Neutral Citation Number: [2026] EWHC 2207 (KB)

Case No: KB-2022-003316
KB-2022-003317
KB-2022-003318
KB-2022-003340
KB-2022-003357
KB-2022-003404

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 August 2026

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

(1) Baroness Lawrence of Clarendon OBE
(2) Elizabeth Hurley
(3) Sir Elton John CH CBE
(4) David Furnish
(5) Sir Simon Hughes
(6) Prince Harry, The Duke of Sussex
(7) Sadie Frost Law **Claimants**

- and -

Associated Newspapers Limited **Defendant**

- -

Nicholas Bacon KC, David Sherborne, Ben Hamer and **Ed Grigg** (instructed by **Sheridans Solicitors LLP** and **Thomson Heath Jenkins & Associates**) for the **Claimants**
Antony White KC, Andrew Caldecott KC, Catrin Evans KC, Roger Mallalieu KC, Sarah Palin, Hannah Glover and **Ben Gallop** (instructed by **Baker & McKenzie LLP**) for the **Defendant**

Hearing dates: 29-30 July 2026

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Approved Judgment

This judgment was handed down remotely at 2pm on 21 August 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Nicklin :

1. Judgment following trial of this action was handed down on 7 July 2026 ([2026] EWHC 1637 (KB) ("the Main Judgment")). A further hearing was fixed for 29-30 July 2026 to resolve any outstanding issues as to the orders to be made consequent upon the judgment. This judgment resolves those issues. In this judgment, I use abbreviations and definitions that are used in the Main Judgment.

2. The Claimants accept that, having lost their claims, they must pay Associated's costs and that they must make a payment on account of those costs. There are two principal issues to be resolved:

   (1) whether the Claimants should pay costs on the standard or indemnity basis; and

   (2) the sum to be paid by the Claimants on account of costs.

3. A further point arose at the hearing: whether, if the Court did make an order for indemnity costs, there is jurisdiction to impose a cap or limit on costs to be recovered under the order for indemnity costs. On this point, the parties provided written submissions after the hearing. I deal with it in Section B below.

A: Indemnity Costs

4. Associated seeks an order that the Claimants should pay the costs of the action on the indemnity basis.

(1) Legal principles

5. The Court's discretion as to costs is conferred by CPR 44.2. So far as material, the rule provides:

> "(1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue;

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim; and

(e) whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so…"

6. The discretion under CPR 44.2 is a broad one. In deciding what order to make, the Court must have regard to all the circumstances, including the conduct of the parties.

Conduct includes conduct before as well as during the proceedings, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, and the manner in which a party pursued or defended its case or a particular allegation or issue. CPR 44.2 also makes clear that the Court's powers are not confined to an all-or-nothing costs order: they include orders for a proportion of costs, costs from or until a certain date, costs relating to particular steps, and costs relating only to a distinct part of the proceedings.

7. CPR 44.3 identifies the two bases on which costs may be assessed: the standard basis and the indemnity basis. The usual order is that costs are assessed on the standard basis. When costs are assessed on that basis the receiving party recovers only costs that were reasonably incurred, reasonable in amount and proportionate to the matters in issue. If there is any doubt about reasonableness or proportionality, the doubt is resolved in favour of the paying party. The Court may, however, order costs to be assessed on the indemnity basis. That does not mean that the receiving party is entitled to recover all the costs it has incurred. Costs incurred unreasonably, or which are unreasonable in amount, will be disallowed. The important differences between the two bases of assessment are that, on the indemnity basis, proportionality does not limit recovery and any doubt as to reasonableness is resolved in favour of the receiving party.

8. An order for indemnity costs is therefore a departure from the usual basis of assessment. The authorities express the test in slightly different formulations, but the central requirement is the same: there must be some conduct, or some circumstance, which takes the case out of the norm. The discretion is wide and must be exercised by reference to all the circumstances. Where conduct is relied upon, it need not attract moral condemnation; unreasonableness may be sufficient. But the authorities also emphasise that the hurdle is a high one. The conduct or circumstances must be outside the ordinary and reasonable conduct of proceedings. In deciding whether to order costs on the indemnity basis, the Court can have regard to an aggregation of factors in deciding whether unreasonable conduct has been demonstrated.

9. A useful summary of the principles was provided by Tomlinson J in ***Three Rivers DC -v- Bank of England*** **[2006] 5 Costs LR 714** [25]:

> "(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.
>
> (2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.
>
> (3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an *a fortiori* ground, but rather unreasonableness.
>
> (4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.

(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

(6) *A fortiori*, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a [claimant] has discontinued only at a very late stage in proceedings:

(a) Where the claimant advances and aggressively pursues serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time;

(b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;

(c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;

(d) Where the claimant, by its conduct, turns the case into an unprecedented factual enquiry by the pursuit of an unjustified case;

(e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;

(f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;

(g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat".

10. The authorities recognise that indemnity costs may be justified where a claim is speculative, weak, opportunistic or thin; where serious allegations, including dishonesty or serious impropriety, are pursued aggressively and fail; where the allegations are the subject of extensive publicity, particularly where courted by the unsuccessful party; or where the litigation is conducted on a very wide and unjustified canvas. Those categories are not closed. They are illustrations of the underlying

question: whether, looking at the case in the round, the conduct or circumstances were outside the norm.

11. Associated relied additionally on ***The New Lottery Company Ltd -v- The Gambling Commission*** **[2026] Costs LR 481**. The decision is a useful recent illustration of the application of these principles in substantial, complex litigation. Joanna Smith J recorded that the applicable principles were not in dispute. Referring to ***Three Rivers***, and to the summary of the law in ***Hislop -v- Perde*** **[2019] 1 WLR 201** [35]-[36], she stated that there must be conduct which takes the case out of the norm; that the question is highly fact sensitive; that the Court's discretion is extremely wide; and that the touchstone is unreasonableness, but unreasonableness "*to a high degree*". She emphasised that unreasonableness in this context does not mean merely wrong or misguided in hindsight, and that the Court may have regard to an aggregation of factors: [3]-[4].

12. On the facts, the Judge ordered indemnity costs for the entirety of the proceedings. The features on which she relied included:

(1) the size and importance of the claim, which was said to be worth over £1 billion and, if successful, could have brought the National Lottery to a standstill: [7];

(2) the unfocused manner in which the claim had been advanced, with numerous issues dropped at the outset of trial, at the outset of closing submissions and even during closing submissions, often only after the point had been drawn to the claimants' attention by the Court or the other parties: [7];

(3) numerous serious and wide-ranging allegations, including allegations of impropriety and dishonesty, advanced over an extended period and many of them abandoned shortly before or during trial in unsatisfactory circumstances: [8]-[10];

(4) the substantial reduction of the list of issues, originally 64 issues in the Process Claim and 17 in the Modifications Claim, often without proper notice and without explanation: [9];

(5) the disruption and prejudice caused to the Court and the other parties by the abandonments and the fluid way in which the case was advanced: [11];

(6) the advancing of unpleaded and unparticularised allegations, and the repeated amendment or reformulation of existing allegations: [12]; and

(7) the weak and speculative nature of the claims, including the near-insuperable hurdles that the claimants had to overcome: [13]-[16].

