed its view that the issue of JR proceedings on a prospective basis '*would appear unnecessary*' and, if issued, '*HMRC would be minded not to agree to a stay, but rather ask the court to refuse permission to proceed*'.

24. The Claimant proceeded with her complaint to the ICO (those proceedings, I am told, have still not yet fully concluded). She did not issue JR proceedings.

25. Nine months later, on 29th August 2020, the Claimant wrote to HMRC a letter before claim. It said this:

> This regime [ie the UK FATCA regime] is in breach of various provisions of the General Data Protection Regulation (the 'GDPR')/Data Protection Act 2018, the Human Rights Act 1998 and the EU Charter of Fundamental Rights. As a result, the Proposed Claimant intends to bring Part 8 proceedings against the Proposed Defendant, pursuant to s.167 of the Data Protection Act 2018. The intention of these proceedings is, amongst other

> things, to prevent the Data Transfer and obtain a declaration from the High Court that the Data Transfer is unlawful.

The proposed claim was described as '*a matter of significant public interest, affecting many individuals on an important issue*'. As well as (a) the declaration, the proposed claim would be seeking (b) a compliance order '*prohibiting HMRC from engaging in the automatic gathering, retention and reporting of the Proposed Claimant's information pursuant to the UK FATCA Regime*' and (c) compensation as a result of material damage. Again, the five grounds of incompatibility between HMRC's bulk data transfers, and the Claimant's data protection and ECHR rights, were particularised.

26. HMRC replied on 25th September 2020. Its letter stated it was responding relatively briefly to the proposed claim '*because we consider that there are fundamental problems with it*'. In particular, it said the order sought:

> 19. … is not a remedy to which you would be entitled on the present state of the law, under s.167 DPA 2018 or otherwise. Such an order would place HMRC in breach of its legal obligations under the UK FATCA Regime. No court would make an order which would require HMRC to act unlawfully.
>
> 20. In order to achieve the result that you seek against HMRC, it would be necessary for you to obtain both a declaration that the decision to enter into the UK-US IGA [Intergovernmental Agreement] was unlawful, a declaration that the UK Order [in Council] is unlawful and of no effect insofar as it requires HMRC to transfer data to the [US tax authorities] under the UK FATCA Regime, and potentially other (eg quashing) relief also.
>
> 21. HMRC does not accept that your client would be entitled to any of this relief. However, if your client wished to seek such relief, your client's challenge was to the lawfulness of the UK Order and the decision to enter into the UK-US IGA. These are decisions in the sphere of public law; accordingly your client was required to proceed by way of judicial review proceedings.
>
> 22. As you will be aware:
>
> (a) It will normally be an abuse of process to challenge the validity of public law actions and decisions otherwise than by judicial review: *O'Reilly v Mackman* [1983] 2 AC 237; *Trim v North Dorset District Council* [2011] 1 WLR 1901 at [20]-[30]. That is so because (*per* Lord Diplock at p.281 of *O'Reilly*):
>
> > "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely

> necessary in fairness to the person affected by the decision."
>
> (b) The time for your client to challenge the decision to enter into the UK-US IGA and the UK Order ran from the point at which your client was first affected by those matters: *R (Delve and Glynn) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199 at [126]. In your client's case, that is May 2016, when your client was apparently first informed of transfers under the UK-US IGA.
>
> (c) A claimant for judicial review is required to bring that claim promptly and in any event within three months: CPR 54.5(1). That time period accordingly expired in December 2016.
>
> (d) Judicial review moreover incorporates the safeguard of the permission stage, which your claim seeks to circumvent. For the reasons set out below, your client's claims are meritless and would not obtain permission on judicial review.
>
> 23. Accordingly, your client cannot now bring a claim challenging the validity of the UK Order, or the decision to enter into the UK-US IGA. Such a claim could only be brought by way of judicial review; it has not been, and your client is now very far out of time indeed to bring such a claim.

(b) The Claimant's pleaded claim

27. The Claimant's claim was issued on 27th October 2021 in the Media and Communications List. As particularised, it was brought in her capacity as a data subject, against HMRC in its capacity as data controller. It alleged not five but two breaches of HMRC's statutory duties.

28. First, it alleged breach by unlawful transfer of her personal data to the US, both while she was a US citizen, and in the financial period during which she renounced her citizenship, by way of the annual bulk transfers of banking information pursuant to the FATCA arrangements. It said HMRC had no lawful basis for doing that because it breached her data protection rights: there were no suitable safeguards for the particular transfers, and US law did not provide an 'adequate' level of protection for data subjects.

29. Second, it alleged breach by disproportionate processing, because the bulk transfer took no account of her personal circumstances, which, in particular in relation to her modest financial situation and interests, disclosed no good reason for sending her information to the US tax authorities and no basis on which they had any good reason to have them. In at least the latter part of the relevant period, she had earned no income in the US, owned no assets there, and had been liable to no tax there. Nothing she had done disclosed any basis for suspecting any tax irregularity.

30. The claim said the Claimant had suffered distress from her personal data being repeatedly unlawfully transferred to the USA. She had suffered distress from the

difficulties she had with opening investment accounts with some UK financial institutions. She had felt compelled to renounce her US citizenship to avoid the data transfers and this distress and inconvenience associated with them.

31. The Claimant claimed a declaration that the transfers of her personal data had been incompatible with her underlying rights in EU and ECHR law, and damages (of between £10,000 and £50,000).

(c) HMRC's defence

32. HMRC's process of finalising its defence went through several stages, including by way of a number of requests for further information. This included, in November 2021, raising the issue of the Claimant's funding. The Claimant challenged HMRC's entitlement to pursue that request. But by letter of 3rd December 2021, the Claimant's solicitors confirmed she was receiving financial assistance from a third party, who was doing so '*for entirely altruistic reasons. The third party is not receiving any benefit from the proceedings.*'. They declined to give any information about the funder, stating that such information was confidential.

33. The final version of HMRC's defence was filed on 15th September 2022. Its opening summary sets out at paragraph 1 that:

> (1) The Claimant's claim seeks to challenge the Defendant's conduct of its duties pursuant to international agreements between the Governments of the United Kingdom and United States of America which create a framework for the automatic exchange of financial account information (as implemented in domestic law), on the basis of their purported non-compliance with data protection legislation. The Claimant's sole, primary, or substantial objective in bringing this challenge is to have that framework declared unlawful; and (on the Claimant's own account) she (i) seeks to act for the alleged benefit of all those subject to the framework and (ii) has obtained funding from an unspecified third party to bring this claim, whose identity she has refused to reveal even on confidential terms. The Claimant's challenge thus comprises an abuse of process. A challenge to legislation said to be brought in the interests of the public generally is required to be brought by way of judicial review.
>
> (2) The Claimant's claim is in large part based on legislation which is no longer effective to found a cause of action, and is in any event ill-founded. The international exchange of tax data serves important public interests, and is specifically identified in the relevant data protection legislation as being an '*important reason of public interest*' which legitimates such a transfer for the purposes of that legislation. The protections for data transferred pursuant to the framework, and the legal rights available to the Claimant, confer an appropriate and adequate degree of protection for the data transferred.

