Neutral Citation Number: [2024] EWHC 1208 (Ch)

Case No: BL-2019-001788

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 21 May 2024

Before :

MR JUSTICE FANCOURT

- -

Between :

THE DUKE OF SUSSEX	**Claimant**
- and -	
NEWS GROUP NEWSPAPERS LIMITED	**Defendant**

- -
- -

David Sherborne and Ben Hamer (instructed by **Clintons Solicitors**) for the **Claimant**
Anthony Hudson KC, Ben Silverstone and Harry Lambert (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing dates: 21, 22 March 2024

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APPROVED JUDGMENT

(sent out 13 May 2024)

This judgment was handed down via hearing at 10.30 am on 21 May 2024 and by circulation to the parties or their representatives and by release to the National Archives.

Mr Justice Fancourt:

Introduction

1. The Duke of Sussex seeks to amend his claim form and particulars of claim ("PoC") in this long-running claim against the Defendant ("NGN") that was issued in October 2019.

2. There are two sets of amendments to consider. The first set is consequential on an order that I made on 27 July 2023 ("the July 2023 Order") granting NGN summary judgment on part of the Duke's claim and requiring him to amend his claim form and PoC "solely so as to give effect to [that decision]" ("the consequential amendments"). The second set are voluntary amendments that the Duke had (in part) indicated that he wished to make as long ago as March 2022, with a draft amended claim form and draft amended PoC first having been provided to NGN in October 2022 ("the voluntary amendments"). The application for permission to amend was issued on 8 September 2023 ("the Application").

3. The July 2023 Order required two sequential sets of draft amendments because of the risk that the consequential amendments that the Duke was required to make (and the question of whether he had done so sufficiently) could become confused with the voluntary amendments, if they were not separately identified.

4. Some additional allegations have been added to the voluntary amendments since October 2022, with the most recent set of changes only being included in the new draft amended PoC provided to NGN shortly before the hearing in March 2024.

5. The trial of the claim, which was originally scheduled for November 2021 and then January 2024, has been delayed twice. The first occasion was because the Duke was unable to exchange witness statements in accordance with the timetable for the 2021 trial, and the second, in mid-2023, when his legal team indicated that his case could not be ready for a trial in 2024 (in part because of the intended Application). As there were at that time about 100 claimants awaiting a trial and NGN did not object, I agreed that the Duke's claim could await the second scheduled trial in January 2025.

6. The trial date is of significance because one of the issues raised by NGN on this application is whether the application for the voluntary amendments is now a "very late amendment" because it jeopardises the trial date, or only (as the Duke accepts) a "late" amendment. This is very far from the only objection taken by NGN, but it was one of the central objections. Regrettably, the Application was not one that could be resolved shortly: both sets of proposed amendments give rise to many contentious and complex issues, and the Application was vigorously debated before me over 2 days and even then required considerable further work on the papers after the hearing.

7. In relation to the consequential amendments, NGN strongly objects that the Duke has not complied with the July 2023 Order because he has not removed all the allegations of phone hacking and accessory unlawful information gathering on which I granted NGN summary judgment in the July 2023 Order. NGN raised its objections in good time in August 2023, in accordance with the timetable set by the July 2023 Order. The objections relate to both the terms of amendments actually made by the Duke in his draft and failure to remove or change other allegations in the original statement of case.

8. The disputes about the consequential amendments and the Application were not able to be heard before March 2024 because, from September 2023, the parties' legal teams (though not the Duke personally) were heavily engaged in preparing for a trial of 48 other claims due to start in January 2024.

9. In the event, all 48 claims were settled by the end of November 2023, and at a case management conference in December 2023 a date in February 2024 was fixed for a hearing of these matters. It then had to be re-scheduled to March 2024 because of delay in preparing and issuing an application by all remaining claimants in this phase of the MTVIL to re-re-amend the generic particulars of concealment and destruction ("GENPOC"), which was to be heard on an additional day at the same time as the Duke's Application.

10. I do not consider that the Duke or his legal team can be criticised for the delay from first raising the proposed Application in October 2022 until now. They were still awaiting a response from NGN to the draft amendments supplied in October 2022 when NGN issued an application in December 2022 to strike out or for summary judgment on the whole of the Duke's claim on limitation grounds, and said then for the first time that it refused consent to the voluntary amendments. Despite criticism by NGN for not having issued his application in December 2022, I consider that it was a reasonable decision to await the result of the strike out / summary judgment application before issuing an application to amend. The voluntary amendments did not directly affect the arguments based on s.32 Limitation Act 1980 with which the strike out / summary judgment application was solely concerned. Following my judgment on the strike out application in July 2023, the Duke did then issue his application promptly in accordance with the timetable in the July 2023 Order.

11. So far as delay is relied upon by NGN as a ground for refusing permission to amend, the relevant period of delay is therefore that between March 2022, when the Duke's solicitors indicated an intention to amend, and October 2022, when the draft amended PoC were first provided to NGN.

The Duke's particulars of claim

12. As it stood before I granted NGN summary judgment on the claim based on mobile voicemail interception and accessory unlawful information gathering (judgment at [2023] EWHC 1944 (Ch)), the Duke's claim was in respect of three different categories of misuse of his private information: accessing or attempting to access mobile telephone voicemail messages; obtaining private information by blagging; and obtaining private information by other unlawful use of private investigators ("PIs"). The claim was advanced in relation to the period 1996-2011 and by reference to three different centres of unlawful activity co-ordination: the News Department of the News of the World; the Features Department of the News of the World; and The Sun (in particular its Showbiz or "Bizarre" column, its Royal Correspondents, and its News Desk).

13. In support of those claims, the Duke pleaded reliance on 206 articles in Part G of the schedule to the PoC ("Part G" and "the Schedule" respectively). He also pleaded reliance on the content of the re-amended GENPOC and generic disclosure provided by NGN.

He pleaded (as examples of private investigator work) 171 payment records or emails at para 6 PoC and an even larger number contained in confidential Part D of the Schedule.

14. Various documents were identified in para 7 PoC, the significant majority of which relate to voicemails and call data. Para 8 PoC pleads 817 items of call data on which the Duke relies, together with 4 private investigator invoices and 20 payment records.

15. It is alleged in paras 9 and 11 PoC that inferences are to be drawn that Mr Mulcaire and/or NGN's News Department at the News of the World targeted the Duke and accessed his voicemails, and obtained access to voicemail messages for and left by the Duke and his associates; that the Features Department of the News of the World targeted him and intercepted his voicemail messages on numerous occasions, using information (including phone numbers) obtained by external companies or individuals, as shown by PI invoices; and that the articles in Part G were derived from or based on or corroborated by information obtained through voicemail interception (para 13(e)).

16. In relation to The Sun, it is pleaded that the Duke was targeted by voicemail interception, blagging and unlawful PI activity, and two PI invoices and 12 payment records to PIs are specifically relied upon. Again, it is alleged (para 18 PoC) that the articles in Part G published by The Sun were derived from, based on or corroborated by information obtained from accessing the Duke's voicemails. Some of the articles are then summarised in para 20 PoC as "blatant examples" of voicemail interception and/or unlawful information gathering ("UIG"), almost all of which are concerned with suspicious calls, double taps and voicemail messages. Para 22 PoC pleads that the publication of the Part G articles is relied upon as being the product of misuse of private information and representing occasions of unlawful activity by NGN journalists or those acting for them.

17. The preponderance of all allegations in the unamended PoC is based on voicemail interception, though there are also significant allegations of PI UIG and a few occasions on which blagging is specifically alleged. All 205 articles in Part G are pleaded as being the product of voicemail interception, but elsewhere they are pleaded as being evidence of voicemail interception, blagging or unlawful PI activity. No articles are separately identified as being the product of blagging or PI activity but not voicemail interception.

18. The articles individually pleaded in para 20 PoC are, save in three cases, clearly identified as being examples of voicemail interception (there are two cases pleaded as "voicemail interception and/or blagging" and one as "voicemail interception and other means of unlawful information gathering"). The strong appearance given by the unamended particulars of claim is that blagging and other PI unlawful activity is relied upon as being associated with voicemail interception, but they are nevertheless separate categories of wrongdoing for pleading and limitation purposes.

The Consequential Amendments

19. On 27 July 2023, I granted NGN summary judgment on "its defence of the Claimant's claims for voicemail interception and for any other wrongs accessory to voicemail interception, as identified in the Claimant's Claim Form and Particulars of Claim" and ordered the Duke to serve a draft amended claim form and draft amended PoC "solely so as to give effect to" that order.

20. The dispute about the consequential amendments is therefore not an application by the Duke for permission to amend but a question about whether the Duke has adequately complied with the July 2023 Order. If he has adequately complied with it, he does not need permission for the consequential amendments. If he has not complied, he must do so if he wishes to pursue his claim. While giving effect only to the July 2023 Order is one aspect of compliance, pleading the amendments in accordance with the rules of the CPR and the Chancery Guide is another.

21. Although the judgment and order referred to "claims for voicemail interception" in general, it is common ground that it is a reference to mobile voicemail interception only, as there was at the time no pleaded claim by the Duke for landline call interception or landline voicemail interception. In the remainder of this judgment, I will refer to mobile voicemail interception as "VMI". The "wrongs accessory to voicemail interception" were other wrongdoing, including any blagging or PI activity, that was accessory to any actual or attempted VMI. As explained in my judgment of July 2023, it could not credibly be said, for limitation purposes, that although the Duke knew or was 'on notice' that he had a claim for VMI, he was not 'on notice' of a claim for any UIG that was involved in the actual or attempted VMI.

22. The Duke's legal team therefore needed to draw a distinction in his amended PoC between blagging or unlawful PI activity that was accessory to actual or attempted VMI, on the one hand, and blagging and PI activity that was not accessory, on the other hand, removing the former category from the claim and leaving in the latter. That also required the Duke's legal team to consider whether articles, invoices and payment records pleaded as evidence of unlawful activity were properly to be removed, as being evidence of VMI or accessory unlawful activity, or left in as being evidence of unlawful activity that was not accessory to VMI.

23. Given that the majority of the pleaded claim was concerned with VMI, it might have been expected that the draft amended particulars would be somewhat (even considerably) reduced in scope. That is not, however, the case.

24. Only two short paragraphs have been removed, along with some sentences, phrases and words in other paragraphs. No articles, invoices or payment records that were originally pleaded as occasions of VMI, or of VMI and/or other unlawful activity, have been removed. The evident reason for this is identified in para 4A of the draft, which reads as follows:

> "Relief in relation to voicemail interception or for any wrongs accessory to any such actual voicemail interception at *The News of the World* and *The Sun* is time barred pursuant to the judgment of Fancourt J with the neutral citation [2023] EWHC 1944 (Ch), and so the Claimant does not pursue a claim arising from these alleged wrongs ("**Phone Hacking**"). For the avoidance of doubt, to the extent these Particulars of Claim refer to incorporate references to the generic case, including the Re-Amended Generic Particulars of Claim the Claimant does not include or incorporate any claim in relation to Phone Hacking. However, the Claimant does continue to rely on the fact of such activities in relation to him and in the generic case in support of his claim in relation to the Unlawful Acts (as defined below, at paragraph 5) as probative similar fact evidence. If, as is averred above, the Defendant engaged in Phone

> Hacking then it can also be inferred that the Defendant engaged in the Unlawful Acts."

Various arguments in support of that conclusion are then set out, in the remainder of para 4A, which concludes by asserting that Phone Hacking (as defined) and its extent in relation to the Duke is "logically probative of the issue of the Unlawful Acts".

25. "Unlawful Acts" is not defined in para 4A but is defined at the end of para 5 of the draft. This paragraph is largely unchanged from the original content, except that the words "such the accessing or interception of his voicemail messages" [sic] as an indication of the nature of the unlawful acts alleged against NGN is replaced by the words "such as blagging", and a further reference to unlawful PI activity alleged against NGN is qualified by the words "where not accessory to actual voicemail interception as set out above at paragraph 4A". The following sentence then appears at the end of paragraph 5:

> "Paragraph 4A above is repeated. Collectively the unlawful information gathering, described above, is referred to as "**the Unlawful Acts**".

What is described above is presumably the activities on the part of NGN described generally in para 5.

26. Thus, while leaving the content of the PoC claim essentially unchanged, the draft creates a dichotomy between matters alleged that are "Phone Hacking", which are to be proved and relied upon as similar fact evidence, and other matters that are "the Unlawful Acts", which are to be proved and relied upon as causes of action leading to an award of damages. What is wholly unclear is where the boundary between the two lies, except at a conceptual level that derives solely from the terms of the July 2023 Order.

27. In a number of places in the draft, allegations which are plainly principally concerned with VMI are left in place, unamended save for the addition of the words "Paragraph 4A above is repeated": see, *e.g*., paras 7, 13 and 20. In other places, a paragraph that was dealing with (or incorporated references in a generic statement of case to) VMI is amended so that any specific reference to VMI is replaced by a reference to "Unlawful Acts" followed by the words "Paragraph 4A above is repeated" : see, *e.g*., paras 9, 13(g), 14, 17, 19, 22. In yet other places, words specifically referring to wrongful accessing of voicemail messages are simply replaced by "the Unlawful Acts", without any further amendment to the substance of the allegation: see, *e.g*., paras 19, 24, 25, 26. This inevitably creates a lack of clarity about the factual distinction between the permitted causes of action and the causes of action that were struck out.

28. The Duke's legal team clearly intend (notwithstanding the July 2023 Order) to seek to prove at trial all the allegations in the current PoC without distinction, so that findings in relation to "Phone Hacking" can stand as similar fact evidence to support findings in relation to "Unlawful Acts", only drawing a distinction between the two categories at the stage when damages must be awarded for such Unlawful Acts as have been identified and proved.