13. Having considered those matters individually and cumulatively, the Judge concluded that the conduct was highly unreasonable and took the case out of the norm: [17]. She also rejected the suggestion that the order should be "*salami sliced*" by reference to individual issues or periods of time, because the conduct warranting indemnity costs was not confined to the trial but ran through the whole case: the pleadings were inadequate and unparticularised from the outset, the claims were weak, the case was broad and scattergun, and the defendant and interested parties had been required to incur

substantial costs in preparing to meet allegations which were later abandoned or changed: [18]-[19]. Finally, she rejected the submission that the alleged disproportionality of the receiving parties' costs should lead the Court not to award indemnity costs, holding that proportionality was not a reason to withhold indemnity costs where the paying party's conduct was highly unreasonable and outside the norm: [20].

14. Associated also referred in oral submissions to ***Breeze & another -v- Chief Constable of Norfolk Constabulary*** **[2026] EWHC 1937 (KB)**, a very recent decision of Cotter J. That case concerned the costs of a 12-day trial of claims for malicious prosecution and misfeasance in public office. The claims had failed comprehensively. The allegations were serious and wide-ranging, including allegations that police officers had acted maliciously, suppressed and manipulated evidence and distorted the decision-making process leading to prosecution: [1]-[11]. Cotter J considered the general principles from ***Three Rivers*** and emphasised that, where the conduct relied upon concerns the making and pursuit of specific allegations, those allegations must be considered in the context of the litigation as a whole. The applicant for indemnity costs does not have to show that any particular conduct increased the costs to any specific degree: [36].

15. On the facts, Cotter J ordered indemnity costs on the limited basis sought, namely from the date following a letter warning the claimants that continued pursuit of the claim was said to be unreasonable: [13]-[14], [20], [64]. The factors on which he relied included the breadth of the allegations, the way in which the claim had turned the case into an unreasonably extensive factual enquiry, at times akin to a public inquiry into matters wider than the pleaded causes of action, the pursuit of allegations akin to serious dishonesty against named officers without real foundation, allegations that were thin, far-fetched or irreconcilable with contemporaneous documents, inconsistent arguments on a central issue, and reliance on evidence that had no real probative value for the causes of action alleged: [37]-[53]. Importantly, he held that it was not necessary to go through every matter in detail *seriatim*. The question was the cumulative effect. There was force in each point relied upon, but it was the cumulative effect of those matters, rather than the individual impact of each, which took the case out of the norm: [39]. He also rejected the submission that the defendant's failure to apply for strike out or summary judgment precluded indemnity costs, holding that in a complex case with a long and protracted history and wide-ranging allegations, such an application would realistically have required a mini-trial and it was wrong to suggest that the defendant should have adopted that course: [55]-[58]. He further considered, but rejected as decisive, the claimants' reliance on the defendant's own disclosure failings, having regard to the context and effect of those failings: [59]-[60].

16. I was also referred to ***Digicel (St Lucia) Ltd -v- Cable & Wireless plc*** **[2010] 5 Costs LR 709** and ***JP Morgan Chase -v- Springwell Navigation Corp*** **[2008] EWHC 2848 (Comm)**. Those decisions do not create a freestanding rule that a party who litigates disproportionately thereby automatically forfeits standard basis assessment. The governing question remains whether the conduct or circumstances take the case out of the norm. But they do identify a relevant consideration. In ***Digicel***, Morgan J held that, where the claimants had cast their claim disproportionately widely and required the defendants to meet it, they had "*forfeited the benefit of an assessment on a proportionate basis*": [68]. In ***JP Morgan***, Gloster J stated that a party who chooses to

litigate a heavy commercial case "*on such a wide and extravagant canvas*", including by taking every point and making unsubstantiated allegations which the defendant must meet, takes the risk that, if unsuccessful, it may have to pay costs on the indemnity basis: [13(iv)]. Properly understood, the principle is that if a party's unreasonable conduct of the litigation justifies an indemnity costs order, that party cannot complain that it thereby loses the benefit of the standard-basis proportionality control. The question is not answered by saying that the litigation was disproportionate; the question is whether the way in which the litigation was pursued was sufficiently unreasonable, viewed in all the circumstances, to be outside the norm.

17. Associated also relied on authorities concerned with failed allegations of fraud, dishonesty or serious impropriety. The relevant principles require some care. In ***Clutterbuck -v- HSBC plc* [2016] 1 Costs LR 13**, David Richards J observed that, where allegations of fraud are made and the case fails, the general approach is that the claimant will be ordered to pay costs on the indemnity basis, although the Court retains a complete discretion and there may be factors which indicate that indemnity costs are not appropriate: [16]. The underlying rationale is that allegations of fraud are so serious that, where they fail, they should ordinarily be marked in costs because the defendant has had no real choice but to come to court to defend its position: [17]. The same approach may apply where, rather than proceeding to trial and failing, the claimant discontinues and thereby abandons the fraud claim: [18]-[21].

18. That approach is consistent with the discussion in *Grant & Mumford, Civil Fraud* (2018, Sweet & Maxwell), which emphasises (§1-016) both the reputational harm and strain caused by allegations of fraud and the fact that, if serious allegations of deceit are unsuccessfully pursued and shown to have been unfounded, the claimant is at risk of indemnity costs; such orders reflect, in part, that the defendant has no choice but to defend the allegations and the unpleasant and distressing experience of being their target over the life of the litigation.

19. But the authorities do not establish an automatic rule. In ***Thakkar -v- Mican* [2024] 1 WLR 4196**, the Court of Appeal held that a failed allegation of dishonesty will very often lead to an indemnity costs order and that a party making such an allegation runs a very significant risk of being ordered to pay indemnity costs in such circumstances. However, there is no presumption, starting point or reversal of the ordinary burden of proof. The default position remains standard basis costs unless the party seeking indemnity costs demonstrates that they are appropriate in all the circumstances: [28]-[30].

20. Nor is the real risk of an indemnity costs order confined to failed allegations of dishonesty. In ***Essex County Council -v- UBB Waste (Essex) Ltd* [2020] Costs LR 1259**, Pepperall J held that allegations of a lack of good faith involved a serious imputation of commercially unacceptable conduct by professional people, and that making widespread allegations of that kind without proper evidential foundation was out of the norm and, of itself, justified indemnity costs: [61]-[63].