> (3) The Claimant's purported damages claim is misconceived: the Claimant seeks damages for matters which do not relate to the transfers about which she complains, but rather (i) independent decisions of financial institutions; and (ii) her own free choice to renounce her United States citizenship.

34. The HMRC defence elaborates on all of these points. In relation to its assertion that the claim is an abuse of process, it particularises as follows, at paragraph 37: (a) the Claimant's claim was brought with the sole, primary or substantial objective of preventing transfers of personal data to the US pursuant to the FATCA regime for some or all of those subject to it, by obtaining a declaration that such transfers are unlawful; (b) the Claimant had repeatedly declared her claim was brought on behalf of herself and others subject to these bulk data transfers in the alleged public interest and in defence of others' fundamental rights; (c) the Claimants' solicitors had stated in correspondence that the claim was brought as part of '*an international strategic data protection litigation campaign focusing on the implementation of various 'transparency' measures for individuals' fundamental rights*' and was intended to force a renegotiation of FACTA and the development of a new system; and was further intended to force reconsideration of other bulk transfers of tax information to other countries; (d) the Claimant had '*obtained funding for this litigation from an unspecified 'third party' which the Claimant has refused to identify to the Defendant, even on confidential terms. Accordingly, prior to disclosure, the Defendant cannot plead as to the identity and motivation of the funder, but reserves the right to do so following disclosure of the same.*'; and (e):

> The Claimant's claim thus comprises a challenge brought in the alleged public interest, in order to obtain a finding that UK legislation is unlawful. The Claimant has accepted in pre-action correspondence that where a claimant is challenging a public law decision or action and his or her claim affects the public generally, or justice requires that such a claim should proceed by way of judicial review, judicial review comprises an exclusive remedy: *Richards v Worcestershire County Council* [2017] EWCA Civ 1998; [2018] PTSR 1563. The Claimant was obliged to bring the instant claim (in its entirety, alternatively insofar as it seeks a declaration) by way of judicial review. Her claim comprises an attempt to circumvent the procedural protections available to the Defendant in judicial review, including the requirement that any such claim should be brought promptly and the safeguard of the permission stage, and an abuse of process.

(d) The interlocutory proceedings

35. Following a costs and case management conference on 21st September 2022, and on an application by HMRC, Deputy Master Fine ordered, among other things, standard disclosure of documents by list, the Claimant's standard disclosure to include '*documents in the Claimant's control relating to: (a) the Claimant's and/or the Claimant's solicitors' motivations for bringing the claim; and (b) the Claimant's and/or the Claimant's solicitors' interaction with third parties concerning FATCA (including*

any third parties funding the claim)'. This was on the ground that these were relevant to HMRC's abuse defence.

36. The Claimant applied for permission to appeal this ruling. Permission to appeal was refused on the papers on 22nd November 2022, including on the basis that the authorities relied on in the application did not arguably establish '*any clear rule of principle or law definitively excluding the potential relevance of this kind of material to a defence such as HMRC's*' and that there was no real prospect of an appellate court overturning the Deputy Master's evaluative decision on relevance. The Claimant did not seek to renew her application for permission to appeal.

37. The documents subsequently disclosed by the Claimant included the documents particularly specified by Deputy Master Fine, but with references to the principal third party funder's identity redacted. HMRC applied on 31st July 2023 for inspection and un-redaction of these documents. The application was heard at a pre-trial review on 16th October 2023. For the reasons set out in *Webster v HMRC [2023] EWHC 2697 (KB)*, the Claimant was ordered to re-serve the disclosed documents with the redactions removed, so revealing the identity of the funder of the claim, that being required in order to comply with Deputy Master Fine's order.

38. The Claimant thereupon indicated that she did not intend to comply with this order, indeed that she was unable to. Her funding contract was said to be subject to conditions of funder secrecy; she did not herself know its identity (although her legal team did) and the funder would withdraw funding sooner than have its identity revealed. HMRC applied on 23rd October 2023 for an unless order, requiring the Claimant to comply on penalty of having her claim struck out or stayed. As explained in *Webster v HMRC [2023] EWHC 2944 (KB)*, HMRC's application was largely successful.

39. The judgment records at [10] that, during the hearing of the unless order application on 31st October 2023, Mr de la Mare KC, leading Counsel for the Claimant, had made submissions going to the merits of HMRC's defence, including to the effect that, in so far as it relied on grounds of abuse of process, it was '*hopeless in law*'. It also explains why that point could not be determined on that interlocutory occasion, not least because no application for any such determination was before the court.

40. The judgment concludes by explaining at [15]-[17] that the proceedings would be stayed, with a view to avoiding both the prospects of a trial which would not be fair to HMRC, and terminal prejudice to the Claimant's position. The stay was indicated to be for a limited number of specific purposes, namely (a) to enable the Claimant to pursue, in discussion with her funder, the possibility of compliance with the order requiring un-redaction after all; (b) to enable the Claimant to pursue alternative sources of funding; (c) to allow the parties to explore further whether there was information about the identity of the funder short of naming it, which could be disclosed and captured in evidence and which could enable the case to go forward fairly on the basis of inference; or (d) to enable the Claimant, if so advised, to prepare an application for strike-out and/or summary judgment, as being the proper means of determining whether or not HMRC's pleaded case on abuse of process was '*hopeless*'.

41. The Claimant was ordered to apply for the stay to be lifted, or to make an application for a terminating ruling, by given dates, failing which her claim would stand struck out.

(e) The Claimant's application for strike-out / summary judgment

42. By application notice of 14th November 2023, the Claimant now applies for an order to: (a) strike out paragraphs 1(1) and 37 of HMRC's defence (that is, the abuse of process defence), pursuant to CPR 3.4(2)(a), on the basis that there are no reasonable grounds for defending the claim apparent in these paragraphs; and/or (b) give summary judgment for the Claimant on those paragraphs, pursuant to CPR 24.3, because HMRC has no real prospect of successfully defending the claim with its abuse of process defence and there is no other compelling reason why that issue should go forward to be disposed of at trial.