29. Mr Sherborne submitted that the Duke was entitled to rely on evidence of VMI and accessory activities if that evidence was probative of blagging or other unlawful activity by PIs. He accepted that there would in due course be a case management decision about whether such evidence as was relevant should nonetheless be excluded, or limited, in the

exercise of the court's discretion, but said that that was an issue for another day. He referred me to an interlocutory judgment of Mann J in Gulati v MGN Ltd [2013] EWHC 3392 (Ch) in which MGN Ltd tried to strike out a paragraph of particulars of claim in the 4 earliest claims in the parallel Mirror Group litigation that relied on evidence of phone hacking generally, which did not relate to the 4 claimants themselves. Mann J held (at [18], [19]) that the pleading was unobjectionable and that the evidence in question could be admissible as similar fact evidence.

30. Mr Sherborne pointed out that there were some relevant admissions, relating to Mr Goodman's, Mr Mulcaire's and Mr Dan Evans' activities at the News of the World, so not every allegation of VMI remained to be proved. He said that disclosure has already taken place in this claim, so proportionality of the similar fact evidence plea is not a problem. He also pointed out that in the claim of Mr Hugh Grant against NGN, the draft amendments following the dismissal of Mr Grant's phone hacking claim used a similar pleading technique and had been agreed by NGN (that claim has recently settled and will not be proceeding further).

31. Mr Hudson KC, on behalf of NGN, was highly critical of the approach that Mr Sherborne has taken to giving effect to the July 2023 Order. He argued that the effect of the judgment striking out the VMI part of the Duke's claim and accessory UIG had been disregarded, and that the Duke had simply "doubled down" on the VMI allegations, and indeed in the voluntary amendments had added considerably to them. The Duke had therefore not complied with the July 2023 Order because he had not removed the VMI and VMI accessory claims from the PoC.

32. Mr Hudson also objected to the pleading of evidence, which is forbidden by the CPR and contrary to the Chancery Guide (while acknowledging that that had, regrettably, been a characteristic of the claimants' pleadings throughout the MTVIL, and is the case in the Duke's existing PoC). He objected specifically to the pleading of similar fact evidence, and also the pleading of arguments as to how the case on similar facts would be established (the second part of paragraph 4A, which follows the first part set out in [24] above).

33. Mr Hudson submitted that the Duke's legal team is trying to plead his amended claim in a way that obfuscates the real issues, which are the causes of action for blagging and unlawful PI activity not accessory to VMI, and that the combination of the consequential and voluntary amendments has the effect of covering up the elimination of the VMI claim and makes it difficult to identify exactly what causes of action remain (bearing in mind that disclosure has been completed and so the Duke cannot say that he has pleaded as many facts as he can prior to disclosure taking place). Mr Hudson noted in particular that the allegations of VMI still remain in the draft, and that the relief claimed still relies on a causative link between the VMI and the publication of the 205 articles. He suggested that the Duke's legal team cannot have done a proper audit of the articles that remain in issue in Part G so that they now represent only the product of blagging or PI activity that was not accessory to phone hacking; and that such an audit needed to be done at this stage, so that the court and NGN could see what particular allegations remained as the Duke's causes of action and case manage the claim effectively.

34. In so far as reliance will be placed on similar fact evidence, Mr Hudson's criticism was that the draft does not enable the court or NGN to see whether and where there is a link between the allegations of VMI and the facts relating to the causes of action based on

blagging and non-accessory unlawful PI activities. The draft therefore creates a significant practical problem for the court in seeking to case manage a claim to try particular issues and deal with the admissibility of evidence of other matters. He said that the acceptance of Mr Grant's consequential amendments was a pragmatic decision in a case where the structure of the particulars of claim was significantly different and the burden of the allegations much lighter.

35. A table of NGN's objections to the consequential amendments was prepared and the Duke responded to it, in accordance with my July 2023 directions. The table is useful because it deals with amendments that the Duke is alleged to have failed to make as well as those that he did make, to which NGN objects. Mr Hudson took me through NGN's criticisms paragraph by paragraph, but the brunt of the objections can be summarised as follows:

i) The Duke has left in very substantial tracts of pleading that relate only to VMI, e.g. paras 3, 4 and 7 and 8(a) to (e), which should have been removed.

ii) The pleaded case fails to identify the "Unlawful Acts" that are now relied on as causes of action with any particularity, and the mechanism of defining "Phone Hacking" and "Unlawful Acts" as mutually exclusive categories does not assist in identifying the causes of action beyond the obvious fact that VMI is now excluded. What is needed ahead of trial is clarity about the factual allegations that are being pursued as causes of action.

iii) In particular, there is no clarity about the extent or nature of blagging or PI activity that is accessory to VMI (and so is struck out of the claim) and that which is not – e.g. which of the 171 payment records at para 6(b), 4 PI invoices at para 8(f) and 20 payment records at para 8(g) relate to PI activity that was accessory to VMI.

iv) The case advanced on similar fact evidence is wholly unsatisfactory because the pleading does not identify the blagging and unlawful PI activity causes of action of which general allegations of VMI are said to be probative, or of which specific examples of alleged VMI pleaded in the particulars of claim are said to be probative. In effect, the entire case previously based on VMI is being re-run to attempt to prove unparticularised blagging and unlawful PI activity.

36. Mr Sherborne's response to this attack was to say that the only additional issue to grapple with as a result of the proposed amendments is the similar fact evidence, and that the extent to which it is admitted is a matter that can be addressed at a later stage, either at the proposed CMC in July 2024 or at the pre-trial review. The arguments in the second part of para 4A were added, he said, because in the schedule of objections NGN had said that the Duke had failed to set out any proper basis for asserting that VMI was logically probative of the Unlawful Acts, as defined. That is factually correct: it had said so. Mr Sherborne said that it was wrong to suggest that the removal of VMI and accessory activities "reduces the claim enormously" because NGN's *modus operandi* was to use a number of unlawful information gathering methods, all to the same end. He said that the particulars in para 6(b) of the draft all relate to PI activity or blagging that was not accessory. He claimed that the unlawful activities that underlie every article complained of are not just VMI and include blagging or unlawful PI activity too.

37. That rather surprising assertion (if by it was meant blagging or PI activity that was not accessory to the VMI) led me to ask Mr Sherborne about the nature of the exercise that had been done after July 2023 to identify the parts of the claim that still remained and which parts of the pleaded material relate to them. Mr Sherborne told me that, "as he understood it" a member of the legal team had been through each of the articles in Part G to see whether there was a properly arguable case that it was not only VMI that underlay it. When I pressed about that, Mr Sherborne said it was previously their case that each article did not necessarily involve VMI and that there might be some or many that did not. However, Mr Sherborne said that in auditing the pleaded case, he was satisfied that there was an arguable case that every article in Part G was the product of blagging or PI activity that was not accessory to VMI.

38. I have given careful thought to what was said. I make allowances for the fact that Mr Sherborne and I might have been slightly at cross-purposes at the end of 2 long days of hearing. I am not, however, persuaded that the Duke's team has focused adequately on the critical distinction between unlawful PI activity that was part and parcel of actual or attempted VMI, on the one hand, and blagging and unlawful PI activity that was not accessory on the other. The claim as originally pleaded was undoubtedly focused on VMI, as are the GENPOC and other generic pleadings that are incorporated by the CSPoC. It is therefore inherently likely that the articles in question were identified as ones where actual VMI was suspected as being the source of the private information, to which other unlawful activity might have been accessory. To be told now that there is a properly arguable case that for every article (and, indeed, every invoice or payment record) the unlawful activity was not accessory to VMI strains credibility.

39. I consider it much more likely that the Duke's legal team has not focused on the right distinction, because it has clearly decided to do what it can to keep all the VMI material before the Court, both in the Duke's statements of case and at trial. The justification is the similar fact evidence argument, which would (if the Duke's approach is accepted) result in all the allegations of VMI being examined at the trial, with the consequence that the boundary between unlawful activity that was accessory to VMI and unlawful activity that was not would not have to be delineated until after the evidence has been heard. My inferential conclusion is reinforced by the content of the voluntary amendments, which in some respects expand upon the VMI allegations, as well as seeking to add similar allegations of landline voicemail interception.

40. If this claim is to be efficiently case managed and the admissibility of the similar fact evidence fairly determined before witness statements are exchanged, it is essential to understand in sufficient detail what causes of action remain, and in what respects and to what extent the similar fact evidence of VMI will be relevant and sufficiently probative of those claims to justify admitting it at trial. I regard that as an important stage of the case management, if the trial is not to be overwhelmed by a vast quantity of evidence about collateral matters, distracting attention from the evidence that relates specifically to the remaining causes of action.

41. In short, I consider that NGN's criticisms of the draft amended particulars of claim are broadly justified and apposite. Almost all the allegations of VMI have been left in the draft, subject only to a disclaimer of any claim being based upon them. The only means of identifying the Unlawful Acts, as defined, if the draft amendments are permitted will be to identify the extent of the VMI and any wrongs that are accessory to the VMI, and then conclude that everything else complained of is an Unlawful Act. With only a few

exceptions, no particulars are given of the matters relied upon as being non-accessory blagging of private information or PIs otherwise obtaining information unlawfully. This is self-evidently a most unsatisfactory way of having to try a case that is now limited (as it stands) to blagging and PI activity not accessory to VMI.

42. Standard disclosure in this claim was completed in January 2022. Generic disclosure has taken place over several years and there have been a number of successful applications for specific disclosure since then. The Duke now has all the documents relating to his pleaded case that will be available at trial. There can therefore be no impediment to his pleading with particularity at this stage, whether by reference to particular articles or invoices or otherwise, the allegations of blagging or unlawful PI activities that are not merely accessory to VMI. If that can be done, it should be done, in the interests of defining the issues for trial and separating the facts relevant to the causes of action from evidence of collateral matters.

43. While at this stage it is sufficient to say that there may be a valid case for permitting evidence of similar facts, there would in due course (in view of the way that the Duke's legal team are running his case) be a significant case management challenge to identify the similar fact evidence that is relevant and sufficiently logically probative. It is material that there are no such facts that have been found by a court in relation to The Sun, though there are admissions in relation to the News of the World. This is therefore not a case where the similar facts have already been proved. Without careful case management, there is an obvious risk of a volume of evidence of collateral matters requiring decision-making that is wholly disproportionate to the causes of action that remain.

44. Mr Sherborne appears to seek to advance the case based on VMI at a high level of generality, namely that NGN used various methods of unlawful information gathering, of which VMI was only one, so that any evidence that NGN executives or journalists directed or used VMI is probative of NGN having directed or used other methods of unlawful information gathering. However, that is something of a reversal of the approach that other claimants will adopt in seeking to prove VMI, namely to draw a conclusion of VMI based on evidence of use of PIs, call data and other matters. What is therefore important is to be able to identify the PI activity that is not ancillary to VMI, so that it can be determined whether the probative force of the evidence going to establish VMI (if proved) is sufficient to justify the cost of preparation and time at trial that will be needed to prove it.

45. As for NGN not taking the same objection in Mr Grant's case, there is some merit in the point that Mr Sherborne makes; but Mr Grant's case was pleaded differently to a material degree. His claim identified as "unlawful acts" six different categories of UIG, of which VMI was one, and there were different parts of his particulars of claim that addressed those categories distinctly. The published articles relied upon as examples of misuse of private information are not at any point pleaded as the product of VMI: they are pleaded as "Unlawful Articles" that would not have been published but for the Unlawful Acts (i.e. originally six categories of unlawful activity, then five after the summary judgment in his case). Further, the Duke's claim is pleaded on a much more expansive scale than Mr Grant's claim and with less clarity. NGN could have objected in Mr Grant's case to the failure of the draft amendments to separate out articles that relate to VMI only, but it did not do so. I do not however consider the fact that NGN felt they could cope with lack of clarity in Mr Grant's case to be a sufficient answer to the criticisms made of the Duke's draft amendments.

46. The draft amended PoC do not, in my view, set out the Duke's claim based on blagging and non-accessory unlawful PI activities with the particularity that is now needed, given that the remainder of his claim has been struck out. It is now necessary to be clear in identifying the allegations that can still properly be pursued as causes of action. I do not ignore in this regard the complaint made by all claimants in the MTVIL that evidence is lacking because NGN has concealed and destroyed it. But that does not prevent the Duke from identifying now the facts that will be asserted at trial to establish the remaining causes of action, as distinct from those that establish VMI and accessory activities. The CPR and the Chancery Guide both require adequate particulars of the causes of action to be pleaded, so far as a claimant can do so.

47. In addition to this overarching objection, which is a failure to give effect to the terms of the July 2023 Order, I set out in Appendix 1 to this judgment the individual paragraphs of the draft amended PoC that are objectionable as failing to comply, with brief reasons for each paragraph. I do not consider that any of the paragraphs identified in Appendix 1 are capable of being justified on the basis that they are a description of matters that the Duke will seek to establish as similar fact evidence. That material is, by definition, evidence, not facts relating to the causes of action remaining in the claim, and the PoC should not be encumbered with them in the interests of obtaining clarity about the facts of the causes of action that are pursued. Once those facts are adequately pleaded, it may well be helpful, before the next CMC, for the Duke to provide a separate schedule identifying the similar fact evidence that he contends is probative of one or more of the causes of action, and if so which one(s).

48. It follows that the Duke must comply fully with the July 2023 Order, as he has failed to do so. I will hear from Counsel on the precise form that the order should now take, to give effect to the conclusions in this judgment.

Voluntary Amendments

49. The voluntary amendments that the Duke wishes to make have been drafted on the basis that the prior consequential amendments are accepted. In the light of my conclusion on the consequential amendments, it follows that the amended PoC giving effect to the July 2023 Order will have a very different appearance, and permission to amend voluntarily cannot be given in the form sought until the consequential amendments have been finally resolved. However, in addition to objections to the drafting style or content, there are objections of a "root and branch" nature taken by NGN to most of the voluntary amendments, and it is therefore appropriate that I deal with them in principle at this stage.