21. Finally, indemnity costs may also be justified where litigation is pursued for an improper or collateral purpose. In ***Full Colour Black Ltd -v- Banksy* [2026] EWHC 795 (KB)**, I summarised the authorities as showing that proof of dishonesty or bad faith is not required, but that proceedings pursued for an improper or collateral purpose, including the exertion of illegitimate pressure, may justify such an order where the

conduct, viewed objectively and in the round, is sufficiently unreasonable to take the case outside the norm: [92]-[96].

22. A further point concerns the extent to which a party may resist an indemnity costs order by saying that the conduct relied upon was that of that party's lawyers, experts or others rather than of the party personally. That is not, of itself, an answer. In ***Excalibur Ventures LLC -v- Texas Keystone Inc (No.2)*** **[2017] 1 WLR 2221**, the Court of Appeal considered an analogous argument advanced by litigation funders who sought to resist liability for indemnity costs on the basis that they had not themselves been guilty of discreditable conduct. Tomlinson LJ rejected that argument. He emphasised that conduct is only one factor in the overall evaluation, and that the character of the action and its effect on the successful defendant are also relevant: [21]-[23]. More specifically, at [24], he held that where conduct is relevant, the successful party is afforded a more generous basis of assessment because of the way in which the opposing party, "*or those in his camp*", have acted. A litigant may therefore be liable to pay indemnity costs because of the conduct of those whom he has chosen to engage, such as lawyers or experts, or those whom he has chosen to enlist, such as witnesses, even though he is not personally responsible for that conduct. The analysis is not dependent on agency: expert and factual witnesses are not agents of the party on whose behalf they give evidence. It is a broader principle of justice. The party who deploys lawyers, experts and witnesses as part of the conduct of the litigation cannot, when the litigation fails, dissociate himself from conduct by those persons that has caused the other side to incur costs in meeting the case. That does not mean that every error by a representative or witness is to be visited on the party by an indemnity costs order. The Court must still ask whether, looking at all the circumstances, the conduct or circumstances take the case out of the norm. But where that threshold is crossed, it is no answer that the relevant conduct was that of those through whom, or by whom, the party chose to advance the litigation.

23. The principle I derive from these authorities is that serious allegations, especially allegations of dishonesty, fraud, bad faith or commercially unacceptable conduct, must be advanced and maintained with particular care. If such allegations are advanced without proper foundation, maintained unreasonably, abandoned without explanation, publicised, or deployed as part of an improper litigation strategy, those matters may be powerful factors in the overall assessment. But they do not create an automatic entitlement to indemnity costs; the Court must exercise its discretion by reference to all the circumstances.

24. The authorities therefore provide examples of circumstances in which indemnity costs may be justified, but they do not displace the need for a fact-sensitive assessment of all the circumstances of the particular case.

25. For present purposes, I draw the following principles and points of caution from the authorities and from the way in which the parties put their submissions.

(1) The discretion is not mechanistic. It is not enough simply to identify criticisms of the losing party's conduct. The Court must stand back and evaluate the conduct relied upon in the context of the litigation as a whole. The Court need not decide the question by treating each criticism as a self-contained compartment; where several matters are relied upon, their cumulative effect may be decisive. The question is not whether the losing party advanced points

that failed, or even whether some aspects of the case were open to criticism. The question is whether the conduct or circumstances, viewed fairly and in context, were outside the ordinary and reasonable conduct of proceedings. In applying that test, the Court must be careful not to reason backwards from failure at trial. A case may fail because the evidential building blocks are ultimately insufficient, without it following that the party acted unreasonably in advancing it. The Court must assess reasonableness by reference to what was known, or ought reasonably to have been appreciated, at the relevant time.

(2) The fact that serious allegations have failed is important, but it does not follow that every failed serious allegation results in indemnity costs. The seriousness of the allegation matters because it affects the burden imposed on the defendant, the reputational consequences for individuals accused, and the extent to which the defendant had no real choice but to defend the allegation. But the Court must still consider whether the allegation was reasonably advanced and maintained, and whether the manner in which it was pursued takes the case outside the norm. That is consistent with ***Clutterbuck***, ***Thakkar***, and ***Essex County Council***.

(3) The Court may take account not only of the conduct of the party personally, but also of the conduct of those whom the party has chosen to engage or enlist in the litigation. ***Excalibur*** supports the proposition that a party cannot necessarily avoid the costs consequences of conduct outside the norm by saying that the conduct was that of lawyers, experts or witnesses rather than the party personally. The principle is not one of agency, but a broader principle of justice. The Court must nevertheless identify the conduct relied upon, consider how it affected the litigation and the opposing party, and decide whether it is just to treat it as part of the conduct of the case for which the litigating party should bear costs consequences.

(4) The fact that litigation is very wide, expensive or complex does not itself justify indemnity costs. But litigation pursued on an unjustifiably wide or extravagant canvas may do so, particularly where the breadth of the case is not justified by the issues properly in dispute and imposes unnecessary cost burdens on the opposing party. That principle emerges from authorities such as ***Digicel*** and ***JP Morgan***. In applying it, however, the Court must distinguish between a case that was genuinely complex and broad because of the nature of the issues, and a case that was made unnecessarily broad by unreasonable pleading, pursuit or maintenance of allegations.

(5) Procedural conduct may be relevant. Failures concerning disclosure, witness statements, compliance with PD57AC, late abandonment of allegations, or putting unpleaded allegations at trial may, individually or cumulatively, justify indemnity costs if they amount to conduct outside the norm. The authorities do not treat every procedural failure as sufficient. The Court must consider the seriousness of the breach, its effect on the litigation, whether it caused additional costs or unfairness, and whether it is fair to treat it as part of the cumulative case for indemnity costs. It is not, however, necessary for the receiving party to prove that each item of conduct increased costs by a specific amount.

(6) The Court may have regard to publicity. Publicity is particularly relevant where serious allegations are made publicly and fail, and especially where publicity was courted by the unsuccessful party. But publicity cannot be treated as an automatic aggravating factor in every high-profile case. The Court must consider whether the party sought or encouraged publicity, whether the publicity was an inevitable consequence of the nature of the litigation, what allegations were publicised, and whether the publicity caused or exacerbated the burden on the successful party. This reflects the seventh principle in ***Three Rivers*** and the discussion in *Grant & Mumford* of the strain and reputational harm caused by serious allegations.

(7) Indemnity costs may be ordered even if the conduct does not amount to dishonesty, bad faith or abuse of process. Conversely, the fact that the conduct falls short of dishonesty, bad faith or abuse does not answer the question. The question remains whether the conduct, judged objectively and in context, was sufficiently unreasonable, or whether the circumstances were sufficiently unusual, to take the case outside the norm. That is consistent with ***Thakkar*** and ***Full Colour Black***.