43. As an alternative, the application seeks strike out of, or summary judgment on, only those parts of paragraph 37 of HMRC's defence which specifically refer to the anonymous funding of the Claimant's litigation as a head of abuse of process.

44. The application also seeks the consequential unwinding – on either basis – of the interlocutory disclosure and inspection orders to the extent they compel the identity of the funder to be revealed to HMRC; and the lifting of the stay on the proceedings.

(f) Developments at the hearing of the application

45. Mr de la Mare KC informed the Court (and HMRC), on the opening day of the hearing of the application, that the Claimant was no longer pursuing the remedy of a declaration. Her intention was to proceed on the basis that she was seeking damages alone.

46. He explained this was because his attention had been drawn to what Nicklin J had said in *Cleary v Marston (Holdings) Ltd [2021] EWHC 3809 (QB)* at [29]-[31] to the effect that pleading a declaration in a media and communications claim is unusual and should not be included unless, exceptionally, there is a justification for one. Ordinarily, the court's judgment and order on a claim supplies all the available vindication of a claimant's legal rights in full, and a declaration adds nothing.

Analysis

(a) Preliminary

47. By this application, the Claimant seeks to grasp the limited opportunity, afforded by the terms on which her claim is otherwise stayed, to pursue a High Court Media and Communications action against HMRC with the financial assistance of her current funder but without disclosing its identity. HMRC says it is her final chance to do so: she has exhausted every other possibility of declining to comply with the extant orders of the court. Instead, she seeks to knock out altogether that part of HMRC's defence in which funder identity is pleaded. With the defence would also go the disclosure and inspection obligations relevant to it.

48. HMRC's proposed abuse of process defence is necessarily the forensic focus of the present application. But I give myself a clear reminder at the outset that the exercise on which I am engaged is *not* the same as if HMRC had itself brought an interlocutory application to dispose of the Claimant's claim as abusive – that is, testing here and now whether *her* claim ought or ought not to proceed to trial. I emphasise that point because the Claimant says my decision on this application is in reality potentially dispositive of

the whole claim (and should be considered as such), because allowing the abuse defence to go to trial with the issue of funder identity included would precipitate the withdrawal of the funder and the termination of the funding agreement, and the Claimant has no other financial resource for continuing to litigate.

49. All of that is asserted rather than evidentially demonstrated. Not only has no other application to lift the stay on these proceedings, and to develop the alternative opportunities provided by its terms, been made so far, I have no evidence as to any steps taken in that direction. But in any event, I re-emphasise that the forensic exercise demanded by this application necessarily has its focus on HMRC's defence, not the Claimant's claim as such. The potential outcome of the application is not *legally* dispositive of her claim in any way.

50. Nor am I asked by this application to engage on a final adjudication on the merits of the proposed abuse defence on a full-facts basis and on a balance of probability, as if it had gone to trial already. What I am considering is a proposal that HMRC not be permitted to proceed to any such adjudication. It is a different test I must apply.

51. There is no dispute about the relevant test, or tests. The Claimant's application is brought for a partial strike-out of pleadings and summary judgment in the alternative. The strike-out application relies on CPR 3.4(2)(a) – '*that the statement of case discloses no reasonable grounds for defending the case*'. This is the purest form of the test of whether HMRC's abuse defence is indeed 'hopeless in law'. A court will strike out a defence under this provision if it is 'certain' that it is bound to fail, for example because pleadings set out no coherent statement of facts, or where the facts set out could not, even if true, amount in law to a defence to the claim. That calls for an analysis of the pleadings without reference to evidence; the primary facts alleged are assumed to be true. It also requires a court to consider whether any defects in the pleadings are capable of being cured by amendment and if so whether an opportunity should be given to do so (*HRH the Duchess of Sussex v Associated Newspapers Ltd [2021] 4 WLR 35 at [11]*; *Collins Stewart v Financial Times [2005] EMLR 5 at [24]*; *Richards v Hughes [2004] PKLR 35*).

52. CPR 24.3 provides as follows:

> The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
>
> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

53. The proper approach of a court on an application for summary judgment was summarised in *Easyair v Opal [2009] EWHC 339 (Ch)* at [15] as follows:

> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success;

ii) A ‘realistic’ claim is one that carries some degree of conviction. This means a claim that is more than merely arguable;

iii) In reaching its conclusion the court must not conduct a ‘mini-trial’;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.

54. It is agreed this applies, *mutatis mutandis*, to an application for summary judgment on a defence. In considering the test of 'real prospect of success' the criterion is not one of probability, it is absence of reality. The test will be passed if, for example, the factual basis for a claim is entirely without substance, or if it is clear that the statement of facts is contradicted by all the material on which it is based. On the other hand, if reasonable grounds exist for believing a fuller investigation into the facts would add to or alter the evidence available to a trial judge, or if a factual dispute is unlikely to be able to be resolved without reference to further (and especially oral) evidence, then a case should be permitted to proceed to trial (*Three Rivers DC v Bank of England [2003] AC 1*; *Doncaster Pharmaceuticals v Bolton [2007] FSR 63* at [18]).

55. On this application, therefore, I am considering whether HMRC's pleaded abuse of process defence is (a) irremediably defective and devoid of reasonable grounds, either in whole or to the extent that it pleads in funder identity, or (b) fanciful and without substance or realistic prospect of success – again, in whole or in part. I begin by considering the abuse of process defence as a whole.

(b) HMRC's case on abuse of process

56. HMRC identifies this as an abusive claim on the grounds that, properly construed *and* as a matter of fact and evidence, it is a public law challenge within the terms of the Senior Courts Act and CPR Part 54 to '*the lawfulness of an enactment*' and/or '*a decision/action in relation to the exercise of a public function*'. That is because it challenges as intrinsically unlawful (a) the Order in Council giving UK domestic effect to its treaty obligations in relation to the FATCA regime, (b) those treaty obligations themselves, and (c) HMRC's policy and practice of discharging its statutory obligations by way of bulk data transfer of (limited) information about US citizens banking or investing in the UK. That public law challenge is to the compatibility of these matters with the UK's treaty obligations, and domestic law, in relation to the protection of personal data. The challenge, says the defence, goes wholly to the legality of the discharge of quintessentially public functions under FATCA and to the legal framework governing it. As such it is hopelessly out of time and, by asserting it has been brought as of right, impermissibly evades the permission stage which safeguards the balance struck in Part 54 between public and private interests in the litigation of such matters. It has not, for example, been put to the threshold test of demonstrating the *arguability* of its wholesale incompatibility arguments before HMRC is subjected to the burden of a trial.