50. Mr Sherborne explained that, from the Duke's perspective, the voluntary amendments are within the scope of the existing pleaded 'umbrella' claims for causes of action for blagging and unlawful information gathering by PIs. The voluntary amendments are therefore in the nature of further particulars, rather than new causes of action. There is accordingly no application that in terms is made pursuant to CPR rule 17.4, since the Duke does not accept that they are "new actions" within the meaning of s.35 Limitation Act 1980.

51. The amendments are said to fall into the following three broad categories:

i) Amendments that arise from disclosure given by NGN after the PoC were served in October 2020, the last batch of which was extensive call data ordered to be disclosed at the CMC in October 2023 and which was then disclosed by NGN in November and December 2023. To this extent, the amendments, he said, are simply bringing the PoC up to date to include new allegations that have come to light since the original PoC.

ii) Further particulars of specific allegations to be made against individuals at NGN, or individual PIs, in order to clarify the allegations of personal misconduct that will be made at trial.

iii) Amendments that result from the claimants' lawyers and the Duke's lawyers' ability to "complete further pieces of the jigsaw" as a result of the development of the generic case since October 2020.

Those seem to me to be three asserted justifications for the late pleading rather than 3 categories of amendment.

52. The voluntary amendments are numerous, and extensive, but they fall into broadly the following categories, as I read them:

i) New allegations of live phone call interception (of landline and analogue mobile phones), bugging, scanning and interception of voicemails left on landline telephone message machines (principally paras 4A, 5, 6C and 6D PoC, but with further consequential references elsewhere).

ii) New allegations and 27 new articles (principally concerned with alleged interception or bugging of calls made by the late Princess Diana) in the years 1994 and 1995 (mainly paras 5, 15A(a), 20(aA) to (aC) PoC and articles A to AA in Part G).

iii) A new allegation of alleged unlawful gathering of the private information of Meghan Markle (now the Duchess of Sussex) in California in 2016 by Mr Dan Hanks, and in consequence of that the unlawful obtaining of mobile phone numbers and call or text data which included the Duke's private information (para 20(w) PoC – this is not said to have been derived from disclosure).

iv) New allegations of breach of confidence in place of allegations of misuse of private information that predate 2 October 2000 (this is nothing to do with disclosure or completing pieces of the jigsaw: it is a response to my decision in the Duke's case against MGN Ltd that a plea of misuse of private information before that date cannot be treated as if it were a plea of breach of confidence).

v) Allegations against a large number of newly-named editors and journalists, and some PIs (para 5, 24(fa) PoC), including the case of Ikon Pictures (paras 6A, 6B PoC) which includes allegations of a different means of capturing private information – an "IMSI-catcher").

vi) Further allegations of VMI intended to supplement the pleaded case on VMI that was struck out, but which is now sought to be relied on as similar fact evidence.

vii) A raft of new evidence obtained from disclosure on which the Duke pleads that he "will also rely" in support of his claim (para 8A, 9A, 13A, 15A, 20(a) PoC).

53. NGN objects to permission being given for the voluntary amendments (other than a short list of very minor changes, corrections or deletions that were notified by NGN in September 2023) on the following principal grounds:

a) Delay and lateness of the proposed amendment;

b) Inclusion of further (and apparent intention to "double down" on) VMI allegations, thereby obfuscating or distracting from the true claims in issue;

c) Limitation in relation to "new claims";

d) Inadequate pleading of the new claims alleging breach of confidence;

e) Lack of adequate evidential basis / real prospect of success for the newly introduced claims;

f) Want of jurisdiction in relation to claims of misconduct in California;

g) Lack of *locus standi* for breach of confidence claims asserted in relation to Princess Diana and misuse of private information claims relating to the Duchess of Sussex.

54. These objections overlap in many cases in relation to particular amendments, but in order to bring some principled approach to bear, it is preferable to address them as grounds of objection rather than address each paragraph and sub-paragraph of the draft PoC in turn. In order to do so, I will summarise first the principles that apply to amendments generally, to "late" and "very late" amendments, and to amendments that seek to introduce new claims.

Summary of Legal Principles Applying to Amendments

55. There was generally no dispute between the parties as to the principles that apply.

56. The power to permit amendments is contained in rules 1 and 3 of Part 17 of the CPR, with special considerations applying under rule 4 of Part 17 where a limitation period has expired.

57. In granting or refusing permission to amend, the court must have regard to the need to deal with the case before it justly, at proportionate cost, and in accordance with the overriding objective. Relevant considerations at the outset are accordingly whether the amendments will be in compliance with the rules, practice directions and any court orders, will further a fair trial or may delay it, will save costs or increase the expense of the trial, will be proportionate to the importance and value of the case and the means of the parties, and will or will not result in an excessive share of the court's resources being allotted to the case.

58. In dealing with the case justly, the Court, in exercising its discretionary power, will usually have to weigh prejudice that would be caused to the respondent by granting permission to amend against the prejudice that would be caused to the applicant if permission were refused. If little or no prejudice would be caused to the respondent and there is no risk to the trial date, the balance will usually tip in favour of the grant of permission, if that will enable the true matters in dispute between the parties to be tried. The degree of lateness of the application for permission is material, however, and the court is entitled to have any significant delay explained.

59. Any proposed amendment must disclose a case that is more than merely arguable and which has a real (as opposed to a fanciful) prospect of success.

60. In Elite Property Holdings Ltd v Barclays Bank plc [2019] EWCA Civ 204, Asplin LJ, giving the lead judgment with which the other members of the court agreed, said at [40] – [42]:

> "There was no dispute about the test to be applied in the circumstances of this case. The dispute was whether the Judge had applied it properly or whether he had fallen into error by conducting a mini trial. In any event, it is important to bear in mind that the overriding objective applies and the question of whether permission to amend should be given must be considered in the light of the need to conduct litigation fairly and justly and at proportionate cost.
>
> For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claimant has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No.3)* [2003] 2 AC 1.
>
> The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon."

61. The Elite Property Holdings case was referred to with approval by the Court of Appeal subsequently in Kawasaki Kishen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33 at [16]-[18], per Popplewell LJ, and CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs [2023] 1 WLR 4335 at [48], [66], [70], per Males LJ and The Master of the Rolls and Newey LJ A claim brought by amendment must have some degree of conviction about the facts alleged and be supported by some evidence, though the court will not

conduct a mini-trial as to the relative weakness of the evidence: CNM Estates v Carvill Biggs at [76]-[77].

62. The position is recognised to be somewhat different where, on a true analysis, the amendment does not advance a different claim but provides further particulars of a claim already pleaded. In those circumstances, the court does not scrutinise each particular to see if it passes the "real prospect" test: Phones 4U v EE plc [2021] EWHC 2816 at [11], per Roth J. However, the amendment must still satisfy the requirements of clear and coherent pleading and be sufficiently particularised.

63. There are particular considerations that apply to "late" and "very late" amendments. A very late amendment is one that imperils the trial date. Even if the trial date will be saved, an amendment that puts the parties on an unequal footing in preparing fully for the trial is prejudicial and may be refused for that reason. Any amendment that will cause significant disruption to the orderly preparation for trial places a heavy onus on the applicant to justify it: see Swain-Mason v Mills & Reeve (Practice Note) [2011] 1 WLR 2735.

64. In CIP Properties (AIPT) v Galliford Try Infrastructure [2015] EWHC 1345 (TCC), Coulson J summarised the right approach to late amendments at [19], referring to previous decisions:

> "(a) The lateness by which an amendment is produced is a relative concept (*Hague Plant*). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of these significant steps in the litigation (such as disclosure or the provision of witness statements and experts reports) which have been completed by the time of the amendment.
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (*Swain-Mason*), even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (*Brown*).
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (*Brown*, *Wani*). In essence, there must be a good reason for the delay (*Brown*)
>
> (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (*Swain- Mason*, *Hague Plant*; *Wani*)
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (*Worldwide*), to the disruption of and additional pressure on their lawyers in the run up to trial (*Bourke*), and the duplication of cost and effort (*Hague Plant*) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (*Swain- Mason*).

> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (*Swain-Mason*). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (*Archlane*)."

65. This summary was followed and apparently approved by Birss LJ in ABP Technology Ltd v Voyetra Turtle Beach Inc [2022] FSR 19, who stated at [24]:

> "The simple point about lateness is that it calls for an explanation justifying the lateness. That is because an amendment which might otherwise be allowed, could well be refused if its lateness has caused unjustifiable prejudice to the other party. Therefore an explanation is needed in order for the court to work out whether or not it is a case in which, despite the prejudice caused by the lateness, nevertheless the balancing comes down in favour of allowing the amendment."

Nicola Davies and Coulson LJJ agreed with Birss LJ.

66. Where the amendments seek to add further examples or incidents of a case already pleaded, the court should (in applying the overriding objective) consider whether adding these matters is disproportionate in that it adds little except volume, cost and time to the case: Various Claimants v MGN Ltd [2020] EWHC 553 (Ch), per Mann J at [59], [60].

67. Where a relevant limitation period has arguably expired when the application to amend is made, CPR Part 17.4 applies and the court can only permit a "new claim" to be added or substituted if it arises out of the same facts or substantially the same facts as a claim in respect of which the applicant has already claimed a remedy in the proceedings. The burden therefore lies on the applicant to satisfy the court that there is no realistically arguable case that the limitation period for a new cause of action has expired. If there is a real prospect of success on limitation, the court should refuse permission to amend and leave the applicant to bring a new claim, which allows the defendant to plead that the cause of action accrued more than six years before the new claim is issued.

68. Pleading new instances or particulars of a cause of action already pleaded is not the bringing of a new claim, but facts that amount to a separate breach of a duty may well be a new cause of action and therefore a new claim: The Kriti Palm [2006] EWCA Civ 1601.

69. The Court of Appeal in Mulalley & Co v Martlet Homes Ltd [2022] EWCA Civ 32 at [38] explained that four considerations therefore arise under rule 17.4:

> "(i) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?
>
> (ii) Did the proposed amendments seek to add or substitute a new cause of action?
>
> (iii) Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?

(iv) Should the Court exercise its discretion to allow the amendment?".

70. The subsequent case of Geo Minerals Ltd v Downing [2023] EWCA Civ 648 illustrates that complex analysis is sometimes needed where different duties or breaches of duty are alleged by amendment, and what is required is to abstract the bare minimum of essential facts from the existing pleading and compare it with the bare minimum under the proposed amended pleading. The pleading of different loss or a different remedy does not necessarily mean that there is a new claim, or that it arises out of facts that are not substantially the same. All the authorities stress that "substantially the same" does not mean "similar".

71. An apparent gloss on the requirement for a new claim to be issued where there is an arguable limitation defence has emerged in recent years. Mr Sherborne submits that the Court can, instead of requiring a new claim to be issued in which the defendant can raise its limitation defence, give permission to amend but specify that the relevant date of the new claim for limitation purposes is not the date of issue of the claim form but a later date (the authorities seem to favour the date of the application for permission to amend under rule 17.4, but it could be the date of the amendment itself if no such application was made). That approach is known as the *Mastercard* approach, following a decision of Field J in WM Morrison Supermarkets plc v Mastercard Inc [2013] EWHC 3271 (Comm) ("*Mastercard*").

72. In *Mastercard*, the claimant sought to introduce by amendment an allegation of concerted practices, contrary to the Competition Act 1998, in relation to UK credit card multilateral interchange fees. The issue for the judge was whether this claim fell within s.35 Limitation Act and so could be permitted. He held that it did not as regards causes of action that arose more than 6 years before the application for permission to amend was issued. However, that was a case in which there was a continuing infringement of competition law alleged, from day to day, both before and after the relevant limitation date. The Judge was therefore in a position where he could grant permission for the causes of action that arose after that date, but should refuse permission for those that predated it.

73. Field J noted an acceptance by counsel for the defendant that an amendment of the existing claim could be brought on the basis that it was expressed to be limited to claims that arose within the last six years (contrary to the terms of the pleaded amendment). Field J accepted that as a sensible approach, to avoid the claimant having to issue a separate claim and have it consolidated. It is notable however that there was no issue of suspension of the primary limitation period under s.32 Limitation Act 1980 in that case and no remaining question of the validity of the limitation defence. The sole issue was whether the claim as pleaded, as a single claim for continuing infringement, should be allowed under s.35.

74. Counsel for the claimant argued that the claim was not new, alternatively arose from the same facts or substantially the same facts as the existing claim, and in the further alternative (see at [18] of the judgment) that since the claim was at least partly not statute-barred the entire claim could be brought by amendment with the benefit of relation back to the date of issue of the claim form. Each of these arguments was rejected by the Judge. What was conceded by Counsel for the defendant and agreed by the Judge was that the new claim could be brought by amendment in relation to only that part of the new claim that was not statute-barred. It was not therefore a case in which there was an arguable

limitation defence to the whole claim, where s.35 mandates a refusal to grant permission to amend.

75. The approach of the Judge in *Mastercard* was implicitly approved by Sales LJ in the case of Mastercard Inc v Deutsche Bahn AG [2017] EWCA Civ 272 ("*Deutsche Bahn*"), another case of an alleged continuing breach of competition law. Barling J had held that the proposed claim raised by amendment fell within s.35 because it arose out of the same facts or substantially the same facts as the existing claim, alternatively because the new claim had already been raised in the claimant's Reply. The Court of Appeal disagreed with both conclusions and allowed the appeal. The appellant had indicated that they accepted that part of the claim was valid but part was statute-barred: see [3]. They said that they were content for the amendment to be made, but only if it was in such terms as made clear that it did not have the effect of relation back to the date of issue of the claim, which would have had the effect of validating a statute-barred part of the claim. In relation to that, Sales LJ said at [4]:

> "MasterCard have accepted in correspondence that the new claim can be introduced into the existing proceedings as an amendment which relates back to 7 August 2015, when the claimants' application to amend was served. This was the approach adopted by Field J in *William Morrison v MasterCard [2013] EWHC 3271 (Comm)* to avoid the necessity of the claimants there having to commence a new claim with resultant waste of costs, where he had found that the new claim did *not* arise out of the same or substantially the same facts. This result can be achieved either by the court refusing permission for an amendment unless the new pleaded claim itself in terms pleads the new cause of action only from that date or by the court making an order stipulating the relevant date for limitation purposes, which is what both sides invited the judge to do and again invite us to do, depending on what date we decide is the proper one…."