(8) The fact that a matter was not the subject of a finding in the substantive judgment does not, of itself, prevent the Court from considering it for the purposes of costs. A judgment on liability contains the factual findings necessary to determine the issues in the claim. It does not follow that the Court has made, or was required to make, every factual finding that may be relevant to the later exercise of the costs discretion. A costs application may raise matters that were not necessary to decide liability but are relevant to the exercise of the Court's discretion under CPR 44.2. There is therefore no rule that the Court is confined to the findings made in the substantive judgment. Where it is necessary and fair to do so, the Court may make further findings for costs purposes, provided that there is a proper evidential foundation, the parties have had a fair opportunity to address the matter, and the issue can fairly and proportionately be resolved on the costs application.

(9) That said, a consequential costs hearing is not a second trial or a post-trial inquisition. The Court must be cautious before making broad adverse findings that go materially beyond the findings in the substantive judgment, particularly where those findings would involve serious allegations against parties, lawyers or third parties. In deciding whether to make any further finding for costs purposes, the Court must consider the nature of the finding, the extent to which it was canvassed at trial or on the costs application, the evidential material upon which it rests, and whether it is necessary to make the finding in order to decide the costs issue fairly.

(10) The fact that the party seeking indemnity costs did not apply to strike out the claim, or seek summary judgment, is not necessarily an answer to an application for indemnity costs. It may be a relevant circumstance when assessing how the litigation was understood at the time, and whether the case was reasonably pursued. But in complex litigation involving wide-ranging factual allegations, such applications may be unrealistic or inappropriate, particularly if they would require the Court to conduct a mini-trial. The Court must therefore be cautious before treating the absence of an earlier strike-out or summary judgment

application as demonstrating that the losing party's pursuit of the case was reasonable. That is illustrated by ***Breeze***, where Cotter J rejected the submission that the defendant's failure to apply for strike out or summary judgment precluded indemnity costs: [55]-[58].

(11) Previous costs orders matter. If a particular procedural episode has already been the subject of a costs order, especially one made on the standard basis, that does not create an absolute bar to considering the episode as part of the overall history. But the Court must avoid double counting. The earlier order may affect the weight to be given to the episode and whether it is fair to rely upon it again in support of a global indemnity costs order.

(12) The Court must consider the conduct of both sides. The fact that the receiving party has succeeded overall does not mean that its own conduct is irrelevant. Conduct by the successful party will not necessarily neutralise conduct by the unsuccessful party, but it may bear on whether it is just to depart from the usual basis of assessment, and on the scope of any such departure. In ***Crypto Open Patent Alliance -v- Wright*** **[2022] Costs LR 279**, HHJ Paul Matthews, sitting as a Judge of the High Court, emphasised that costs decisions are intended to reflect the broad justice of the case and should not become satellite litigation: [11]-[13]. On the facts, he declined to award indemnity costs where both sides had conducted the litigation in an ultra-aggressive and unco-operative way: [29]-[33]. The point is simply that the Court must stand back and assess the overall justice of the case, including the conduct of the party seeking indemnity costs.

(13) Finally, the scope of any order matters. CPR 44.2 expressly permits costs orders limited by proportion, date, step or distinct part of the proceedings. The Court is not required to choose only between standard basis costs for the whole proceedings and indemnity basis costs for the whole proceedings. If only some conduct, stages or periods justify indemnity costs, the Court may consider a more tailored order. At the same time, the Court should have regard to the practical consequences of issue-based or temporal orders, including whether they would complicate detailed assessment and generate further costs. The consequences of an indemnity costs order in a budgeted case, including the loss of the protection of costs budgeting, form part of the practical context. They do not, however, alter the threshold question whether the conduct or circumstances take the case outside the norm.

26. I add one case-specific point about procedural fairness. The directions for the hearing to determine the orders consequent upon the Main Judgment required Associated to serve its skeleton first and the Claimants to respond thereafter. That sequence was deliberate. The Claimants were entitled to know what order Associated sought and upon what basis. Sequential exchange of skeleton arguments meant that the Claimants had a full opportunity to answer the points upon which Associated relied. The Claimants did so, in their skeleton for the hearing (and in an annex responding issue-by-issue to Associated's skeleton) and at the hearing. That does not remove the need for caution before making findings beyond those in the substantive judgment, but it is relevant to whether the Claimants had a fair opportunity to address the matters relied upon.

(2) The parties' submissions

27. Associated clearly identified the matters upon which it relied in support of its application for an order for indemnity costs. The Claimants have responded to those matters in their written and oral submissions. In this section I will summarise the matters relied upon by Associated and the Claimants' response.

(a) Associated's overall case

28. Associated's application for indemnity costs was put on a cumulative basis. Its primary submission was that the claims, and the manner in which they were brought, pleaded, pursued, maintained and publicly advanced, involved a combination of circumstances and conduct that took the litigation well outside the norm. Associated submitted that this was not a case in which the Court should "*salami-slice*" the costs order by individual issues or periods of time. It relied by analogy on cases where serious and wide-ranging allegations of dishonesty or impropriety, pursued over an extended period and in the glare of publicity, had justified indemnity costs. It submitted that this litigation bore the same essential features: serious allegations against many named individuals, a very wide pleaded case, unpleaded or shifting allegations at trial, serious allegations not withdrawn when no longer pursued, and claims which failed comprehensively.

29. Associated emphasised that it did not rely only on discrete instances of litigation misconduct. It said that the vice lay in the cumulative effect of the relevant matters, beginning with the origins of the claims and continuing through the pleaded case, disclosure, witness statements, trial conduct, closing submissions and post-judgment publicity. In reply, Mr White KC submitted that Mr Bacon KC had engaged with only some of the points relied on by Associated and had not gainsaid the factual basis of many of them. In particular, he submitted that the Claimants had said nothing, or nothing of substance, about the origins of the claims, payment for testimony, the full Burrows chronology and the handling of the Burrows evidence and allegations at trial (see Main Judgment Appendix 3), the breadth of the pleaded allegations, the Limitation Application (see Main Judgment [A1.1]-[A1.3]), the abandonment of the foreign law point, the shifting case at trial, unpleaded allegations, the handling of the "*Leveson Lies*" allegations (see Main Judgment [1574]-[1604]), the abandonment of serious allegations without acknowledgement, and the post-judgment statements. That submission must be considered against the Claimants' written Annex, but it is fair to record that several of Associated's detailed points were met in the Annex by relatively high-level responses or by cross-reference to the main skeleton rather than by a point-by-point factual answer.

(b) The Claimants' overall answer

30. The Claimants submitted that this was, and remained, hard-fought litigation in which they had brought genuine claims in good faith, based on their belief that private information concerning them had been obtained through unlawful information gathering ("UIG"). They accepted that Associated was the successful party and that costs should follow the event. They did not, however, accept that the case justified the stigma and practical consequences of indemnity costs. They emphasised that the Court had not found any of the Claimants to be dishonest, had in important respects accepted their evidence, and had made significant generic findings about the use of TPIs by

Associated and the circumstances in which information was obtained which raised legitimate concerns.