57. As a matter of *construction*, HMRC says the Claimant's claim primarily, inevitably and intrinsically impugns its domestic and international legal obligations, and its discharge of those obligations in general, in a manner which is impossible to confine to the facts of this case. That is because (a) the 'breaches' of data protection law of which the Claimant complains are not only not breaches at all, but are positively demanded by national and international law, and (b) the regard the claim insists should be had to the Claimant's individual circumstances is fundamentally incompatible with the bulk data transfer on a non-individuated basis which national and international law envisage. The sheer scale of the operation required by law (affecting more than nine million accounts) means it is *impossible*, in obvious reality albeit not as a matter of explicit duty, to comply with the law in any other way. So this is a challenge which *cannot* be considered on a private law basis – it necessarily and wholly engages public law and public interest considerations which cannot fairly be considered and determined on the

facts of an individual private law claim. The private law form of the claim is no more, says HMRC, than a flaky veneer on an obvious public law challenge.

58. As a matter of *fact and evidence*, HMRC wishes to rely on the following:

(a) statements made by or on behalf of the Claimant acknowledging expressly that this is in fact an incompatibility challenge to the whole regime with inevitable implications across the board, both nationally and internationally, and that that is the specific effect knowingly sought, to the exclusion of any real private interest (‘*the heart of the matter, really*’);

(b) the claim having been originally conceived and presented in pre-action correspondence as a JR claim, but one which would obviously have stumbled at the permission stage because it was by then *already* out of time and because the Claimant had admittedly not exhausted alternative remedies; the claim as brought having been one which undoubtedly *could* have been commenced in the Administrative Court (at the right time) because it sought declaratory relief; and the claim having in reality not been brought against HMRC exclusively, primarily or at all *qua* data controller but *qua* public authority exercising public law functions;

(c) the factual nature of the claim as issued:

- seeking *declaratory relief* as its principal objective;

- the objective of *privacy vindication* being implausible in circumstances in which almost all of the (limited, and relatively unintrusive) information transferred by HMRC was information the Claimant had had routinely to provide to the US tax authorities anyway (and more) as a US taxpayer, entirely independently of FATCA; her principal complaint in any event being loss of UK investment opportunities (not privacy related and not attributable to HMRC data transfers); and transfer of the Claimant’s data to the US having long ceased on her voluntary and self-interested relinquishment of US citizenship for reasons not causally attributable to HMRC;

- the *damages* claim as such being unreal and without substance or plausible evidential base, pleaded defectively as to causation, and capable of achieving at best a quantum of between two hundred and two thousand pounds;

(d) the claim by contrast being lavishly funded (as at the CCMC in September 2022, budgeted up to £1.4m, the costs already incurred by then being described by the Deputy Master as a ‘*staggering, eye-watering figure*’ – a figure now in excess of £½m) on a basis which discloses an international vested interest and investment obviously far wider than and entirely disproportionate to the Claimant’s personal case; and on a resolutely secretive basis for which the Claimant’s proffered explanation of a benevolent and wholly disinterested philanthropist, concerned solely with privacy principles, is (subject to eventual compliance with the disclosure and inspection orders) improbable; the secretive basis itself being deliberately engineered and abusive; and

(e) the Claimant's last-minute discarding of her claim for declaratory relief (with no application for permission to amend pleadings, or for relief from sanctions) being itself abusive: firstly, in seeking to take unrealistic, impermissible and formalistic advantage of the Civil Procedure Rules that 'claims in data protection' *must* be issued in the Media and Communications List and that a claim for damages alone *cannot* be brought by way of JR (and anyway having no bearing on the issue of how the original claim could/should have been brought); and secondly because it necessarily reveals the reality that the 'vindication' she seeks (by the damages claim) is itself predicated on the asserted incompatibility between FATCA and fundamental data protection law in any event, and would necessarily deliver the declaratory relief of general significance sought, whether or not expressly pleaded. This is not, says HMRC, properly a 'claim *in* data protection' at all; it is a public law challenge *to* the compatibility of (domestic and international) data protection law with the FATCA legal regime, and the claim for damages is a disguised claim for declaratory relief with extensive implications and application.

59. As a matter of *law*, HMRC relies principally, but, it emphasises, not narrowly, on the principle of 'procedural exclusivity', or due process, originally articulated in *O'Reilly v Mackman* *[1983] 2 AC 237* by Lord Diplock as follows (at p.28E):

> … it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of [what is now CPR Part 54] for the protection of such authorities.

60. Mr Milford KC, leading Counsel for HMRC, took me to the line of authorities recognising this species of abuse of process, and summarised in the decision of the Court of Appeal in *Clark v University of Lincolnshire & Humberside* *[2000] 1 WLR 1988* at [14]-[18]. He draws my attention in particular to what is said at [39] in that case about developments since *O'Reilly*: that on a 'due process' abuse challenge of the present sort a court will interest itself in whether or not the protections, or safeguards, for public affairs provided by CPR Part 54 have been '*flouted in circumstances which are inconsistent with the proceedings being able to be conducted justly*'. He says this species of abuse of process is these days not so much about the formalities or 'exclusivities' of procedure as such, but about the substance of (a) prolonging public law challenge, contrary to the public interest, and the requirements of justice, in dealing with such challenges *promptly* and (b) the assertion of a private right in a public law context without addressing the controls of the permission stage of public law proceedings. It requires, he says, an active investigation and evaluation of whether or not the court's proceedings are being conducted '*justly*'.

61. The authorities were reviewed more recently by the Court of Appeal in *Richards v Worcestershire CC* *[2018] PTSR 1563* and distilled to '*two general propositions*' (at [65]):

> (i) The exclusivity principle applies where the claimant is challenging a public law decision or action and (a) his claim affects the public generally or (b) justice requires for some other

> reason that the claimant should proceed by way of judicial review.
>
> (ii) The exclusivity principle should be kept in its proper box. It should not become a general barrier to citizens bringing private law claims, in which the breach of a public law duty is one ingredient.

HMRC intends to argue that the present case falls under the first of these propositions and not the second, again drawing attention to the issue of what '*justice requires*'. But Mr Milford KC also relies on the appellate authorities guiding courts to consider abuse of process not on the basis of rigidly compartmentalised and mutually exclusive categories (indeed, boxes), but as requiring '*a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court*' (Johnson v Gore Wood *[2002] AC 1* per Lord Bingham of Cornhill at 31D).