76. That left the question of the relevant date to identify what could legitimately be claimed without infringing the Limitation Act, and the Court of Appeal agreed with Field J that the date of the application to amend under rule 17.4 was the right date (though no one contended for the date of the amendment itself). In *Deutsche Bahn* too, therefore, once the issues arising under rule 17.4 had been decided on the application to amend, there was no remaining limitation issue to be tried. The permitted amendment defined only non-barred claims: it did not leave an issue about limitation to be determined later, at trial.

77. In Libyan Investment Authority v King [2021] EWCA Civ 1600 at [22] ("*Libyan*"), Nugee LJ commented that in a case he had heard as a puisne judge he persuaded the parties to agree to permission to amend being granted on the basis that the question of whether the amended material fell within rule 17.4(2) would be decided at trial. The indication in his judgment is that there was particular complexity about whether the new claims arose out of substantially the same facts as existing claims, which the trial judge would be better placed to decide, following which the matter of relation back or not would be determined accordingly.

78. In all these cases except *Libyan*, the parties were agreed about how the valid part of the claim could be pleaded by way of amendment. In *Libyan* on the other hand, the parties

were persuaded to agree, in effect, to defer to trial the determination of the application under rule 17.4 for permission to amend.

79. The question of whether the Court had power to impose a *Libyan*-style solution against the will of one of the parties was considered in Advanced Control Systems, Inc v Efacec Engenharia e Sistemas S.A. [2021] EWHC 914 (TCC) ("*ACS*"). In *ACS*, it was common ground that *some* of the amendments pleaded *might be* statute-barred but others were valid, but there was no concession by the claimant that any claims were statute-barred. There was therefore a limitation issue about all the claims sought to be pleaded. The claimant proposed to side-step the immediate issue about whether permission to amend could be granted by having the order state: "The amendments permitted by paragraph 1 above are to take effect from 1 March 2021" (the date of the application to amend).

80. That was therefore a case where there was a live dispute about barred claims, but the claimant was willing to have the court make an order that negated what would otherwise have been the effect of allowing a new claim to be made by amendment. It would have the effect of deferring to trial the question of which claims were statute-barred.

81. The defendant contended that the court had no power to take that approach. Mr Ter Haar QC, sitting as a Deputy High Court Judge, held that if the parties could agree to such a course (as he considered that previous decisions confirmed) the court must be able to impose it, since the parties could not agree to do something that s.35 Limitation Act 1980 did not allow. He accordingly gave permission to amend on the basis suggested. The effect of that was to leave to trial the question of which new causes of action were statute-barred. The decision therefore went further than the *Mastercard* or *Deutsche Bahn* cases because it allowed potentially statute-barred claims to proceed by way of amendment, with the limitation defence being determined later, but protecting the defendant from the new claims automatically relating back to the date of the claim form.

82. In In Media Trust SpA (as trustee for the Jacaranda Trust) v BGB Weston Ltd [2023] EWHC 1491 (KB), Master Dagnall had to deal with an application to amend to raise new claims where the main limitation issue was under s.32 Limitation Act, as in this claim. The Master referred to an earlier decision of HHJ Russen QC, DR Jones v Drayton [2021] EWHC 1971, in which that judge had held that the court could not adopt the *Mastercard* approach to amendment where there was an arguable case in relation to all the new claims that they were statute-barred (in other words, it was not common ground that permission to amend could be given in relation to some part of the new claims).

83. In the event, the Master did not need to decide the point because the claimant abandoned its request to proceed on that basis. However, where there is an issue about whether the running of the primary limitation period is deferred by s.32, a *Mastercard* approach of excluding claims arising more than 6 years before the date of the application to amend will not be effective. The only order that would work, in such a case, is the equivalent of the order made in *ACS*, specifying that any "new claims" later identified as not falling within s.35 are deemed to be brought on the date of the application to amend (or a suitable later date).

84. Mr Sherborne indicates that he is willing to accept such a stipulation, but such an order will not resolve the question of whether any of the new claims is statute-barred. It will leave the issue to be determined at trial, at which NGN will have to fight those claims on

their merits too. The suggested order will therefore simply have the effect of deferring to trial the entire question of whether all or any of the new claims are statute-barred.

85. Does the court have power to make that order, if one of the parties does not agree to it?

86. Literally, s.35 and rule 17.4 do not permit such an approach. I have considered whether to conclude, as Judge Russen QC did, that the procedure approved by the Court of Appeal should only be exercised in a true *Mastercard* case (as a means of defining the non-barred claims that can be added by amendment), and not where the new claims would remain subject to limitation defences. I think that may be too narrow an approach.

87. Where an *ACS* order is made, the purpose underlying s.35 can be achieved, in that the defendant is not deprived of its ability to rely on limitation as fully as if a new claim form had been issued, but the determination of that issue is deferred. S.35 itself is concerned only with preserving the ability of a defendant to rely on a limitation defence; it is not concerned with protecting the parties from having to investigate the facts relating to the new claim, as they may have to do to some extent if a new claim form is issued instead. On the other hand, the issue of a new claim would provide the defendant with the opportunity to seek to strike it out summarily on limitation grounds, or have a trial of a preliminary issue, without the need to prepare for a full trial on the merits. Early determination of a limitation issue is usually desirable because, if the defence succeeds, it saves the parties from the costs of investigating the merits of a stale claim.

88. It therefore seems to me that the court ought to have power to permit an amendment in *ACS* form where (but only where) that is just and convenient, even if a relevant party does not consent, because it gives effect to the purpose of s.35 and may be more convenient than requiring a new claim to be issued. Mr Hudson did not argue that the Court could not do it, only that it should not do so on the facts of this case. It is, in my view, nevertheless a power that should be exercised with caution, given its potential to subvert the purpose underlying the Limitation Act.

89. The discretion to permit an amendment in *ACS* form must be exercised with regard to any prejudice likely to be caused to the defendant, the extent to which in a particular case the purposes of the Limitation Act would be undermined by it, and the consequences for the future management of the trial, both as regards the existing claims and the new claims. If the defendant might be prejudiced by such a course, as compared with its position if a new claim has to be issued, or if it will encumber or possibly delay the trial or add to the burdens of case management, it is unlikely to be appropriate to make such an order. Whether it is appropriate to make an *ACS* order is likely to depend on the stage that the unamended proceedings have reached, when the trial is due, the nature of the issues for trial as matters stand, the impact of the new limitation issues on the trial, including what further disclosure or evidence might be required, and whether the respondent has a strong case for summary (or prior) determination of the limitation issue.

90. If, having considered those matters, it is more convenient to deal with a limitation issue within the existing proceedings, the court can make an *ACS*-type order, even if one party unreasonably objects.

NGN's objections to the amendments

(1) Are the amendments "new claims" within rule 17.4?

91. It is convenient to address, first, whether any of the voluntary amendments are "new claims" within Part 17 rule 4, and if so whether they arise out of the same facts or substantially the same facts as an existing claim.

92. I have previously held (and there has been no appeal against the conclusion) that misuse of private information claims relating to UIG where deliberate concealment is alleged can properly be pleaded on a "compendious" basis, without the Duke having to plead the facts relating to each individual cause of action (it having been determined by the Court of Appeal in 2016 in Gulati v MGN Ltd [2017] QB 149 that each separate occasion of misuse, whether hacking, blagging, other UIG, or publishing, is a distinct tort). In the MTVIL, claimants cannot generally identify and plead the relevant facts relating to individual occasions of misuse before disclosure or, in some cases, at all, if evidence of the relevant facts has been concealed or destroyed. An "umbrella" style of pleading is therefore valid and effective to plead all causes of action, known or unknown, within the general description of the causes of action: see Various Claimants v MGN Ltd [2022] EWHC 1222 (Ch).

93. Mr Sherborne is therefore right to say that pleading now – on the basis of disclosure given or other evidence lately obtained – that misuse of private information took place on specific occasions by the doing of a specified acts will not be a new claim if it falls beneath the pleaded umbrella, but rather should be treated as particulars of a claim that is already compendiously pleaded.

94. The relevant question here is accordingly: what categories of misuse of private information claim are covered by the umbrella pleading? That is a matter of interpretation of the claim form and the PoC. A new misuse of private information claim that is not beneath the umbrella will be a new claim, and the issue then is whether that new claim arises out of the same facts or materially the same facts as claims that are beneath the umbrella.

95. I have explained in my judgment on the application to amend the GENPOC why the making of a new allegation that is beneath the umbrella against an additional individual, or naming such an individual for the first time, is not a "new claim".

96. The Duke's PoC, as they stand, plead (compendiously) three types of misuse of private information claim: phone hacking (though all such claims have now been dismissed); blagging; and "the obtaining of his private information by private investigators" (para 5 PoC – a paragraph which is described as an "Overview of the Defendant's unlawful activities"). Examples of PI work are given in para 6(b) PoC, where 171 invoice payment records are pleaded, but none is specific about the nature of the PI activity.

97. Landline etc. allegations. None of the particulars in the remainder of the PoC refer, or are said to relate, to the interception of landline calls, the interception of calls from cordless phones and analogue mobile calls, or the interception of landline voicemails, as distinct from "Phone Hacking". These newly-identified activities form the basis of the amendment that the Duke now seeks to introduce in paras 4A, 5, 6C and 6D PoC, and, in part, in the claim form itself.

98. It is unsurprising that these activities are not contained in the claim form and PoC as they stand. Landline call and voicemail interception and allied activities were only first introduced into the MTVIL in 2021, with the witness statements of Dan Evans dated 7 June 2021 and Gavin Burrows dated 3 May 2021 and 28 September 2021 being the first evidence provided of them. The position is the same in relation to bugging and use of tracking devices in cars, which Mr Burrows' statements address. This, together with a more recent witness statement of Paul McMullan dated 20 September 2023 addressing "analogue scanning" of live phone calls (which he did not address in his witness statement dated 28 September 2021 for the anticipated trial in November 2021) is the evidence on which the Duke relies to satisfy the "real prospect" test. The Duke's PoC were served in October 2020, before this evidence was deployed and before standard disclosure. Later particulars of claim in other claims, such as Mr Grant's, plead interception of landline calls and landline voicemail interception as a distinct category of misuse of private information.

99. It must be right, in those circumstances, to regard the umbrella claim for other UIG by PIs as not covering any claim of the kind that the Duke now seeks to introduce by these specific amendments. That is implicitly accepted by his applying to amend his claim form to add landline interception. The amendments in paras 6C and 6D PoC, reflected in paras 4A and 5 PoC, are properly to be regarded as a new group of claims of a different type from those previously alleged, even though, literally, the very broad words of para 5 PoC would include landline call interception and landline voicemail interception if done by PIs (though this would not cover the activity of Mr Evans and Mr McMullan, who were journalists). The new claims, as pleaded, are not limited to PIs.

100. Accordingly, the claims sought to be added by amendment to the clam form and in paras 4A, 5, 6C and 6D PoC are "new claims" within the meaning of Part 17.4 and s.35 Limitation Act 1980 and not the introduction of further particulars of claims already compendiously pleaded.

101. These claims are in some respects similar to the claims that already exist, particularly landline voicemail interception, but they do not arise out of the same or substantially the same facts as the existing blagging and PI UIG claims. That is clear from the fact that NGN contends that there is no credible evidence to support the newly pleaded claims, on the basis that (they say) the evidence of Mr Evans given at the trial in <u>Duke of Sussex v MGN Ltd</u> ([2023] EWHC 3217 (Ch)) was to the effect that he hardly ever did it, and that Mr Burrows' evidence is said to be unreliable and incredible. The claim based on landline voicemail interception requires an inquiry into facts (e.g. attempts by PIs to obtain landline numbers and hack into those landline voicemail machines) that are different from facts relating to mobile voicemail interception, e.g. which PIs were instructed to obtain landline numbers, did they do so, and did PIs or journalists call those landlines and listen to messages? The difference between the essential facts of the existing blagging and umbrella PI claims and the essential facts of the new claims is markedly greater in relation to the causes of action of listening into live telephone calls, bugging, scanning and related matters.

102. Given that there is a live and likely to be hotly contested issue at trial about whether the existing claims are statute-barred (turning on the state of the Duke's actual and constructive knowledge of these claims by September 2013), it would be a surprising conclusion to reach that there was no serious issue to be tried about whether the new claims were statute-barred by September 2017 or March 2018. I held in my judgment of

July 2023 that reasonable investigations by the Duke in relation to VMI before September 2013 might have led to material suggesting a worthwhile claim for different UIG activities. It is clear from evidence that the Duke previously relied on that in 2016 he was aware of Meghan Markle being targeted and wanted the Royal solicitors to take action (a matter that, inferentially, is likely to relate to what is now pleaded at para 20(w) of the draft amended PoC). Given that six years have passed since the latest of the matters about which the Duke complains, the onus on this application lies on him to establish that there can be no real doubt that he will succeed under s.32 Limitation Act at trial. He is clearly unable to do so at this stage. That means that NGN has an arguable case that a relevant limitation period has expired for a new claim that does not arise from the same or substantially the same facts.

103. <u>Ikon Pictures</u> A similar issue arises under the proposed introduction of paras 6A and 6B PoC, which read:

> "The Claimant will also contend that Ikon Pictures, owned and operated by Niraj Tanna, Jesai Parshotam and Chandni Tanna, used unlawful information gathering to track his movements and location, and those of his associates, in order to obtain photographs, which were then sold to the News of the World and The Sun, Pending further disclosure, the Claimant will rely on payments to Ikon Pictures, its directors and Mr Chandni Tanna as evidence of that arrangement, and that Ms Tanna in particular was also paid by NGN for tips which did not result in a photograph but, the Claimant will ask the Court to infer, were the product of unlawful information gathering.
>
> The Claimant will further contend that the unlawful information gathering techniques used by Ikon Pictures (and those named in paragraph 6A above) included the use of international mobile subscriber identity ("IMSI") catchers. IMSI-catchers intercept mobile phone traffic and location data of mobile phone users and allow, inter alia, a user of an IMSI-catcher to identify the location of the user of a specific phone if it is in range. Such IMSI techniques were used by Ikon Pictures (and those named in paragraph 6A above) to obtain private information from the mobile phones of the Claimant and/or his Associates."