31. The Claimants further submitted that Associated's application sought to convert the consequentials hearing into a form of second trial. They contended that Associated was inviting the Court to make new findings about the origins and motivations of the claims, payment for evidence, alleged deliberate withholding of documents, alleged misleading evidence and other matters that had not been necessary to decide in the liability judgment. They argued that this was not an appropriate exercise at the costs stage. They also contended that many of the matters now relied on had already been the subject of interlocutory applications and costs orders, often on the standard basis, and should not be reopened to support a global indemnity costs order.

32. The Claimants' further broad answer was that the litigation had been attritional on both sides. They relied on examples of Associated having advanced serious allegations that had failed, including allegations on the Restriction Application concerning misuse of Leveson material and the limitation camouflage case. Their submission was that, standing back, this was a hard-fought case in which both sides had taken serious points, some of which were unsuccessful, and that the Court should be cautious before isolating the Claimants' conduct as conduct out of the norm.

(c) The origins and purpose of the claims

33. Associated submitted that the origins of the litigation were highly unusual. It relied on the "*Operation Bluebird*" material and on the evidence of Dr Evan Harris and Graham Johnson to submit that the claims were conceived as part of a wider campaign to demonstrate that Associated had misled the Leveson Inquiry, to show that Associated had been guilty of the same kinds of UIG as other newspaper groups, and to generate political pressure to implement the second phase of the Leveson Inquiry ("Leveson Part 2"). Dr Harris accepted in his evidence that generating pressure on the government to implement Leveson Part 2 was an objective of his organisation, Hacked Off, and a reason to pursue litigation against Associated. The link between that objective and what was to become the Leveson Lies allegation in the claim was made explicit in Dr Harris's and Mr Johnson's "*Operation Bluebird*" Memo in December 2016:

> "We are planning a coordinated media attack on Associated Newspapers in the New Year.
>
> The aim of this media campaign is to drag the Daily Mail into the spotlight for phone hacking. To show that Daily Mail Editor Paul Dacre, former Mail on Sunday Editor Peter Wright and Daily Mail lawyer Liz Hartley misled Leveson 1, over their denials about phone hacking and use of private detectives.
>
> The timing is key, as the government will be deciding whether to proceed with Leveson Part 2 (which considers what happened in phone hacking and whose terms of reference cover inquiring into illegality and cover-ups in all Newspaper Groups) in the New Year.
>
> For this campaign, I propose to use a unique combination of traditional and new media, print and broadcast, alongside activist groups and lobbyists, not forgetting various legal actions, to 'swarm' Associated.

> In addition, my associates at Hacked Off are lobbying hard in the House of Commons and the Lords - they won a crucial vote this week to keep Leveson Part 2 alive".

34. Associated submitted that the litigation was intended to use high-profile claimants to obtain disclosure, create publicity and produce further claims. It relied, among other things, on references to a "*coordinated media attack*", the aim of dragging the *Daily Mail* "*into the spotlight for phone hacking*", and the use of "*various legal actions*" to "*swarm*" Associated.

35. Associated submitted that the letters before action themselves revealed that the Claimants were not merely seeking damages or vindication of individual rights. Each Claimant's letter of claim contained the following paragraph under the heading: "*the objective of [the] claim*":

> "Moreover, in addition to the great distress they personally feel, our clients regard it to be a matter of enormous importance to expose the extent of the wrongdoing and subsequent cover-up by ANL. Given that it now appears that the use of the Illegal Acts was both habitual and widespread, it is highly likely that there will be numerous other individuals who were similarly targeted by your newspapers, many of whom will not be of such high-profile or will have become of interest to your newspapers either because they suffered as a result of, or were simply caught up in, a newsworthy event or are associated with someone else who was. Again, the fact that you have so vigorously (and falsely) denied any knowledge of this covert activity has prevented these individuals from discovering that they were victims".

36. The objective of seeking to "*expose the extent of the wrongdoing and subsequent cover-up*" by Associated and to identify "*numerous other individuals*" who might have been similarly targeted, Mr White KC submitted went beyond the normal conduct of litigation. He characterised this as a campaign and the claims as the "*vanguard*" or first wave of further litigation. He submitted that this campaigning purpose explained the breadth of the pleaded case, the inclusion of allegations unconnected with any individual Claimant, and the publicity surrounding the claims.

37. The Claimants answered that Associated was inviting the Court to find that they had deliberately implemented a litigation strategy for ulterior purposes, but that no such finding had been made in the judgment. They stressed that Associated relied in the skeleton on only two passages of the judgment, which did not establish that any Claimant had pursued the claims for a collateral purpose. Their case was that the claims were genuine attempts to vindicate individual rights and that the Court should not infer a collateral purpose from the involvement or views of others in the Claimants' wider camp.

38. Associated replied that it was not necessary to show personal dishonesty or personal culpability by each Claimant. It relied on the principle that a litigant may be responsible in costs for the way in which those in the litigant's camp, including lawyers, investigators and witnesses, have acted. Associated submitted that the Claimants' attempt to distance themselves personally from the origins and conduct of the claims did not answer the broader costs point.

(d) Payment for evidence and the Burrows material

39. A central part of Associated's application concerned the evidence of Gavin Burrows. Associated submitted that witnesses, whose evidence was regarded by the Claimants' team as critical, had been paid, and that in some cases payments were being offered for the purpose of obtaining or changing evidence. It identified payments to Mr Burrows, Glenn Mulcaire, Greg Miskiw, Steve Whittamore, Daniel Portley-Hanks and Christine Hart. Associated submitted that the distinction advanced by Graham Johnson between payments for journalism and payments for testimony was artificial, and that the material showed payment for "*testimony*".

40. Associated's principal point was that the Burrows allegations were among the gravest allegations in the case. They included phone hacking, bugging, hardwire landline tapping and live-call interception. Associated submitted that these allegations were used to recruit Claimants and then to support multiple claims, even though the evidence was patently unreliable, unsupported by contemporaneous documents and known, before the proceedings were issued, to be compromised by the circumstances in which it had been obtained and by Mr Burrows' withdrawal of cooperation. Mr Johnson had pleaded in his Defence to proceedings brought by Mr Burrows (dated 10 October 2022) that Mr Burrows had failed to produce any evidence of value to him in 2021 and 2022, pleading that "*the lack of evidence*" provided by Mr Burrows (including critically the absence of corroborative evidence) had put a number of his media projects at risk.