62. That case was about a different 'category' of abuse of process: relitigation. But Mr Milford KC says this is a point of general application to *all* species of abuse of process. Although the appellate courts do identify a number of well-defined categories of abuse, '*the categories of abuse of process are varied and not closed; the courts have declined to define or circumscribe the circumstances in which an abuse may be established*' (*Municipio de Mariana v BHP Group (UK) Ltd* *[2022] WLR 4691* at [172]). The present case, says Mr Milford KC, is not on all fours procedurally or factually with any other decided case; indeed there is nothing in the authorities even very close on the facts. While the authorities therefore fall to be applied by factual analogy (only), this is a paradigm situation where the necessity of the fact-sensitive and flexible approach to investigating whether due process has been abused, and which is recommended by the authorities, is fully apposite.

63. Mr Milford KC relies also on the passage cited with approval by Lord Bingham at 22E-G in ***Johnson*** about the inherent power, or rather duty, of a court to:

> prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the present appeal are surely unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

(c) The Claimant's challenge to the abuse defence

64. Mr de la Mare KC's argument that the HMRC abuse case is 'hopeless' begins with an extensive review of the 'procedural exclusivity' authorities focusing on how they have been applied in practice. From this, he derives a principle that a claimant *cannot* abuse the process of the court by seeking the vindication of private law rights through a private law claim. The fact that that claim may be inextricably mixed with public law issues does not affect the situation; *Woolwich* restitution claims and *Francovich* damages claims are clear examples of proper private law claims in which public law issues are closely engaged. To hold otherwise would create precisely the general barrier to vindication of private rights that the courts have repeatedly refused to countenance. That is why a substantial corpus of exceptions to or confinement of 'procedural exclusivity' abuse has been clearly developed in the caselaw. And Mr de la Mare KC accuses HMRC, by its abuse defence, of trying in turn impermissibly both to block access to justice and deny the Claimant any remedy at all (contrary to the UK's treaty obligations), and to knock out an important test case of an entirely familiar and legitimate sort which is frequently crowdfunded by anonymous donors.

65. As to whether any claim is indeed a private law claim, Mr de la Mare KC says the courts will focus exclusively on the pleaded case and the remedy sought. Here, a claim for damages alone *cannot* be brought *otherwise* than by way of a private law claim. The Claimant does not seek to overturn underlying law or decisions, or undo historical events; she merely seeks historic compensation, and the fact that that may affect others, or provoke a public body to reconsider its policies and practices, is irrelevant. Nor does a 'campaigning' or test-case context convert a private law claim into a public law challenge. The Claimant's claim also, he says, involves conflicts of facts and evidence, which are clear pointers towards a proper private law dispute.

66. In so far as HMRC's abuse defence relies on a mismatch between the cost of the litigation and the remedies available, Mr de la Mare KC says this is nothing to the point. The decided authorities on damages for breach of data protection rights establish both the proper modesty of financial quantum in general but also the high non-financial value of the vindication of privacy rights in and of itself. Successful data protection claims nearly always show a mismatch between costs and damages in pure financial terms. In any event, to the extent to which this is a *Jameel* disproportionality objection (the case is not worth the candle: *Jameel v Dow Jones [2005] QB 946*), that particular species of abuse of process is not pleaded by HMRC.

67. Mr de la Mare KC also characterises HMRC's defence as being inappropriately reliant on the Claimant's (or her funder's) *motivations*, contrary to the clear authority of *Broxton v McClelland [1995] EMLR 485*.

(d) Consideration

68. That is an extremely brief summary of detailed, sophisticated and wide-ranging submissions on behalf of the Claimant, surveying and analysing a wealth of caselaw. But before engaging further with them, I remind myself again, as I must, that it is not my task to consider the full merits of the case the Claimant might want to make at a trial in response to an abuse of process defence. I can acknowledge, without fully rehearsing, the degree of research, analysis and forensic narrative already apparent in that case, as previewed by Mr de la Mare's submissions. But my task is not to consider the case the Claimant wants to make, whether her arguments on abuse are better than HMRC's and/or whether on balance they probably ought to win out in the end. It is to

consider whether the case *HMRC* wants to make is devoid of reasonable grounds or substance, is bound to fail, and has no realistic (as opposed to fanciful) prospects of success whatever – and that there is no other compelling reason to allow the defence to go to trial. And it is the Claimant's task to satisfy me of *that*, not of the merits of her own counter-case.

69. The jurisprudential sophistication of Mr de la Mare KC's submissions, and the fact that I heard the best part of two days' legal argument on this application, are not by themselves an indication that there must be something of substance to HMRC's defence. Nor are they an indication of its hopelessness; that turns on the nature, not the number, of the points taken against it. And if the hearing often had the distinct flavour of a 'mini-trial', if not of a dress-rehearsal for the real thing, that is not a sure guide either. My present focus has to be on the *viability* rather than the merits of HMRC's case as pleaded and (at this interlocutory stage) evidenced. This is not about its susceptibility or otherwise to superior forensic argument. That is what trials are for. It is about whether it is so unreal as to disqualify its progress to trial. It is only the points which go to that, individually or collectively, that I need to address.

70. So I turn to consider the issues that HMRC's defence would require a court to deal with at trial, and reflect, with the assistance of Mr de la Mare KC's critique, on whether they lack reality and there is nothing meriting taking to trial here. And I reflect first on whether, as Mr de la Mare KC's submissions proposed, the Claimant's application '*raises a pure point of law*'.

(i) The legal basis for HMRC's abuse defence

71. In my judgment, the principal issue raised by HMRC's defence is the application of the caselaw on abuse of process *to the facts of this case*. There is certainly a prior question of law as to what the authorities say should be the correct, or properly relevant, approach to this sort of question. As to that, the parties disagree as to the correct starting point. HMRC proposes an inclusive approach, taking into account all the history and circumstances, and competing public and private interests, before arriving at an evaluative conclusion about whether the court's processes are being abused. I can see that Mr Milford KC sets out a groundwork of authorities to support that approach: ***Johnson***, ***Clark*** and ***Richards***. The Claimant, on the other hand, distinguishes or limits these on the facts, and says the starting – and indeed finishing – point is the engagement of private law rights by a private law claim brought in accordance with rules of procedure. Mr de la Mare KC relies for that particularly on *R (El-Gizouli) v SSHD [2019] 1 WLR 3463* and *R (AAA (Syria)) v SSHD [2023] HRLR 4*. How, says Mr de la Mare KC, on the modern authorities which have largely left *O'Reilly* 'procedural exclusivity' behind, can it *ever* be abusive to seek to vindicate private law rights by way of private law procedure? And Mr Milford KC in turn seeks to distinguish *these* authorities on their facts and show they do not support the broad proposition contended for. So this a dispute about which authorities are properly apposite to determining issues of due process abuse and how. It is hard to recognise that as a *pure* dispute of law. It is not said that these authorities *conflict*. It is said they need to be reconciled contextually – that they are, or are not, *relevant to the facts of this case*. The authorities relied on themselves are much preoccupied with the factual matrices before them.