104. Ikon Pictures fall into the "PI" rather than "journalist" category: although the term "paparazzi agency" is used in evidence, there is no relevant distinction in this regard, or a separate category, so far as the pleading of the claim is concerned. All that is alleged is a different method used by a third party to extract information from mobile phones. This is different from the new categories of listening into landline or mobile calls, or listening to landline voicemails, dealt with above. So again, literally, their activities are covered by the words "the unlawful obtaining of [the Duke's] private information by private investigators" in para 5 PoC. Para 6A PoC pleads nothing more than UIG. The use of IMSI-catchers is a new allegation that has not previously been described in the PoC and had not been alleged in October 2020 (though the evidence in support of and against the application suggests that it had been known about, or at least suspected, by the Duke for some time). The allegations against Ikon Pictures are not, however, limited to the IMSI catcher, which is pleaded as an additional method of obtaining private information about the Duke from his mobile phone. It is also material that, in evidence in support of the application, it is said that information about Ikon Pictures was obtained from standard

disclosure, i.e. disclosure of documents that were relevant to the existing pleaded claim, and that the amendment sought is the result of that disclosure.

105. On the basis of the evidence, and given that the allegations relate to capture of information from mobile telephones other than listening in to calls, these allegations can properly be seen as falling beneath the umbrella unlawful PI information gathering claim, and as being new particulars of such PI activity rather than a new claim. There is therefore no objection in limitation terms to those claims being pleaded, but NGN has another objection, to which I will turn below (at [158]).

106. The years 1994, 1995 and 2016 The same conclusion cannot be reached on the attempt to introduce new allegations of all three existing categories of unlawful information gathering in the years 1994, 1995 and 2016, reflected in the proposed amendments to para 5 PoC and other paragraphs (such as 15A(a), 20(aA), (aB), (aC) and (w)), and in additions to Part G, where these claims are pleaded.

107. The period covered by the currently pleaded allegations is 1996-2011. Mr Sherborne tried to persuade me that because the period was pleaded in the following terms – "the Defendant targeted him from at least as early as 1996 until at least early 2011 ('the Relevant Period')" – it could be read as extending to 1994, 1995 and 2016. I disagree. If 1994, then why not 1993, or 1990, or 1984 when the Duke was born? What was the Relevant Period if not 1996-2011? The words "at least as early as" (which have no real place in such a pleading), if they mean anything, should be read as signifying only that the Duke was not admitting that there was no earlier (or later) misuse of his private information, though he could not currently allege that. The meaning is quite different from that of the words "including but not limited to", which Mr Sherborne showed me unsurprisingly resulted in a different conclusion being reached in a different case.

108. To raise a case that UIG did happen earlier than 1996 (or later than early 2011) requires an amendment, which the Duke implicitly acknowledges by advancing his voluntary amendment to that effect. The case that NGN had to meet was confined to the period 1996 to early 2011 and disclosure was limited accordingly. There is not a single instance of an invoice, payment record or article from 1994 or 1995 or after 2011 in the existing PoC. Nor do the years 1994, 1995 and 2016 feature in the GENPOC.

109. The facts relating to these different periods of time are self-evidently not the same facts, or substantially the same facts, as for the allegations in the Relevant Period, however similar the allegations might be. The Duke acknowledges that further disclosure will be required from NGN to cover activities in the years 1994 and 1995, and indeed the articles introduced into Part G as articles A to AA all have a rather different focus, namely a breach of the privacy of the late Princess Diana. It is clearly reasonably arguable that the new claims are outside the limitation period in all cases. NGN has some evidence that the Duke has always been aware of the allegations about interception of his mother's calls and the consequential impact on his privacy. Further, there is a strong *prima facie* inference that Duke was actually aware of the Meghan Markle incident in 2016, as he took advice from the Palace lawyers, Harbottle & Lewis, at that time to seek to protect Ms Markle. Even with the 2016 allegation, therefore, there is a reasonable argument that the limitation period has expired.

110. Breach of confidence claims The next category of amendments where a limitation question arises is the plea of breach of confidence in place of each of the pleas of misuse

of private information that pre-date 2 October 2000. This too is the subject of an amendment of the claim form. For all allegations after that date, the Duke maintains (or in some cases adds) a case based on misuse of private information; but in relation to each of the allegations before that date, breach of confidence is relied on in substitution for the existing, doomed pleas of misuse of private information, and as the basis of the new pleas sought to be introduced by amendment (principally relating to the late Princess Diana).

111. The breach of confidence claims are plainly new claims, as they add or substitute new causes of action in this claim. Mr Sherborne submitted otherwise on the basis of a reference to breach of confidence in one paragraph each of the (largely superseded, as he accepted) Weeting and Pinetree standard form particulars of claim. However, the paragraphs of these that were specifically relied on by the Duke related only to VMI, and no remedy was sought in the PoC in reliance on a breach of confidence. The proposed amendment to the claim form and the prayer of the PoC seeking to add breach of confidence to the claim, in relation to acts committed before 2 October 2000, demonstrate that that claim was not otherwise included in the Duke's claim. Indeed, the Duke deliberately brought his claim as a claim for misuse of private information, on the basis that it was advantageous for him to do so, as he continues to do in relation to all acts after 2 October 2000. These are therefore clearly new claims.

112. The key question is therefore whether, to the extent that the new breach of confidence claims are substituted for existing misuse of private information claims, they arise out of the same or substantially the same facts as those abandoned claims. NGN tried to argue that that cannot be the case, as the existing claims disappear at the same moment as the new claims are sought to be introduced. I do not accept that a new claim has to proceed in parallel with an existing claim based on the same or substantially the same facts. Section 35(2) of the 1980 Act and rule 17.4(2) expressly contemplate that the new claim may be in substitution for the existing claim, and the same or substantially the same facts have to be "already in issue on any claim previously made" (s.35(5)(a)) or the facts of "a claim in respect of which the applicant has already claimed a remedy". There is no requirement for the existing claim to continue.

113. I deal with the breach of confidence claims in more detail below. The essential facts for a cause of action in breach of confidence are: (a) information that is confidential by its nature; (b) NGN receiving or obtaining the information in circumstances such as to impose on it a duty of confidence; and (c) an unauthorised disclosure of the information. The essential (relevant) facts for a cause of action in misuse of private information are: (a) information in relation to which the claimant has a reasonable expectation of privacy ("private information"); (b) unauthorised publication or other use of the private information; (c) in circumstances amounting to a breach of the duty not to misuse the private information.

114. The Duke has identified in Part G and elsewhere in the PoC the alleged private information, and the unauthorised use is the obtaining of that information without consent by blagging or by using PIs (in most cases but not all, no specific facts are pleaded because the Duke does not have them and cannot plead them). The circumstances of breach of duty relied on are the nature of the private information, the means by which and circumstances in which it was obtained without consent and provided to NGN (or obtained directly by NGN's journalists), and the use made of it.

115. There is likely to be a direct overlap between the facts relied on to establish the private nature of the information and those relied on to establish its being confidential (although the Duke has not amended the relevant column in the table in Part G to identify what is alleged to be confidential, and needs to do so if permission is to be granted). The facts that give rise to the duty of confidence will therefore be likely to be substantially the same facts that give rise to a duty not to misuse the private information, namely the private character of the information that is not in the public domain, and the means by which and circumstances in which it was obtained and received by NGN. In most cases, the Duke had not specifically identified those facts because he was relying on inferences that they must have been obtained by VMI, blagging or other unlawful practices of PIs.

116. Now that VMI and accessory wrongdoing have been removed from the claim, what is required from the pleading is clarity that the articles or other pleaded examples that remain are attributable to blagging or unlawful PI activities that were not accessory to VMI. Once that has been clarified, and any confidential information relied on has been pleaded in place of the private information previously identified, it appears to me that the substituted breach of confidence claims from 1996 to October 2000 are very likely to be unobjectionable in limitation terms because each such claim will arise out of the same facts, or at least substantially the same facts, as are currently pleaded and in relation to which the Duke claims a remedy.

117. There are other, more minor, voluntary amendments in relation to which NGN raises a limitation objection, but they are either amendments that are consequential on one of the categories of amendment that I have already addressed – and the same conclusion therefore applies – or they are amendments that are particulars of a claim that is already compendiously pleaded.

118. There are, therefore, 3 categories of new claim where I have concluded that there is an arguable limitation defence and that the claims do not arise out of the same facts or substantially the same facts as existing claims. These are:

i) the claims in respect of 1994 and 1995, referred to hereafter as “1994/1995 claims”;

ii) the category of claims relating to landline phones and voicemails, including live interception of calls, bugging and tracking, referred to as a category hereafter as “landline claims”;

iii) the 2016 claim relating to Meghan Markle, referred to hereafter as “the 2016 claim”.

The breach of confidence claims are most unlikely to do so, but that cannot finally be determined until the claims are adequately pleaded.

119. I will return to consider the implications of a possible *Mastercard/ACS* direction in relation to the 1994/1995 claims, the landline claims and the 2016 claim once I have addressed the other objections to the amendments raised by NGN.

<u>(2) Delay and lateness</u>

120. There is no explanation provided of why the Duke delayed between March 2022 and October 2022 in providing his draft amendments to NGN for their agreement. Mr

Chisholm Batten says in evidence that it was 18 March 2022 when his firm indicated that the Duke would be amending his claim in the light of the documents provided by NGN on disclosure or subsequently. There is however no explanation of why it took from March to October 2022 to seek NGN's consent to draft amendments. It was a significant delay, bearing in mind the nature and extent of the new claims and other amendments sought to be introduced, which are substantial matters. These were not minor amendments without case management consequences that could afford to be left until the run up to the January 2024 trial date, when the Duke's claim was then due to be heard. However, as I have said, once NGN issued its application for summary judgment on the whole of the Duke's claim on limitation grounds, it was reasonable not to issue and pursue the amendments until after that application had been determined.

121. The Application is therefore late – much later than it would have been if there had been no delay in 2022 in pursuing the voluntary amendments – and the consequences of that lateness are that the amended case, if permission is granted, will now have to be prepared by the parties within a period of 8 months or so before the January 2025 trial. While by the standards of ordinary claims that would seem likely to be an ample period for orderly preparation, it is not so in the context of this complex litigation, where the legal teams of both sides are expected to continue to take the remaining 42 cases towards an 8-week trial of their individual claims, alongside the generic claim now pleaded in the GENPOC – which the claimants also seek permission to amend to enlarge very significantly at this late stage. The preparation process will involve dealing with further claimant-specific disclosure, possibly some generic disclosure, article selection, and preparation and exchange of witness statements in all remaining claims in late October 2024, and then any further generic witness statements two weeks later; and finally the selection of the trial claims and preparation of those in time for January 2025.

122. NGN contends that the timeline will now be so compressed that the trial date will be at significant risk if permission to amend is granted, and the amendments therefore count as "very late" amendments to which a much more restrictive approach to giving permission applies (see [66]-[68] above). NGN raised a similar objection in the claimants' application to amend the GENPOC, which I heard the day before this Application and the judgment in which is handed down today. The two work streams to deal with the amended cases would clearly have to be carried out at the same time.

123. In the Duke's claim, the argument of NGN is that once permission is granted and 7 days for service of the revised amended PoC elapse, NGN will require 8-10 weeks to investigate the new claims and other allegations in the amendments and plead an amended Defence. Allowing 2 weeks for an amended Reply and then 4 weeks for the agreement of new search terms for disclosure and a further 8 weeks for disclosure to be completed, it will mean that the parties are now only in a position to start preparing claimant-specific witness statements by about the same time in October 2024 when they are due to be served. At the same time, they will be preparing the generic case for trial.

124. Ms Mossman, on behalf of NGN, says in her third witness statement that a timetable that she calculated to start on 19 April 2024 and end in mid-September rather than mid- to late-October 2024, would probably require repetition of steps already taken (the uploading of data from journals and searches), lead to substantial additional costs, and disrupt the procedural timetable and result in the Duke's claim not being ready for trial, since NGN also has to prepare all the other remaining claims and the generic claim. The timetable is now about a month behind what she envisaged.

125. The Duke's lawyers dispute that analysis, and Mr Sherborne said that NGN's lawyers always make such claims about shortness of time when a trial is approaching and always exaggerate the impact of the amendment or further disclosure, as the case may be. He suggested that the impact of having to address issues and obtain evidence in relation to the 27 new articles from 1994 and 1995 could be eliminated by ensuring that those were not the articles selected to go forward to trial in the first instance. There was, however, no specific evidence that Ms Mossman's estimates of time required were seriously flawed.

126. Mr Sherborne expressly accepted that further disclosure would be required in relation to 1994/1995 but said that it was now clear that there were electronic records that could be uploaded for the relevant years to provide searchable databases, in the same way as was done previously for the years 1996 onwards, so that there will be no need for time-consuming manual searching. He said that there would "mostly" be no further disclosure required, but I note that in various places the amended pleading is qualified by the words "subject to further disclosure", and it seems obvious that there will need to be further searches in relation to landline claims, what was done with the Meghan Markle search provided by Dan Hanks and more extensive PI data relating to 2016, as well as extensive searches and disclosure in relation to 1994/1995.