41. Associated submitted that, by March 2022, before the letters before action, at least Ms Sangani and Mr Johnson knew both of the flaws in the Burrows evidence and that Mr Burrows was no longer cooperating. It submitted that, nevertheless, the allegations were put forward in the letters before action, relied on in the press release (see [48] below), pleaded, deployed in answer to the Limitation Application, and pursued at trial without any formal withdrawal. Associated relied on the Court's finding that the certification of the 16 August 2021 statement as PD57AC compliant was a serious error of professional judgment. In reply, Mr White KC said that Mr Bacon KC's description of Mr Burrows as having "*collapsed at trial*" was a wholly inadequate answer to this chronology.

42. The Claimants answered that they did not rely solely on Mr Burrows. They submitted that the Burrows evidence had to be seen in context and that there were other documents and evidence said to corroborate aspects of his account. They relied on witness evidence given by Mr Burrows in other proceedings, public admissions, the hearsay statement of John Ford, and material said to authenticate or support aspects of the Burrows material. They submitted that the Court's criticism of the circumstances surrounding Mr Burrows and his evidence did not amount to a finding that the Claimants had acted so unreasonably as to justify indemnity costs.

43. The Claimants also submitted that Associated was overstating the findings actually made. They accepted that the Court had found a serious error of professional judgment by Ms Sangani in certifying the 16 August 2021 statement, but contended that the weight to be given to that point had to be calibrated accordingly. They stressed that the finding was not a finding of dishonesty against the Claimants themselves.

(e) The limitation camouflage issue and the Limitation Application

44. Associated relied on what has been called the "*limitation camouflage scheme*". It submitted that Dr Harris dishonestly proposed the use of Byline articles to obscure the true origin of the claims and deter or blunt a limitation argument, and that the scheme was implemented in substance in respect of Sir Simon Hughes. Associated relied on the Court's findings that the proposal recorded in the 11 July 2019 email involved an improper attempt to blunt a limitation argument by obscuring the earlier availability of the facts relevant to the Miskiw/Anderson emails, and that, at root, the proposal involved a deception.

45. Associated submitted that the Claimants' evidence and submissions in relation to the Limitation Application had been seriously misleading, including in relation to when the Miskiw/Anderson emails were available to the Claimants' camp and in relation to the deployment of the 16 August 2021 Burrows statement in response to the Limitation Application. Associated submitted that these matters were relevant not merely to the ultimate limitation findings but to the manner in which the Claimants had conducted the proceedings.

46. The Claimants answered that the Court had expressly declined to find that Sir Simon Hughes or Sadie Frost Law were dishonest participants in any such scheme, and had rejected serious allegations against professionals as well as against those Claimants. They submitted that Associated's approach failed to distinguish between the different Claimants and could not justify indemnity costs against all Claimants. They also submitted that the limitation camouflage allegations themselves showed that Associated had advanced serious allegations, including against regulated professionals, which had substantially been dismissed.

47. Associated replied that the limitation camouflage allegations could not properly be equated with the Leveson Lies allegations advanced by the Claimants. It submitted that its limitation camouflage case was evidentially relevant to limitation, whereas the Leveson Lies allegations were, at best, tangential to the pleaded issues. It further submitted that Associated had substantially succeeded on the limitation camouflage issue because the Court found a dishonest proposal and found that Sir Simon Hughes implemented it, albeit not dishonestly.

(f) Publicity at the launch of the claims

48. Associated relied heavily on the publicity surrounding the launch of the claims. It relied upon a press release, published on behalf of the Claimants in October 2022 to coincide with the issuing of the civil claims, which included the following:

> "Today a group of people have launched a legal action against Associated Newspapers, publishers of *The Daily Mail*, *The Mail on Sunday* and the Mail Online.
>
> The group behind this legal offensive are: Baroness Doreen Lawrence of Clarendon OBE; Prince Harry, The Duke of Sussex; Sir Elton John and David Furnish; Elizabeth Hurley; and Sadie Frost.
>
> These individuals have become aware of compelling and highly distressing evidence that they have been the victims of abhorrent criminal activity and gross

breaches of privacy by Associated Newspapers. Unlawful acts alleged to have taken place include:

The hiring of private investigators to secretly place listening devices inside people's cars and homes

The commissioning of individuals to surreptitiously listen into and record people's live, private telephone calls whilst they were taking place

The payment of police officials, with corrupt links to private investigators, for inside, sensitive information

The impersonation of individuals to obtain medical information from private hospitals, clinics, and treatment centres by deception

The accessing of bank accounts, credit histories and financial transactions through illicit means and manipulation.

It is apparent to these individuals that the alleged crimes listed above represent the tip of the iceberg - and that many other innocent people remain unknowing victims of similar terrible and reprehensible covert acts.

They have now therefore banded together to uncover the truth, and to hold the journalists responsible fully accountable, many of whom still hold senior positions of authority and power today.

These individuals have been the subject of public interest during the course of their careers and personal lives. They are united in their desire to live in a world where the press operates freely, yet responsibly. A press that represents truth, is sourced in fact and can be trusted to operate ethically and in the interests of the British public".

49. Associated submitted that the press release deliberately used extremely emotive language, including "*abhorrent criminal activities*", "*crimes*" and "*terrible and reprehensible covert acts*". It submitted that the allegations placed first in the press release included bugging and live-call interception, which were Burrows allegations, and that by then the Claimants' camp anticipated that Mr Burrows was not likely to be available as a witness. Associated characterised the press release as a deliberate and unjustified act designed to inflict maximum reputational damage and as a recruiting call to others to join further litigation.

50. The Claimants answered that no finding had been made in the judgment that the Claimants had courted publicity by launching their claims, and that Sir Simon Hughes was not a party to the press release. They submitted that, given the Claimants' public profiles, publicity was inevitable and it was unrealistic to expect them to remain silent. They further submitted that the Court had not found that they did not genuinely believe they had been victims of UIG. They also contended that criticism of publicity sat ill in Associated's mouth, given its own extensive reporting of the litigation.

51. Associated also relied on post-judgment publicity, including a statement by Prince Harry and Baroness Lawrence, issued only a matter of hours after the Main Judgment had been given, claiming that the decision had been a "*whitewash*", the effect of which

was to suggest that the journalists against whom the Court had rejected allegations of serious wrongdoing were nevertheless guilty of the serious allegations made against them. Associated submitted that it was entitled to rely on post-judgment statements made before costs were determined, by analogy with ***Three Rivers***.

52. The Claimants answered that the Court should not consider post-judgment conduct, which, in any event, concerned only some of the Claimants. The application for indemnity costs concerned the action itself, not reactions to the judgment.

(g) The breadth of the pleaded case

53. Associated submitted that the breadth of the pleaded case was a major reason why this litigation was out of the norm. It relied on the fact that the claims originally alleged serious wrongdoing against 77 journalists, editors and executives, although only 23 journalists were involved in the allegations made in the Claimants' individual cases. Even after the strike-out and case management process, allegations of serious impropriety remained against 56 individuals at trial. Associated submitted that the Claimants had cast the net deliberately widely, in part to maximise disclosure and in part because these claims were intended as the first wave of further litigation.