72. In particular, Mr Milford KC says the decisions the Claimant relies on assume (or establish on the facts of each case) precisely what HMRC proposes by its defence to

disprove here, and what it has put squarely in issue thereby – a *genuine* private law claim for a *meaningful* personal remedy. Whether a private law claim is *genuine* or *abusive*, he says, turns on more than form, and more than ostensible or literal compliance with rules of court. It turns on an investigation, in all the circumstances, of its substantive and procedural reality and whether, in that reality, it turns out to be a deceptive Trojan horse for the infiltration and destruction of constitutional and legal protections for the public interest. Or not. And that is something a court has a *duty* to investigate – in the present case, with particular regard to the whole of the litigation history.

73. Whether or not that is the right approach here is not a 'pure' point of law. Or if it is, it is a point of considerable complexity (or '*really complicated*', as *Easyair* puts it) since at its core is an issue about whether or not – or how far – fact-sensitivity and an evaluation of competing public and private interests are properly in play on a due process abuse objection to a private law claim at all. It is certainly not a '*short point of law or construction*' offering a nettle to be grasped on an interlocutory application. As a possible issue for a 'preliminary ruling' on the present application it eludes encapsulation in any clear question that is at all straightforward to articulate.

74. At the heart of HMRC's defence is a proposition that if the remedy sought, on a proper construction (on the facts here, it is said, *de facto* declaratory relief in substance, reverse-engineered from a weak and low-value financial claim), is fundamentally inconsistent with a public authority's domestic and international law obligations *on a whole-system basis*, then it is procedurally abusive in bypassing public law litigation controls. It is a proposition that this claim is *all* about HMRC's discharge of its *public* functions; there are no genuine private law rights here at all – or, if there are, they anticipate a change in the law or are predicated on a public law duty to prioritise one set of international obligations over another, and that in turn is predicated on demonstrating a conflict between the two in the first place – a quintessentially public law question.

75. I have read carefully the principal authorities relied on by each party, with that proposition in mind (I have noted their preoccupation with the case-specific facts and histories with which they deal). I am satisfied there are legal arguments properly to be had both ways about it. I agree with Mr Milford KC that the circumstances of this case – as they appear at this interlocutory stage – are not specifically precedented in the authorities to which I was taken, indeed that there is nothing even very close to it on the facts in the many decisions we looked at. I also agree that this could fairly be described as an area of law which has not finished developing, and where new factual matrices may reasonably require fresh consideration and application of the principles emerging from the authorities. Put at its lowest, the caselaw has not in my view crystallised out definitively against the proposition for which he contends. It discloses a more than merely arguable basis for arguing that a court must, or at least may, look beyond the mere assertion of statable private rights and remedies to interrogate whether its processes are being abused. There is appellate authority to support the contended approach to abuse of process that on any basis it is fact-sensitive, probing of the issue of form versus substance, and evaluative of the overall justice of the matter. Reliance on *Johnson*, *Clark* and *Richards* for that is not in my view misconceived to the point of unreality; in particular it is not definitively excluded *as a matter of law* by *El-Gizouli*

and _AAA (Syria)_: the real question is whether any or all of these decisions are applicable to or relevantly distinguishable from the present facts.

76. In these circumstances, I am satisfied the legal basis put forward by HMRC to underpin its abuse defence is not unreal, is more than statable, is properly arguable and has a more than fanciful prospect of succeeding. It is not so clear either from the authorities or from first principles that HMRC's abuse defence goes no further than being 'merely arguable', so as fairly to support a conclusion that it ought to be rejected on an interlocutory basis. It may not be, and does not at this stage need to be shown to be, unanswerable or without vulnerability. The test is not whether the abuse defence will succeed but whether it is bound to fail. I am clear that 'hopeless in law' is, in the circumstances of a substantial, and not entirely straightforward, prospective contest of authority and principle, on unusual facts, a considerable overstatement. I was shown no authority in which a comparable contest was consigned to oblivion on an interlocutory adjudication. I am not persuaded it is fair to do so here; on the contrary I am satisfied that justice cannot be done to this contest on an interlocutory basis. HMRC's argument for a holistic approach to abuse of process ought to be tested contextually, on the full facts of this case, at a trial.

77. Before moving on from the legal groundwork, I observe that the pleading point taken on a lack of reference to _*Jameel*_ abuse in HMRC's pleaded defence appears to miss its target. As I understand HMRC's case as pleaded, it does not rely on disproportion between achievable remedy and costs *per se*. Rather, it seeks to bring that in as one part of its overall picture of the *reality* of this claim. It is, in other words, part of the wider factual and evidential picture it relies on, to which I shall turn shortly.

78. I observe further that the objection taken to reliance on 'subjective motivation' in HMRC's case, contrary to _*Broxton*_, also appears to miss its target. HMRC's case as pleaded does not rely on the vitiation of an otherwise sound claim by subjective motivation. It posits that there is no sound private law claim in the first place, relying principally on the *effect* sought to be produced by the claim – the apparent desire or *objective* to bring about that effect being a second-order or evidential issue, as well as one going to an overall evaluation of *all* the interests, including the interests of justice, engaged in this case.

79. None of these points, individually or collectively, in my judgment delivers the necessary fatal wound to the viability of HMRC's legal case on abuse.

(ii) Facts and evidence

80. I am not to attempt a mini-trial of the facts and evidence. But I am to look critically at the materials currently before the court and consider whether, on the basis HMRC's defence has sufficient legal substance to warrant full contextual argument, there is sufficient factual and evidential substance apparent to support a realistic prospect of the defence succeeding.

81. At present (and leaving aside the question of funder identity itself, to which I return below), I can see little significant disagreement over which *questions* of fact apparent in this dispute potentially go specifically to the abuse issue. I am told more generally that expert evidence on the issue of US law has been in contemplation by both parties, that steps have been taken to obtain it, and that the evidence is largely convergent. I

am not told that significant further new areas of evidence will be opened up, as opposed to opportunities to drill further down into the matters already identified in evidence at this stage. So I hold in mind the questions of whether (a) there is enough in the way of fact and evidence now or in prospect and (b) whether further investigation of the facts and evidence would add to the overall picture available to a trial judge.