127. Further, Mr Sherborne submitted that NGN had now had the proposed amendments for 18 months (though that disregards recent changes that were made shortly before the hearing) and so NGN can be expected to have done some work already to investigate the allegations. As Mr Sherborne otherwise submitted, however, it was reasonable not to be concerned with the voluntary amendments while the strike out / summary judgment application of NGN was being pursued, so it is more realistic to say that NGN has been aware of most of the proposed amendments since September 2023 and all of them since early March 2024. It is also clear from the very detailed evidence of Ms Mossman on behalf of NGN in response to the Application (80 pages of witness statement and 675 pages of exhibit) that considerable thought has already been given to certain aspects of the amendments.

128. My evaluation of the evidence and submissions that I have heard on this question is that it is unlikely that the trial date would be lost by allowing the voluntary amendments in full, and very unlikely that it would be lost if some only of the amendments were permitted, but that to allow the amendments in full – which is what the Duke seeks – would put considerable pressure on NGN to prepare in time for a trial of the Duke's claim alongside other claimants' trials and the generic claims. The amendments that I have permitted to the GENPOC in my judgment today will themselves place an additional burden on NGN to deal with. The amendments sought by the Duke cannot be regarded in isolation.

129. I consider that there would be some prejudice to NGN in preparing in an orderly way for trial if all the amendments were permitted. This is therefore not quite a case of "very late" amendments, but a case of "late" amendments that prejudice the orderly preparation for trial. In the words of Coulson J, this goes beyond "being mucked around" and creates disruption of and additional pressure on NGN's lawyers in the run up to trial, as well as resulting in some duplication of cost and effort. I would therefore be concerned in any event about giving permission to amend for all the new claims and all the other amendments on which the Duke seeks to proceed to a January 2025 trial.

130. In paras 5(a), (b) and (c) of the draft PoC, the Duke seeks permission to plead long lists of names of executives, editors and journalists at the News of the World News Desk, its Features, Showbiz and TV Desks and various desks at The Sun respectively, who are alleged to have either run or staffed the desks that used PIs to carry out unlawful activity widely or done such unlawful activity themselves. The activities alleged include "voicemail interception" generally, without distinguishing between VMI (now struck out) and landline voicemail interception, which leaves me with some concern that the lists of names do not attempt to differentiate between those who were responsible for VMI and accessory UIG, on the one hand, and other UIG that was not accessory to VMI on the other hand.

131. The Duke has pleaded these names so that he can seek findings at a trial that some or all of them were personally involved in UIG, rather than just a finding that editors or journalists at the various desks were involved. In principle, there can be no objection to this unless the effect is to add substantially to the burden on NGN in preparing for a trial. I have explained why it is wrong in principle to say that it amounts to a new claim for the purpose of s.35 of the Limitation Act.

132. Objection to these amendments on the ground of adverse impact on preparation for trial was not at the forefront of NGN's case. NGN did object on the ground that the allegations against individuals are unclear and lack proper particulars, and that there is no attempt to separate out allegations of VMI. In my judgment, once the facts relating to the remaining causes of action are adequately identified, there is no need for the Duke to plead particulars of the allegations against each individual beyond the facts that they ran or staffed the identified desks of the newspapers where these activities were being carried on, at specified times, or wrote the identified columns at The Sun, and so forth. In effect, the Duke is saying that they were the persons responsible for the matters already pleaded in his PoC. Those who are alleged to have been specialist users of PIs or who carried out voicemail interception or blagging themselves are identified in the draft.

133. In reality, the names now pleaded are, for the most part, the names that have been pleaded in the GENPOC or in other individual claims for some time. 34 of them are named in the GENPOC as it stood at the time of the Application, and a further 14 are in the draft re-re-amended GENPOC. A particular objection to the belated naming of Piers Morgan is that he was only the editor of the News of the World in 1994/1995, and the same objection is valid in relation to anyone else who was only employed outside the Relevant Period. If there is any such further person, permission to name them is refused as it is in relation to Mr Morgan, for reasons that I shall explain below.

134. NGN's objection to the undifferentiated allegation of involvement in "voicemail interception" is however justified, and before serving the amended PoC the Duke must amend each of paras 5(a), (b) and (c) to clarify who is alleged to have been involved in landline voicemail interception or other UIG that is not accessory to VMI.

135. Subject to those points, I would permit the voluntary amendments in paras 5(a), (b) and (c) of the draft PoC.

<u>(3) Inadequate pleading of the new claims for breach of confidence</u>

136. This objection relates to the proposed amendments to the claim form and paras 5, 5A, 19, 22(a) and, principally, 22A PoC, and other consequential references. Para 22A reads:

> "In relation to unlawful acts complained of that were committed prior to 2 October 2000, the claimant relies on these acts as being an actionable breach of confidence and not as a misuse of private information. In support of this contention:
>
> > 22A.1 the information obtained as a result of the unlawful acts had the necessary quality of confidence about it in each case given the method in which it was obtained and that the defendant did not have and knew it did not have the claimant's consent or authorisation to access, obtain, use, publish, communicate or disclose any part of the information;
> >
> > 22A.2 in the circumstances the defendant knew or ought to have known that the claimant reasonably expected the information to be confidential and private and to remain so and the defendant was not and is not entitled to use it in any way whatsoever without the consent of the claimant;
> >
> > 22A.3 the information obtained was therefore communicated or became known to or was accessed or obtained in circumstances which imported an obligation of confidence.
>
> In the premises, the defendant owed the claimant a duty of confidence in respect of the private and confidential information obtained and by accessing, obtaining, retaining, using, publishing, communicating and/or disclosing the information or any part of it and/or intending to do so, the defendant has acted in breach of the duty of confidence owed to the claimant as well as a misuse of private information."

137. Para 19 PoC, which introduces the articles in Part G relied on as the product of misuse of private information, simply has the additional words "(or breach of confidence, paragraph 22A below is repeated)" inserted, which was intended, presumably (though it does not say so expressly), to apply to those articles published before 2 October 2000. Articles numbered 1-21 in Part G, which are those published before 2 October 2000, retain under the heading "Private Information" the same description of the private information pleaded in the unamended version, when misuse of private information was relied upon. Para 20(aA), (aB) and (aC), which introduce new articles A to AA relied upon in the 1994/1995 claim and otherwise plead matters from those years, simply refer to "private and confidential information". Articles A to AA are listed in the amended Part G using the same heading, "Private Information".

138. NGN's case is, in summary, that the Duke has failed to identify (a) the information that is said to be confidential, (b) the facts or matters relied upon to suggest that NGN held the information under a duty or obligation of confidence, or (c) the use of the information which is alleged to be a breach of confidence. NGN says that the Duke has failed to particularise the method by which the information was obtained or the circumstances in which it was imparted to NGN such as to impose a duty of confidence.

139. NGN relies in this regard on para 8.2 of CPR 53BPD, the Practice Direction with the rules for claims in the Media and Communications List in the King's Bench Division. It specifies what should be pleaded in a case of misuse of confidential information or breach of confidence, namely: the information said to be confidential; the facts and matters on

which the claimant relies in support of the contention that it was (or is) information that the defendant held (or holds) under a duty or obligation of confidence, and (c) the use or threatened use of the information which the claimant claims was or would be a misuse of the information or a breach of the obligation. That can be compared with the specified content in a claim for misuse of private information, also in para 8.2. The principal relevant difference, apart from the distinction between "private" and "confidential", is the requirement to specify the facts that establish the obligation of confidence binding the defendant, rather than the facts relied upon to support the contention of a reasonable expectation of privacy by the claimant. There is, in other words, a material difference to that extent.

140. Mr Sherborne submitted, rather lamely, that the PD does not apply to these proceedings because it only applies to claims that are "media and communications claims" within the meaning of rule 53.1, and those are claims in the MAC list in the King's Bench Division, whereas these proceedings are in the Chancery Division. Be that as it may (and it is technically correct), the PD is nevertheless a salutary guide for what should properly be pleaded in a claim for misuse of confidential information in whichever Division it proceeds.

141. Rather more convincingly, Mr Sherborne submitted that it must be borne in mind that these are not the usual type of publication claims (to which the PD is primarily directed) because the claims based on publication have been dismissed or withdrawn; they are claims based on the underlying UIG, where the claimants are generally unaware of the detailed facts relating to the circumstances in which the confidential information was obtained. That is because of concealment and destruction of evidence, as pleaded in the GENPOC, or simply because those facts are known to NGN's employees but not to the claimants. The Duke and other claimants are therefore not well placed to plead the facts relating to the obtaining of the information by NGN that gave rise to an obligation of confidence. That point was well made in argument by Nicklin J in hearing an application in the parallel litigation, Lawrence and others v Associated Newspapers, which Mr Sherborne was able to show me in a transcript of the hearing, and I accept that the Duke and other claimants in the MTVIL are often unable to plead details of this kind. On the other hand, the Application is made following standard disclosure in the claim, so the Duke has the benefit of such disclosed documents relating to the existing claim in misuse of private information, which he did not have when the original PoC were pleaded.

142. The principal criticism of NGN, or at least the criticism that has most traction, is that the Duke's lawyers have made no effort to translate the pleaded facts and matters, such as they were, to the substituted claims of breach of confidence. Indicative of that is the fact that the pleas of private information in Part G remain untouched, as does the heading of the column. The degree of confusion is heightened by the fact that the introductory words of para 22A PoC state that the acts before 2 October 2000 are relied on as breaches of confidence and not as misuses of private information, and yet the concluding words of the paragraph plead that NGN has acted in breach of the duty of confidence owed to the claimant *as well as* a misuse of private information. Further, the Duke has failed to do what he can, after disclosure, to plead such facts of which he is now aware that relate to each of the claims based on breach of confidence. That would include the claim that relates to each of articles 1-21 in Part G, as well as the new 1994/1995 claims and articles A-AA (though in relation to the latter the Duke has not yet had disclosure, so NGN's expectations must be somewhat different).

143. I am conscious that, in some cases, it may be self-evident that (*e.g.*) information derived directly from private communications between the Duke and his girlfriend at the time, or other members of his family, is confidential; and that if it was extracted by an NGN journalist by illegal means, or by a PI who then passed it to NGN, it may be equally self-evident that NGN held the information subject to a duty of confidentiality. However, first, not all of the complaints will fall into this category (or, if they do, it is necessary for that to be pleaded); and second, it is important to understand which complaints are of this kind and which are of a different kind. For complaints of a different kind, it may be essential to understand why it is said to be confidential (*e.g.* where the information has been given some degree of publicity previously), or why NGN received or obtained the information subject to a duty of confidentiality. When the claim in misuse of private information was first pleaded, the Duke may not have been able to provide particulars; but with a new plea of breach of confidence advanced at this stage of the proceedings, the position is different.

144. Apart from the purely formulaic words in para 22A PoC, the Duke's legal team has not tried to identify the confidential information relied upon in relation to each claim in the period January 1996 – October 2000, or the facts relied upon in an individual cause of action for the contention that NGN held the information that is identified subject to an obligation of confidentiality. If the Duke is unable to plead any facts directly relating to the existence of the duty or the breach, the PoC should say so and identify the factual basis for any inference that will be sought to be drawn. At this stage of the proceedings, that should, in my judgment, be done in relation to each cause of action relied upon, to support the proposed amendment.

145. In short, I agree with NGN that the approach to pleading the substituted claim is deficient. For that reason, there does not appear to be a real prospect of success based on what is pleaded in para 22A PoC: there is no adequate factual connection made with the content of Part G. That may be capable of easy remedy, but as it stands the new causes of action in breach of confidence are not adequately pleaded. The Duke should give full particulars of his individual claims for breach of confidence at this stage, not merely in his witness statement or, worse, in a skeleton argument before trial.

146. I will therefore not give permission to amend to allege breach of confidence until this pleading deficiency is resolved. Otherwise, provided that there is no significant further delay in remedying these defects and that no significantly different facts are relied upon, there will be very little prejudice to NGN in giving permission in relation to the claims from 1996 to October 2000.

(4) Lack of evidential basis for / real prospect of success of the amendments

147. The following proposed amendments are said to fall into this category of NGN's objections:

i) the 1994/1995 claims;

ii) the landline claims;

iii) the breach of confidence claims (on the basis that they are inadequately pleaded and particularised) – I have addressed these above;

iv) the case in relation to Ikon Pictures;

v) the entirety of para 15A PoC (though this is merely evidence on which the Duke pleads that he will rely);

vi) the allegation pleaded in para 20(a) PoC, on the basis of the Mulcaire Index, that Mr Mulcaire was instructed to target the Duke and others connected with the Rattlebone Inn using UIG techniques;

vii) the plea in para 20(i) PoC about an email passing between Fran and Clive Goodman (though this is merely evidence relied upon); and

viii) the plea in para 20(q) PoC about an email exchange between Mr Edmondson and Mr Goodman (though this is merely evidence relied upon).

No such allegation is made in relation to the 2016 claim.

148. Nothing more needs to be said about the breach of confidence claims, and it is unnecessary to dwell on those paragraphs that amount only to a plea of evidence on which the Duke will rely. They are either to be refused as amendments because they are only pleas of evidence, not the material facts of causes of action (though the pleading of evidence is consistent with the way in which the PoC have been pleaded to date), or if permitted, they will simply stand as advance notice of evidence to be relied on and therefore do not need to satisfy a test of having a real prospect of success. Given the lack of clarity about the extent of the remaining causes of action, I will not permit what is obviously only evidence to be pleaded at this late stage.

149. So far as the landline claims are concerned, NGN argues that there are no particulars given of any landline voicemail interception directed at the Duke and no evidence to support such an allegation. The proposed amendments include only two landline numbers in the confidential part of the Schedule, and one of these is a South African number. The principal allegations are in paras 6C and 6D PoC. There is no plea in those paragraphs as to whose landline answering machines were allegedly intercepted, or over what period or periods of time. There is no plea in those paragraphs as to whose landline calls were allegedly intercepted, or which rooms, residences or cars were allegedly bugged or tracked. The only allegations there are generic ones, and the only evidence that the Duke says that he will rely on in those paragraphs is the generic evidence of Dan Evans and Gavin Burrows, neither of whom says anything about the Duke or his associates.