54. Associated singled out the Ward burglary allegations and Operation Oxborough as examples of allegations that no ordinary and reasonable litigant would have pleaded in individual claims of this kind. It submitted that the Ward allegations had nothing to do with any individual Claimant but would inevitably create a very large disclosure exercise and a serious reputational burden. Operation Oxborough, Associated submitted, concerned credit reference checks, journalists and a period unconnected with the Claimants' individual cases. These matters were said to demonstrate that the pleaded case was designed to broaden the scope and seriousness of the litigation beyond proper bounds.

55. The Claimants answered that the breadth and scope of the allegations had been actively monitored and controlled by the Court through strike-outs, amendment decisions, disclosure orders and limits on witness evidence. They submitted that the fact that the litigation remained wide-ranging after those interventions reflected the way the litigation had evolved under judicial control, not unreasonable conduct by the Claimants. They also relied on the fact that costs orders arising from the relevant case management applications had generally been made on the standard basis or reserved.

56. The Claimants also submitted that their generic case was not unreasonable because the Court had made important findings about Associated's use of TPIs. They relied on findings that the use of TPIs was widespread at Associated, that some enquiries were not readily explicable by routine lawful enquiry, that some journalists knew TPIs might obtain information by deception, and that Associated's use of TPIs raised questions as to how information had been obtained lawfully.

57. Associated's reply was that those generic findings did not justify the breadth of the pleaded case or the persistence in article-specific allegations in the absence of evidence capable of proving those allegations. Associated submitted that the Claimants had attempted to litigate the case as though it were a "*do-over*" of litigation against other newspaper groups, notwithstanding the absence of admissions by Associated.

(h) The Leveson Lies allegations

58. Associated submitted that the Leveson Lies allegations were a particularly significant feature of the case. They were relied on by each Claimant and involved the extremely serious allegation that Paul Dacre, Peter Wright and Elizabeth Hartley had deliberately lied on oath to the Leveson Inquiry. Associated submitted that those allegations originated in the "*Operation Bluebird*" strategy, were pleaded as seriously as possible yet were never properly particularised, and were included to further the campaigning objectives of the litigation and to put pressure on Associated.

59. Associated submitted that the Leveson allegations were pleaded in a way that no ordinary and reasonable litigant would have adopted. It also submitted that the gravamen of the allegation was that Associated had lied to Leveson about phone hacking, but that that allegation was not properly pursued at trial and was not withdrawn. Associated relied on the seriousness of the allegations, the warnings given by the Court at earlier stages, and the failure to put key parts of the allegations to the relevant witnesses.

60. The Claimants did not seek to sidestep the Court's concerns about the Leveson Lies allegations. However, they submitted that this point had to be approached with care. They relied on the fact that Associated had itself not sought to have the issue removed when the Court raised whether the "*nettle*" should be grasped during the trial. Associated's position at trial had been that it did not see the Leveson issue as irrelevant to the pleaded case on deliberate concealment, and Associated accepted orally that it wanted the Court to determine allegations which had been made and aired publicly.

61. In oral argument, the Court observed that the sequence arguably made the issue more nuanced for costs purposes. Associated had been placed in the position of facing grave allegations, but it had also, for understandable litigation reasons, chosen to have the allegations adjudicated rather than removed. Associated accepted that, by the point at which the issue was raised during the trial, it wished to have a ruling on the allegations, but submitted that this did not detract from the original vice of introducing, advancing and then retreating from them.

62. The Claimants also submitted that Associated's limitation camouflage allegations provided an example of both sides pursuing serious allegations of bad faith or dishonesty where, depending on the Court's legal analysis, the findings might not strictly have been necessary to resolve the claims. They relied on that as part of their broader "*both sides*" submission. Associated resisted any equivalence, for the reasons already summarised.

(i) Disclosure, amendments and failure to reassess

63. Associated relied on the Claimants' disclosure conduct and their failure to reassess their claims after disclosure. It submitted that Associated had provided extensive disclosure against the original, unpruned generic case, and that the disclosure did not support the most serious allegations or the pleaded case of widespread and habitual UIG using the most extreme methods. Associated submitted that an ordinary and reasonable litigant would have taken stock and withdrawn allegations that could no longer properly be maintained. Instead, it said, the Claimants doubled down, including by seeking amendments and by continuing to rely on the Burrows material.

64. Associated further submitted that there were later points at which a responsible reassessment was required. It identified the July 2025 judgment, which set the parameters of the litigation and limited the role of generic and propensity evidence, and the exchange of witness statements, when the Claimants had the benefit of the journalists' explanations and, in many instances, supporting contemporaneous documents. Associated submitted that the absence of any significant pruning of allegations showed a failure to adopt a responsible approach to serious allegations.

65. The Claimants answered that Associated was speculating about privileged advice and internal reassessment, and that it had always been open to Associated to apply to strike out the claims after disclosure if it contended they were hopeless. They also submitted that allegations concerning late amendments had already been reflected in costs orders on the standard basis. More generally, they submitted that their claims were inferential claims, brought against an incomplete documentary record, and that the Court had itself recognised in the judgment that some material gave rise to legitimate concern.

66. Associated's reply was that the fact that the claims were not struck out did not answer the indemnity costs application. It submitted that the issue was not whether the Claimants were entitled to have a trial on arguable claims, but whether it was reasonable, after disclosure, case management rulings and witness statements, to maintain every allegation in the form in which they did. In reply, Mr White KC submitted that Mr Bacon KC had not defused the force of the failure-to-reassess point and that the absence of any pruning had to be viewed together with the wider thread of the Claimants' conduct.

(j) The Claimants' disclosure conduct

67. Associated also relied on what it described as the Claimants' "*parlous*" disclosure. It criticised the timing and adequacy of disclosure of Research Team documents, documents relating to Mr Johnson, documents relating to Mr Burrows, and documents disclosed late or during the trial. Associated submitted that this was not a series of isolated technical failings but part of a broader pattern of non-compliance and lack of candour.

68. The Claimants answered that much of the disclosure conduct relied upon by Associated had already been the subject of specific applications and costs orders. In relation to Research Team disclosure, they relied on the Non-Compliance Order, under which Associated was awarded 80% of its costs, with the automatic position being standard basis assessment. They also submitted that the Court had expressly declined to find that the Claimants had defied its order in respect of the Research Team documents. They argued that other disclosure complaints were matters on which Associated now invited the Court to make further findings that were neither necessary nor appropriate at the costs stage.

69. The Claimants also pointed to Associated's own disclosure issues, including late disclosure of material concerning Lee Harpin, ledger material described as "*Pandora's box*" material, ELI invoices and other material disclosed late in 2025 and during the trial. They submitted that late disclosure was not one-sided and did not justify indemnity costs.