82. The facts on which HMRC principally relies are those of the litigation history of this case. Specifically, and to recap, it relies on building up a picture of which the following are said to be at least some of the chief components: (a) the effect the Claimant has consistently declared she wishes to achieve with this litigation; (b) the threatened commencement of proceedings in the Administrative Court, the basis for which was said to have been unlikely for a number of reasons *apart from its substance* to have been given permission; (c) the delay in issuing the claim in the Media and Communications List and the persistence of the public law character of that claim; (d) the consistent focus on declaratory relief, abandoned late in the day in what is said to be an attempt at reverse-engineering an argument that this claim *could not* (now) be brought in the Administrative Court; (e) the unreality of the Claimant's personal interest in this litigation, being no longer subject to data transfer, making a fanciful case on privacy vindication, having minimal expectation of substantial compensation, and apparently being subject to no costs discipline of her own; and (f) the Claimant's conduct of the interlocutory proceedings, demonstrating, it is said, resort to a series of manipulative and unwarranted devices designed to obscure the true nature of the interests invested in this case which, if not abusive in themselves, were self-serving, unfair and disrespectful of the interests of justice.

83. Mr de la Mare KC of course joins issue energetically with this *characterisation* of what happened. But what happened is a matter of record. Its bare bones are that this claim was originally conceived as a public law challenge. The challenge as set out in pre-action JR correspondence was largely reproduced, if slimmed down, in the claim as issued, including by way of retaining its declaratory focus. The declaratory focus was abandoned at a late stage, without application, and on a contestable basis. A considerable amount of litigation effort, expense and ingenuity has gone in to resisting compliance with an unappealed series of court orders relating to funder identity and its relevance.

84. If HMRC succeeds in its contention for the correct legal approach to abuse of due process, an associated argument that this history is unusual for a private law '*claim in data protection*', raises questions of propriety and procedure, and engages with issues of transparency and fairness, is not, in my view, without substance. Nor is the negative conclusion invited on the facts a fanciful one. The history does not speak for itself. Mr de la Mare KC has answers and explanations for all that happened, as may be expected, including a narrative of an unexceptionable struggle for access to justice. But the question is whether I have before me a basis for a defence of abuse of process which is not merely arguable in law but has a realistic prospect of being made good on the facts. Mr de la Mare KC's principal challenge on this application was to whether HMRC could get a legal argument sufficiently off the ground – that the defence was 'hopeless in law'; as to the facts, he says in all simplicity that the Claimant is a private individual of modest means trying to vindicate her privacy rights. That is one, face-value, version of the story; HMRC's defence asks the court to interrogate it and consider whether to

accept it or not. On the undisputed facts so far, that appears to be a matter eminently requiring the inquiry of a trial and the probing of the evidence.

(iii) Procedural issues

85. Mr de la Mare KC raises three points of procedure which he says should militate against the abuse defence being permitted to go to trial. First, he suggested more than once, if in passing, that HMRC's abuse defence itself ought to have been raised by way of an application for a terminating ruling. That was not, however, a submission he developed with any clarity, and I was shown no authority to suggest it is impermissible to do otherwise. HMRC has other defences it intends to run in the alternative, and perhaps had a hope to avoid the potentially reduplicative costs of interlocutory hearings. Indeed, its pleaded defence, viewed as a whole, joins issue squarely on the merits of the private law claim as such; it may be that if or when the case comes trial, with the benefit of full disclosure and evidence, HMRC chooses to concentrate on these defences as its primary position with the abuse defence as a secondary one. But that is a matter for it. So I am not persuaded this point weighs significantly in the analysis.

86. Second, Mr de la Mare KC objected that HMRC had not sought to test the abuse issue by applying to have the claim transferred to the Administrative Court. Again, while that was a step HMRC might have taken, I do not see the argument that it can properly be penalised on an application for a terminating ruling for not having done so. From its own point of view, that would presumably have been with a view to termination of the claim by seeking refusal of permission for JR, and transfer would no doubt have been resisted. The advantage of that route over an application in the Media and Communications List for a terminating ruling is not obvious, and it is not clear that HMRC 'ought' to have followed either path. It does not appear on the face of it unreasonable for HMRC to have taken the view that a trial in the Media and Communications List would enable the court to consider the abuse point but at the same time be appropriately seised of the full merits of the claim in the alternative.

87. Third, Mr de la Mare KC advanced an argument that, by its own conduct of the JR pre-action correspondence, HMRC had waived any entitlement it may have had to run the abuse defence, and it would be in all the circumstances unfair to permit it to do so. He says HMRC's pre-action responses represented to the Claimant she had to proceed by way of exhausting her regulatory and private law remedies first. She relied on that, and acted accordingly. So it is not fairly open to HMRC now to say her claim is after all a quintessentially public law claim and that she *cannot* proceed by way of her private law claim.

88. Mr Milford KC's answer to this is that it is wholly unsustainable as a matter of interpretation to say that any of HMRC's pre-action correspondence amounted to a clear representation or acknowledgment that the Claimant had any good claim in private law, much less that *this* claim was a good or genuine claim. He also says it is implausible (and unevidenced) that she relied on any such representation to her detriment, reasonably or at all, not least because the correspondence disclaimed that ('*it is not for HMRC to advise the proposed claimant on the scope of her remedies*'; '*should the claimant have a justified complaint*'). The context of pre-action correspondence between represented parties, one of whom is a public authority, is, he says, crucial, and the warning in relation to the exhaustion of alternative remedies is routine and formulaic in pre-JR correspondence, and known to be so.

89. Strictly speaking, on an application for a terminating ruling, the question is whether I can be satisfied Mr Milford KC's case on this is without substance, reality, or non-fanciful prospect of success. I cannot. On the contrary, Mr de la Mare KC would, indeed, appear to have something of an uphill task with this argument, so far as can be determined on an interlocutory basis, for the reasons Mr Milford KC suggests. There is the further point against it that, looking at the correspondence, the principal alternative remedy contemplated by both parties at the time – alternative, that is, to JR – appears to have been the engagement of the regulatory powers of the ICO rather than any private law claim. The ICO cannot award damages, but on the Claimant's own case it is the vindication of her privacy rights that she principally seeks, and the ICO has powers to investigate and adjudicate upon that, without the expense of private law litigation. It was not made clear to me precisely where the ICO process has got to, but it seems to have been pursued with some vigour and not yet to be exhausted. The Claimant's principal contention, that the FATCA regime is inconsistent with the GDPR and its underpinning in domestic and international law, appears, in other words, to be under active parallel consideration. If it is not ultimately dealt with by the ICO to the Claimant's satisfaction, then there may well yet be a potential for further remedies (and indeed in the end the possibility of JR proceedings) to be taken into account in considering the relationship between the pre-JR correspondence, HMRC's abuse argument, and the Claimant's response to it.