150. In para 5 PoC, the Duke seeks to allege that NGN engaged PIs in connection with the interception of his landline voicemail messages and those of his associates, and listening in to his landline telephone calls and those of his associates. It appears therefore that this is, first, an extension of the general allegation that voicemail messages left for or by him were intercepted, and second, a separate allegation of live landline call interception or recording. But no particulars are pleaded of the landlines of the Duke or his associates, other than two confidential landline numbers. It appears, therefore, that the case could only go forward on that very limited basis, as no other particulars of phone numbers or periods of time have been given. If it is to have any greater ambit (other than in relation to the 1994/1995 claims with which it is, perhaps, principally concerned) appropriate definition of the allegations is urgently required, by reference to landline numbers, associates, time periods and whatever the Duke can now plead (on the basis of disclosure

already given) about which journalists or PIs were instructed to gather his private or confidential information by these unlawful means.

151. Mr Burrows' IIG Associates website includes a reference to interception of telephone lines as well as a separate reference to mobile interception. Landline interception has been pleaded generally in the GENPOC, by reference to those named in schedule D to the Order made in MTVIL on 1 November 2019. This is supported to some extent by disclosure, including numerous telephone calls between Mr Webster of NGN and Mr Burrows that Mr Webster had previously disputed. NGN has not to date searched its call data for calls to the 2 specified landline numbers of the Duke and/or his associates (so here is another category of disclosure that will be required following the amendments), and the Duke has no hard evidence available to establish his case. He depends on disclosure that shows that landline numbers were among those obtained by PIs and that NGN journalists had landline numbers as well as mobile numbers; and on inherent likelihood that landline voicemail interception would have been attempted in the same way as VMI if journalists also had landline numbers.

152. No particulars are given of attempts to intercept landline or analogue mobile calls of the Duke or his associates, but there is an expanded case in para 20(aA) to (aC) PoC of alleged interception of phone calls and landline messages of the late Princess Diana, the Duke's father and his stepmother. These are pleaded solely on the basis of the content of articles A-AA in Part G. No further particulars are pleaded, and the Duke has not yet had disclosure in relation to 1994/1995 when these articles were published. There is a general plea that the private information of the Duke will have been unlawfully obtained as a consequence, but no plea of breach of a duty of confidentiality owed to the Duke himself is pleaded, possibly because the Duke does not yet know what if any information about him was obtained.

153. In my judgment, there is just about sufficient evidential material to support the limited allegation of interception of phone calls and the interception of landline voicemails (though currently, before disclosure, no evidence connecting the allegations with the two identified phone numbers). The evidential case does not need to be compelling, and it is not, but there can be said to be a sufficient degree of conviction about it because of the way that the allegations match other allegations of UIG that are already pleaded and the generic allegations in the GENPOC. However, the pleading is currently inadequate because it does not identify the period or periods during which the allegations of landline voicemail interception and landline or mobile call interception are made, unless it is the period specified in the amended confidential part B of the Schedule. If it is to be read as limited to that period, and the landline numbers identified in the confidential schedule, then there can be no objection.

154. So far as the 1994 and 1995 allegations are concerned, the problem that the Duke faces, apart from the fact that these are new claims not falling within s.35 Limitation Act, is that there is no adequate pleading of any cause of action in breach of confidence that the Duke is able to bring. Breach of a duty of confidentiality owed to the late Princess Diana or the then Prince Charles and Camilla Parker Bowles does not give the Duke a cause of action. In my view, NGN is right that it should not have to guess what case it is that the Duke may eventually rely on at trial that arguably falls within the general description in paras 20 or 22A PoC. Before permission could be granted for any of these articles, the Duke would have to specify what information relating to him is confidential in relation to any of the new articles relied on, and on what basis it will be asserted that NGN

obtained or received the information about those other persons and owed the Duke a duty of confidentiality.

155. That leaves the case in relation to Ikon Pictures and the allegation in para 20(a) PoC in relation to Mr Mulcaire and the Rattlebone Inn.

156. I have given my reasons for concluding that the Ikon Pictures allegations are not to be regarded as a new claim. The activities of Ikon Pictures were adequately covered by the existing PoC and the Duke is adding particulars of the allegations against them specifically. It is implicit therefore that what is alleged is that NGN journalists made use of Ikon Pictures to carry out UIG. There is no need to pass an additional test of real prospect of success or be some evidential basis for naming them too (see Phones 4U v EE plc, above), but if there were I would be satisfied on that point too. As NGN has pointed out, the allegations against Mr Tanna and others have been circulating for some years and there is a body of evidence that is arguably capable of supporting allegations of UIG against him and Ikon Pictures generally.

157. As for para 20(a), this relates to articles 28-34 in Part G, which were originally pleaded as "blatant examples of voicemail interception and/or unlawful information gathering". That description remains in place but now the Duke wishes to plead a reference to the Mulcaire Index, a compilation of Mr Mulcaire's notes relating to the Rattlebone Inn episode, said to demonstrate the extent of UIG. This is therefore a plea of evidence, but para 20(a) then pleads the substance of a factual case, namely that Mr Mulcaire was to target the Duke and four others connected with the Rattlebone Inn using UIG techniques other than VMI. This is criticised by NGN as being unclear and lacking proper particulars and a sufficient evidential basis, and (somewhat inconsistently) as being an inappropriate and disproportionate plea of evidence. I find it difficult to see any real objection to this amendment on this particular ground, beyond a lack of clarity about whether it is just an evidence plea or a cause of action (which is a common problem with the PoC as a whole), but if it is a cause of action it seems to me to be adequately pleaded. However, the real issue is that it is connected with previous allegations of VMI (see below), which have been struck out of the claim. Until the consequential amendments are properly made, in accordance with the July 2023 Order, this amendment cannot be permitted.

158. The effect of my decisions in this section of the judgment dealing with lack of merit or sufficient evidential basis is that permission:

i) will not be granted for the 1994/1995 claim, on the basis of lack of clarity about the viable causes of action as a result of the inadequate pleading;

ii) will not be refused for the landline claims on grounds of lack of merit or inadequate evidential basis, if the claim is limited to the two landline numbers specified in part B of the Schedule or other specific numbers and other details are pleaded too, on condition that the period to which the claim relates is clarified in the amended PoC;

iii) will not be refused for this reason in relation to the pleas against Ikon Pictures or the plea based on the Mulcaire Index.

(5) Inclusion of further VMI allegations

159. I have explained that the July 2023 Order required the Duke to amend to remove his case based on VMI and accessory UIG. It is not acceptable for that case to remain fully pleaded in the PoC simply because he will seek to adduce evidence of similar facts relating to VMI at trial. A single paragraph giving notice of that intention would suffice.

160. It follows that voluntary amendments that add to the allegations of VMI and accessory UIG are inappropriate. Such allegations exist in the amendments in para 5(a) and 5(b) PoC, where it is clear that the proposed amendments include PI activities relating to VMI and unlawful activities such as VMI by journalists; and in para 5(c), where an express allegation of VMI against journalists at The Sun is introduced.

161. There are also certain evidential matters pleaded in the sub-paragraphs of para 8A PoC that appear to relate to VMI or activities accessory to VMI (such as para 8A(a), (g) and (h)), though most of the matters pleaded concern allegations of blagging. Para 9A PoC is a plea of reliance on Mulcaire Notes, but these are, as pleaded, in support of a contention of what was previously pleaded in para 9 PoC as the Duke's and his associates' voicemails being accessed by Mr Mulcaire and/or NGN. The amendment to replace "accessed their voicemails" with "undertook the Unlawful Acts" is not a credible change in para 9, and if the allegation in para 9A supports para 9 then it appears to relate to VMI and should not be pleaded.

162. Paras 20(aA), (aB), (aC) and (a) are pleaded as blatant examples of VMI and/or UIG. Further blatant examples of VMI or any UIG accessory to that VMI are obviously inappropriate at this stage. It is unclear whether para 20(a) can survive once the VMI allegations have been stripped out.

163. The amendment to para 20(i) is in connection with allegations of VMI, as the rest of the sub-paragraph makes clear. It is therefore inappropriate and is in any event a plea of evidence.

164. Para 20(q) is the pleading of an email exchange concerning article 136 in Part G, but the email does not appear to relate to the Mike Behr ZC payment, which is the only non-VMI allegation in para 20(q). It and paras 8A(g) and (h) therefore appear to be connected to VMI and so are objectionable on that basis.

165. These amendments will therefore be refused on the basis that, as alleged by NGN, they amount to the Duke "doubling down" on his VMI allegations.

(6) Foreign law issues

166. This challenge relates only to the 2016 claim, which itself relates to two articles that the Duke seeks to rely on by amendment (para 20(w) PoC). NGN contends that the applicable law for this complaint is that of a US state, not English law, and that there is a much shorter limitation period under that law, which means that these allegations are clearly statute-barred and should not be permitted. (As new allegations, they would be prima facie statute-barred under English law, subject to s.32.)

167. The original version of the draft amended PoC was limited to an allegation that Dan Hanks was instructed by James Beal of The Sun to obtain private information about

Meghan Markle in the form of a report containing sensitive information about her, such as her social security number. It was alleged that this enabled NGN to obtain the private information contained in the articles, which was alleged to be details of the Duke's flight to Toronto to visit Ms Markle and the details and frequency of text messages with which the Duke had allegedly "besieged" her.

168. Mr Hanks operates in California and Mr Beal is understood to have been working in New York City at the time. The allegation that NGN had instructed him to obtain information about Ms Markle in California therefore raised obvious questions about the applicable law of the misuse of private information alleged (given that it is not the publication of the articles). It also raised a question about the Duke's title to sue in respect of a wrong allegedly done to Ms Markle, which itself might depend on the applicable law point. NGN therefore obtained an expert opinion from a US law practitioner with relevant experience of the laws in question and seeks permission to rely on his report.

169. In the March 2024 latest version of the draft amended PoC, however, the Duke's legal team has added further allegations that:

a) Ms Markle's mobile phone number was unlawfully obtained;

b) that number was then used (by whom is not stated) "to obtain private information about the frequency of text messages between the Claimant and the Duchess <u>which constituted the misuse complained of</u>" (emphasis added); and that

c) in consequence, the applicable law is that of England and Wales.

170. It can be seen that, in the latest iteration of the draft, the misuse alleged appears to have changed from being the instruction to Mr Hanks unlawfully to obtain Ms Markle's private information (in California) to obtaining (somewhere unspecified) details of the frequency of text messages between the Duke and Ms Markle, implicitly as a result of obtaining her mobile phone number from Mr Hanks's report.

171. That at least creates a connection with what may be a wrong done to the Duke, rather than Ms Markle, but what is missing is any clear allegation of who performed or instructed the extraction of this information, starting with Ms Markle's phone number, and where it was carried out. It is not stated, for example, whether it is alleged that the phone number of Ms Markle that was obtained was that of a Californian, Canadian, UK or other mobile phone account, and therefore where details of that account might have been extracted; whether Mr Beal (if it was he who was involved in that) was based in London or in the United States; and where the obtaining of call or text data was done. (It is of course understandable that the Duke may not be able to specify which PI was instructed to do it, if that is what happened.)

172. If the current draft pleading is intended to include the actions of Mr Beal and Mr Hanks in the United States in relation to Ms Markle's information, then I am not persuaded that there is a real prospect of the Duke establishing that he has *locus standi* to sue for that. It was not explained by Mr Sherborne in his skeleton argument, or orally, how that would be so. The first stage at which the Duke's private information was obtained would be when (if this is what is alleged) his mobile or landline telephone numbers or the details of calls or text messages from his own phone were obtained by extraction of Ms Markle's

call or text data (or alternatively a similar extraction was performed on his own phone account data).

173. It is common ground that the Rome II Regulation does not apply to a claim for misuse of private information and so the applicable law is governed by the Private International Law (Miscellaneous Provisions) Act 1995. Section 11 provides that the general rule is that the applicable law is the law of the country in which the events constituting the tort or delict occur and, if they occur in more than one country, the law of the country in which the most significant element or elements of those events occur. Section 12 provides for the general rule to be displaced where (to summarise) it appears to be substantially more appropriate for the law of country B to apply to determine the issues, or any of the issues, having compared the significance of the factors that make the law of country A applicable under the general rule with the significance of any factors connecting the wrong with country B.

174. It is therefore critical to know where the events constituting the tort of misuse of private information occurred, it now being apparent that the relevant misuse of private information was the extraction of information about the frequency of text messages between the Duke and Ms Markle. If (as Professor Little, the Duke's intended expert witness, assumed) the report on Ms Markle that included her mobile phone number(s) was sent by Mr Beal to The Sun in London, and whatever next happened happened in England, the applicable law of any claim by the Duke for misuse of his information would be English law. However, if his private information was extracted by persons unknown in California, or by Mr Beal in New York, the position might well be different.

175. The problem is that particulars are lacking in the draft. It may be that until disclosure in relation to this allegation has taken place the Duke is unable to be sure what happened where. However, it is plainly unsatisfactory for a claim to be advanced on the basis that the relevant events may have happened in one country or may have happened in another. In response to the expert report disclosed by NGN, the Duke's lawyers instructed their own expert US lawyer, who was given factual information materially different from those given to NGN's expert. This shows why it is problematic if parties, without first obtaining permission from the court, proceed to use evidence of expert opinion. It appears that the Duke's lawyer approached matters on the understanding that it was in London and not in New York that the Duke's private information was extracted, but that is not clear. Permission should not be granted in any event before there is clarity about what the Duke's case is.

176. The current draft asserts that the applicable law, or the substantially more appropriate law (presumably under the 1995 Act, though that is not mentioned), is the law of England and Wales. That seems implicitly to acknowledge that some at least of the events constituting the misuse of private information complained of took place outside England and Wales, but it is not clear which these are.