90. In any event, I am satisfied that Mr Milford KC has demonstrated a responsive case on the waiver point, in law and on the facts, which has substance, reality and a genuine prospect of success. At present, on the materials before me, and just as a matter of interpretation of the correspondence, I would consider its prospects more than even. I am unpersuaded to terminate the defence on this ground, whether considered on its own or cumulatively. But I can see that it may be a point that would need to be looked at in more detail, along with consideration of the ICO process, if a trial judge were persuaded to take into account *all* the circumstances of this case in considering whether it is, or is not, abusive.

(e) Funder identity

91. The anonymity or secrecy of the Claimant's funder, and her conduct of the interlocutory proceedings relating to that issue, form part of the matrix HMRC wants to rely on for its abuse of process defence. Its relevance to that case was the basis on which disclosure of funder identity was sought, and an order obtained, from Deputy Master Fine in September 2022. (I note in passing that on that occasion junior Counsel for the Claimant accepted before the Deputy Master that HMRC's abuse argument was one they were '*fully entitled to make*' and there was '*no question*' that they could do so – transcript page 33A. Counsel for the Claimant also described the abuse of process defence as '*a matter for trial*' at the PTR.)

92. The relevance of funder identity to the abuse case, as HMRC has consistently explained it, is that it goes to the 'true' nature of the Claimant's claim: not, it is said, an individual's pursuit of vindication and compensation, but a whole-system attack on the FATCA regime, funded as such by hidden interests, with that effect and outcome its objective, and by an entity whose relationship to the UK public interest is in the circumstances a material consideration.

93. HMRC also wishes to rely on the Claimant's efforts to maintain funder secrecy, including from the court even under confidentiality conditions – first by purporting to enter into a legal obligation not herself to learn the identity of the funder, next by asserting privilege over the funding agreement on an unexplained and unapparent basis, and then by a series of artificial devices attempting to circumvent interlocutory orders of the court – as also going to the true nature of the claim.

94. The Claimant now applies, in the alternative to her principal case, for strike-out of those parts of HMRC's abuse defence which plead in funder identity. I put it that way, although as Mr Milford KC points out, the application in this respect is not altogether effectively drafted to achieve that effect. I consider the point on its merits none the less.

95. The paucity of information before the court about the Claimant's funding agreement, its privileged status, and indeed its enforceability, was remarked on in the most recent interlocutory judgment in this case (at [3] and [13]). I am told that the Claimant does not know, *and cannot find out from her own legal representatives*, who the funder is. Privilege is asserted in these circumstances on a distinctly obscure basis. The information is said to be contractually confidential – presumably to the Claimant's solicitors – but the effectiveness of any such contractual term has not been explained. Be all that as it may, HMRC now has in its hands documents which identify the funder, but where that identity is redacted, and where un-redaction is now an acknowledged legal obligation of the Claimant, at any rate so long as HMRC's defence is permitted to continue to plead it in.

96. I have the (incremental) evidence of the Claimant's solicitors that the funder is: (a) '*a group of companies within the same group under common control*'; (b) '*an international business with significant philanthropic interests which believes in privacy and data protection. It is owned by a number of individuals, none of whom are subject to FATCA*'; (c) '*not based in the United States nor owned by a US institution*'; and (d) '*not, whether directly or indirectly, owned by any state or Government entity*'. That leaves a considerable amount of room for speculation – although, as held in previous interlocutory proceedings, not inference. Nevertheless, in the context of the issues, raised by HMRC's defence and by the present application, about the precise nature of the claim the Claimant now wants to pursue, the fact that this much at least has been 'volunteered', apparently by way of reassurance, perhaps says something interesting in itself.

97. The situation we have reached on this issue is, as I said at the outset, that this application seeks to split off and dispose of the issue of abuse of process as a whole, or its reliance on issues of funder identity in the alternative, as a last opportunity for the case to continue to trial with the current funder but without complying with the extant disclosure and inspection orders of the court. Indeed, suggests Mr Milford KC in his submissions, this application could itself be seen as the latest in a long series of ingenious (and expensive) but unmeritorious devices to try to achieve that result.

98. I have considered the primary application for a terminating ruling on its own merits. My conclusion has been that the abuse defence cannot fairly be disposed of on an interlocutory basis. Mr de la Mare KC did not significantly develop the case for the disposal of the funder identity issue as a standalone matter in his submissions on this application. He might be thought to have been in some difficulty doing so. The case

for the *relevance* of this issue to the abuse defence has already been considered and decided on a meaningful interlocutory basis. Mr de la Mare KC has already accepted in those proceedings an obligation to comply with what Deputy Master Fine has been confirmed to have ordered (and that a 'suitable sanction' would fall to be imposed for persisting in not doing so). The opportunities to challenge this obligation, as such, have come and gone, and the present secondary application cannot be entertained as a collateral means of challenging, relitigating or appealing the extant decisions. I would have been minded to refuse to make the order sought in the alternative on that basis alone.

99. But in any event, and on its merits, I am satisfied HMRC's case on the relevance of funder identity to its abuse defence has sufficient substance, reality and prospect to make it unfair to dispose of it on an interlocutory basis on this application. On the basis advanced by HMRC, and which I have satisfied myself has sufficient substance and reality, it is a part of the overall factual matrix going to the issue of the true nature of this claim, and the overall evaluation of the wider public interests, and the interests of justice, it engages. Although the measure of what it is ultimately capable of adding to the *strength* of HMRC's case on abuse is necessarily conditional on the outcome of the disclosure process, it is neither speculative nor Micawberish on that account. That is not least because disclosure on this specific head has already been mandated, but also because the evidential 'reassurance' provided so far on this subject falls a long way short of defeating the prima facie case of relevance raised by HMRC on the basis of its construction of the claim and its interpretation of the Claimant's conduct.

100. Funder identity goes, on HMRC's case, to the core issue of whether this is a genuine private law claim, albeit a test case, generously funded by a disinterested and publicity-shy benefactor with a commitment to human rights, or whether the court's processes are being abused by an unregulated attack, on a government department exercising statutory public functions in the public interest, made in the service of agencies whose own commitment to the UK public interest, and the interests of justice, is unapparent. The full contextual balance between public and private interests, and the interests of justice, are put in issue by HMRC's abuse defence. On the basis that that defence goes to trial generally, I have been given no good reason for splitting out funder identity from the factual matrix at this stage, as being a proposition as to relevance which has no reasonable grounds for being advanced and an unreal prospect of being successfully established.

Decision

101. In these circumstances, and for these reasons, the Claimant's application for a terminating ruling is dismissed.