177. Whichever law is applicable, it is impossible to conclude, as things stand, that NGN would not have an arguable limitation defence. In reaching that conclusion, I have read without any formal ruling on their admissibility the expert reports on US federal, Californian and New York law that the parties have obtained and sought to adduce as evidence. There appears to be no dispute, at least, that there would be a one or two year limitation period under whichever US law applied to a claim of invasion of privacy at common law. The Duke instructed Clintons to write to NGN on 1 April 2020 intimating

a claim based on these exact allegations, and so the 2016 claim, raised by the Application in 2023, would be too late.

178. If English law applies, it is impossible to conclude that NGN has no properly arguable case that the Duke knew or had constructive knowledge more than 6 years before the Application was made that he had a worthwhile claim in relation to the obtaining of the information referred to in these two articles. Indeed, having regard to para 86 of Ms Mossman's 3rd witness statement, which sets out what the Duke has previously said about these matters, it appears that NGN has a strongly arguable case that the Duke had discussions with the Palace's lawyer, Gerrard Tyrrell of Harbottle and Lewis, in 2016, about taking legal action then for the invasion of Ms Markle's privacy. Although I cannot, on this application, summarily dismiss the possibility of the Duke establishing at trial that he can rely on s.32 Limitation Act to rebut a limitation defence, *i.e.* that he did not know and could not reasonably have discovered the relevant facts for a non-VMI claim before about September 2017, the obvious potential limitation defence is a material consideration in the exercise of my discretion whether to give permission to amend on a *Mastercard/ACS* basis, as Mr Sherborne urges.

Final analysis

179. In Appendix 2, I set out my decision on whether to grant or refuse permission to amend the disputed amendments on a paragraph by paragraph basis. Where I have not specifically explained my decision on the amendment in question in the body of the judgment, above, I include a short explanation of my reasons.

180. I have indicated that permission for various voluntary amendments will be refused on the basis that they are inadequately pleaded. These are in some cases relatively minor issues of clarification of the factual basis of the pleaded claim (e.g. the 2016 claim – see [175] above, and the landline claims – see [153]-[154] above). In other cases, they are more substantial objections (e.g. the breach of confidence claims and the 1994/1995 claims).

181. I indicated when dealing with the limitation and delay issues that there were questions that remained to be determined. These are, first, whether a *Mastercard/ACS* basis of order would be appropriate in relation to new claims that do not satisfy the s.35 criteria for permission to amend; and second, whether in view of the impact of delay and the lateness of the amendment, permission to amend should be given in some but not all cases, as to give permission to amend on all the amendments would have a significantly prejudicial effect on NGN's preparation for trial.

182. The 1994/1995 claims, the landline claims and the 2016 claim are ones that cannot (subject to *Mastercard/ACS*) be permitted by way of amendment. The 1994/1995 claim is the new claim that will give rise to substantial further disclosure needs. It also brings a very different focus to the Duke's claim, namely a focus on press harassment of the late Princess Diana and only incidentally on him. The landline claims are, as currently pleaded, narrowly focused and should not give rise to any or any significant further disclosure requirements. The 2016 claim, if adequately pleaded, would give rise to a need for further disclosure at a time for which no disclosure has yet been given, and may yet require expert evidence of foreign law to determine the limitation issue.

183. All the existing claims of the Duke are subject to a limitation defence at trial, namely whether the Duke can bring himself within the provisions of s.32 Limitation Act. The

relevant question, in relation to them, is whether by September 2013 the Duke knew or could with reasonable diligence have known that he had a worthwhile claim against NGN for blagging or UIG conducted by PIs. In relation to the 1994/1995 claim, but not in relation to the breach of confidence claim, giving permission to amend would give rise to a new focus of the same limitation defence, namely whether the Duke had that knowledge or constructive knowledge by about September 2017, 6 years before the Application was issued, or a later date. It would add an issue on which NGN considers that it has even stronger prospects of succeeding on limitation. That is because the matters alleged happened much longer ago than most of the articles about which the Duke complains in Part G (about 90% of the original total of 206 are after October 2000), because the subject matter of articles A-AA have had a good deal of publicity over the years, and because the Duke has to prove his s.32 case at a date 4 or more years later than the applicable date in the existing claim.

184. In those circumstances, it might be expected that, if the Duke had to issue a new claim to pursue the 1994/1995 claim, NGN would apply for summary judgment, in the same way as it did (and succeeded) in relation to the Duke's VMI claims. The same applies to the 2016 claim, in relation to which I have already indicated that there appears to be some evidential support for an argument that the Duke actually knew sufficient of the relevant facts in 2016 and therefore could with reasonable diligence have appreciated that he had a worthwhile claim. If an *ACS* order is made in relation to either of these claims, NGN will either lose the opportunity to make that application for summary determination of the limitation issue, without having to investigate the separate and different facts relating to what happened in 1994 and 1995 (and 2016) to be ready for a trial, or alternatively will make that application within the existing (amended) claim. If it were to do that, the trial date would be lost unless (as Mr Sherborne accepted as a possibility) the articles for 1994 and 1995 (and 2016) were omitted from those selected for the January 2025 trial. If that is what is needed, there is little benefit in allowing the amendment on *ACS* terms.

185. In either case, it therefore seems to me preferable, in order to avoid or limit prejudice to NGN in preparing for trial and for broader case management reasons, for the 1994/1995 claim and the 2016 claim to be left to be dealt with in a new claim, if the Duke wishes to bring one. Proceeding in this way will remove the greater disclosure burden from the existing claim, avoid the need to investigate quite different facts at different times in a short period of time, and ensure that there is no risk to the trial date or undue prejudice caused by granting permission for other amendments.

186. The position in relation to the landline claims is rather different, in that it appears to be of a limited ambit, as currently pleaded (two pleaded landline telephone numbers, and no particulars about cars or homes that were bugged), and appears to be based on limited evidence that has already been filed. The pleaded position is not entirely clear, as I have explained, and if it is intended to be more extensive that I have understood it then it will not be permitted by way of amendment until proper particulars of that more extensive case are provided.

187. Subject to that, the landline claims are likely to be based on very similar facts to those in issue on the blagging and PI UIG claims, and the VMI claims of other claimants. Landline voicemail interception and landline call interception claims are already pleaded together in many other such claims, so the issues may well be live at the January 2025 trial in any event. That seems to me to be a strong reason for an *ACS* order to be made.

188. Further, the landline claim is less obviously vulnerable to a limitation defence. I have read the evidence of Mr Chisholm Batten that relates to this, most of which is directed to the allegations relating to the late Princess Diana in the 1994/1995 claim, not allegations that the Duke's own landline calls or messages were intercepted. I have described the evidential support as not being compelling, but there is some. There will undoubtedly be questions for the Duke in cross-examination about what he knew about landline phone call and message abuse by September 2017. But there does not seem to me to be such a strong case for saying that the Duke clearly knew that he was a victim or those types of UIG specifically, in contradistinction to VMI, or that he clearly could reasonably have discovered that he had a worthwhile claim in relation to them, such as to make summary determination on that issue realistic.

189. Accordingly, it seems to me that there is less prejudice to NGN if this claim (subject to confirmation of its scope) were allowed to join the existing claims, on an *ACS* basis, namely that it is a claim deemed to have been issued on 7 September 2023 or the date of service of the amended PoC, whichever is deemed to be right in principle, and not in October 2019. The fact that a different date of knowledge or deemed knowledge will be in issue raises a disclosure issue for the Duke but not for NGN, though there may be further evidence that NGN will wish to adduce about the extent of publicity about such matters by September 2017, or later. Given the other claims for which I have indicated that I refuse permission, I consider that these limited issues can easily be accommodated in the existing claim.

190. I will therefore grant permission for some of the amendments that the Duke seeks to make but not others, as explained above and set out in Appendix 2.

Appendix 1

Consequential Amendments

i) Paragraph 3. Only relevant to voicemail interception and should be removed.

ii) Paragraph 4. Only relevant to voicemail interception and should be removed.

iii) Paragraph 4A. Pleading of case and argument on similar fact evidence, which should be removed. Particularity is needed about the "Unlawful Acts" that remain in the claim, which cannot be defined solely on the basis that they are not "Phone Hacking".

iv) Paragraph 5. Use of reference to para 4A inappropriate as a means of defining the causes of action. The "Unlawful Acts" as defined require appropriate particularity.

v) Paragraph 6. Wholesale incorporation of the GENPOC in para 6(a) is inappropriate given that most of the GENPOC is concerned with VMI. Which of the items listed in para 6(b) are relied on in connection with blagging or alternatively unlawful PI activity that is not accessory to VMI need to be identified.

vi) Paragraph 7. Use of reference to para 4A inappropriate as a means of defining the causes of action. Further, the sub-paras are replete with allegations of VMI, which should be removed.

vii) Paragraph 8. Sub-paras (a) to (e) are solely concerned with phone hacking allegations and should be removed. Confirmation required for each invoice and ZC payment in sub-paras (f) and (g) that it is relied on as evidence of blagging or alternatively unlawful PI activity that is not accessory to VMI.

viii) Paragraph 9. Incorporation of paras 21.5 and 21.B of the Weeting generic particulars of claim is inappropriate as these are concerned with phone hacking. Relevance of Mr Mulcaire to blagging or other unlawful activities not accessory to phone hacking is not explained.

ix) Paragraph 11. Relevance of Mr Mulcaire to blagging or other unlawful activities not accessory to phone hacking is not explained.

x) Paragraph 13. It is necessary to clarify what the relevant activities under the headlined Arrangements were, in so far as they relate to the surviving causes of action, and remove the reference to para 4A. The continued relevance of para 13(a) is unclear, and paras 13(b) and 13(c) appear to be solely concerned with VMI and therefore should be removed.

xi) Paragraph 15. Confirmation required for each invoice and ZC payment that it is relied on as evidence of blagging or alternatively unlawful PI activity that is not accessory to VMI.

xii) Paragraph 17. Clarification needed of why para 35A of the Pinetree generic particulars of claim is relied upon, given that this appears only to relate to voicemail interception.

xiii) Paragraph 19. The amendments made alter the effect of the plea in para 19 but without indicating which articles in Part G relate to allegations of blagging and which relate to allegations of unlawful PI activities that are not accessory to VMI. The reference to para 4A should be removed.

xiv) Paragraph 20. The amended paragraph still refers to the selected articles as being blatant examples of voicemail interception. It is now necessary to omit the case on voicemail interception and specify which of the selected articles relate to unlawful information gathering that is not accessory to VMI. The selected articles described in the sub-paras are almost all described in terms of VMI taking place before the article, but no case in relation to blagging or unlawful PI activity that is not accessory to VMI is pleaded.

xv) Paragraph 22. The reference to para 4A should be removed.

xvi) Paragraph 25. Sub-paras (a) and (d) must exclude participation in VMI and accessory activities.

xvii) Prayer, para 4(a) and (d). These must exclude participation in VMI and accessory activities.

Appendix 2

Voluntary Amendments

i) Paragraph 4 – this amendment is in connection with the Duke's former VMI case and so is not permitted.

ii) Paragraph 4A, 5, 6C and 6D re landline interception and hacking – permitted, subject to clarification of the extent of the allegations, as explained in the body of the judgment, and on condition that the claims are deemed to have been brought on a later date (to be determined) and do not relate back to the issue of the claim form.

iii) Paragraph 5 – extension of period to include 1994, 1995 and 2012-2016 not permitted. Plea of confidential information is not permitted pending pleading of breach of confidence case with proper particularity.

iv) Paragraph 5, 15A, 20(aA), (aB) and (aC) and articles A-AA in Part G – amendments in respect of 1994/1995 claims not permitted: arguable limitation defence.

v) Paragraph 5(a), (b) and (c) – permitted, subject to (a) clarification of whether each of the persons named as having directly used unlawful activities such as voicemail interception and blagging is alleged to have used landline voicemail interception rather than (or in addition to) VMI, and (b) the exclusion of Piers Morgan and any other individual who was only employed at the News of the World or The Sun outside the period 1996-2011.

vi) Paragraph 5A, 19, 22(a), 22A, 23, Prayer paras (2), (5) – not permitted in relation to breach of confidence claim pending proper particularisation of that claim, or the reference in para 5A to para 4A, but otherwise permitted.

vii) Paragraph 6 – reference to 1994/1995 claims not permitted, but other voluntary amendments permitted, subject to overarching requirement in relation to para 6(b) as stated in Appendix 1, above. Paras 6(b)(iiia) and (lxxviiia) are not "new claims" within s.35 LA 1980.

viii) Paragraphs 6A and 6B – permitted.

ix) Paragraph 7(a) – this is not permitted because it clearly relates to VMI.

x) Paragraphs 8A, 9A, 13A, 15A – these are merely pleas of evidence, some of which relates to VMI, and are not permitted. Further, para 15A(a) relates to 1994/1995 claims and is not permitted for that reason too.

xi) Paragraph 11 – not permitted, as too opaque what is being referred to.

xii) Paragraph 19 – plea of breach of confidence not permitted pending pleading of case with proper particularity.

xiii) Paragraph 20(a) – Not permitted pending compliance with the consequential amendments Order – see [157] and Appendix 1, above.

xiv) Paragraph 20(i), (q) – The non-agreed amendments are pleas of evidence and are not permitted.

xv) Paragraph 20(w) – 2016 claim not permitted: arguable limitation defence.

xvi) Paragraph 22B – permitted. No specific objection to this was raised by NGN, and it has the effect only that NGN will have to plead in response to specify, if it so contends, that the law of a foreign country is different, as regards the lawfulness of the PI activities alleged to have been conducted there. Any issue about this that is raised in response will be managed at a CMC.

xvii) Paragraph 24(fa) – the only objection in writing to this allegation of knowledge by senior editors and managers is that it is deficiently pleaded, but the objection was not developed orally. Given that the GENPOC raise the issues of senior executive and editorial knowledge, there is no objection to the Duke pleading this specifically as a factor going to damages and aggravated damages claimed, but the allegation against Mr Morgan must be removed as this can only relate to the years 1994 and 1995. Subject to that point, permission granted.