70. Associated replied that the fact that some interlocutory costs orders had been made did not disable the Court from considering the same conduct as part of the overall pattern when deciding the basis of assessment for the action. It also submitted that some relevant costs had been reserved, and that the Claimants' characterisation of prior costs orders was incomplete.

(k) Witness statements and PD57AC

71. Associated relied on the Claimants' trial witness statements as a further example of conduct outside the norm. It submitted that witness statements had included extraneous material, statements based on what solicitors had told witnesses, and material designed to advance the generic case or insinuate widespread UIG through the back door, notwithstanding the Court's case management rulings. Associated also relied on the need to bring late PD57AC applications and the limited time available before trial to address the problems.

72. The Claimants answered that Associated had itself sought costs on the standard basis in respect of PD57AC applications and that these matters had therefore already been addressed, or at least should not now support a global indemnity costs order. They also noted that Associated had served amended witness statements late in some instances.

73. Associated replied that, in relation to some of the relevant PD57AC matters, costs had in fact been reserved rather than finally disposed of, and that the Court's expressions of dissatisfaction at the time were relevant to the costs discretion now being exercised.

(l) The conduct of the trial: shifting and unpleaded allegations

74. Associated placed particular weight on the way the case was conducted at trial. It submitted that serious allegations were put to witnesses without proper pleading, without adequate evidential foundation, or in a form different from the pleaded case. It relied on the Court's findings that unpleaded allegations were put in many article-specific instances, including allegations of phone hacking or other serious UIG, and on the fact that closing submissions sometimes advanced cases materially different from those put to witnesses.

75. Associated also submitted that this conduct had consequences beyond the immediate forensic unfairness at trial. It submitted that unpleaded allegations of serious criminal conduct, including voicemail interception, were put in open court and under the protection of absolute privilege, in circumstances where the allegations were liable to be reported. Associated relied on what it described as the "*unfortunate – but entirely predictable*" consequence that damaging allegations, for which there was no proper evidential foundation, were widely reported. It submitted that this had a lasting impact on individual journalists, relying by way of example on an article by Nicole Lampert in the *Telegraph* in which she stated that, following the allegation made in court, she had been smeared as a phone hacker.

76. Associated further submitted that the Claimants failed to withdraw allegations that were no longer being pursued. Mr White KC gave the example of eight Schedule C journalists whom the Claimants had previously indicated they wanted to cross-examine, but then did not call for cross-examination when the trial timetable changed. Associated's point was that serious allegations of voicemail interception or other UIG

against those individuals were never withdrawn, even though some had been prepared to give evidence and one had travelled from abroad.

77. The Claimants answered that some issues were not pursued, or were not pursued fully, at trial, but submitted that this did not amount to conduct of such seriousness as to justify indemnity costs in a lengthy and hard-fought case. They relied on the fact that the claims were inferential, that some allegations had more substance than others, and that there were examples, such as the evidence concerning Katie Nicholl, where the material required careful assessment.

78. Associated replied that the trial conduct was not a handful of isolated excesses. It submitted that the shifting nature of the case, the putting of unpleaded allegations and the persistence in unsupported allegations were a central part of the overall costs picture. It further submitted that Mr Bacon KC had said virtually nothing about much of the trial conduct relied on by Associated, including the handling of the Leveson allegations, the handling of Burrows at trial, and the abandonment of serious allegations without acknowledgment.

(m) Closing submissions

79. Associated criticised aspects of the Claimants' closing submissions. It submitted that the Claimants advanced points in closing that had not been put, maintained allegations that had no proper evidential basis, and failed to acknowledge the extent to which pleaded or opening allegations had fallen away. It relied on this as part of the wider pattern of a shifting case and a failure to recognise the limits of the evidence.

80. The Claimants answered that criticisms of a party's closing submissions, including that they failed to signpost points or advanced points the other side regarded as unmeritorious, were not sufficient to justify indemnity costs. Their submission was that such criticisms are common in hard-fought litigation and should not be elevated into conduct out of the norm.

(n) Existing costs orders and the relevance of prior applications

81. A repeated theme of the Claimants' argument was that Associated sought to rely on procedural episodes that had already generated interlocutory applications and costs orders. The Claimants submitted that where Associated had sought costs on the standard at the time, or where the Court had made standard basis orders, it should not now be open to Associated to rely on the same conduct to obtain indemnity costs for the whole action. They relied on examples including the strike-out applications, the Non-Compliance Order, the foreign law illegality issue and PD57AC applications.

82. Associated's answer was that earlier costs orders did not preclude the Court from considering the same conduct as part of the overall picture. It submitted that the costs decision now required the Court to stand back and assess the cumulative effect of the conduct and circumstances of the litigation as a whole. It further submitted that some of the Claimants' characterisation of previous costs orders was inaccurate, because some matters had been reserved and others did not determine the significance of the conduct in the wider costs discretion.

(o) Issue-based and temporal orders

83. Associated's primary position remained that indemnity costs should be ordered for the whole proceedings, save where previous costs orders had already been made. It submitted that an issue-based indemnity costs order would be unworkable because the matters relied on, such as Burrows, ran through multiple phases of the litigation and could not sensibly be disentangled on assessment without disproportionate complexity and satellite litigation. It accepted that a temporal order would be workable in principle, but submitted that it would not meet the justice of the case because the matters taking the case out of the norm began at the outset.

84. Associated submitted in reply that a temporally limited order starting at some point in 2025 would be demonstrably unjust if the Court accepted Associated's case on the breadth and seriousness of the original pleading. That was because the early investigation, pleading and disclosure work had been driven by the very width of the allegations that Associated said were out of the norm from the start.

85. The Claimants submitted that, if the Court were minded to make any indemnity order, it should consider whether a more limited or intermediate order would better reflect the justice of the case. They relied on the fact that some issues had more substance than others, that the Court had actively case-managed the scope of the litigation, that prior costs orders had been made, and that both sides had taken contentious points. They also submitted, in the context of possible caps or limits, that the Court had wide discretion under CPR 44.2 to make costs orders by date, issue, proportion or stated amount.

(p) Summary of the competing positions

86. Associated's submission, in short, was that this was not merely a case in which serious claims failed. It was a case in which very grave allegations were advanced on an exceptionally wide canvas, with extensive publicity, in reliance in significant part on compromised or unsupported evidence, and were then pursued through disclosure, witness evidence and trial in a shifting and unpleaded fashion without appropriate withdrawal or reassessment. It submitted that each of these features had force, and that their cumulative effect clearly took the case out of the norm.

87. The Claimants' submission, in short, was that they brought genuine claims in good faith, that no Claimant had been found dishonest, that there were real generic findings concerning Associated's use of TPIs, that some article-specific allegations had real evidential force, that Associated had itself advanced serious allegations that were not upheld, that many procedural episodes had already been dealt with in costs, and that the Court should not use the consequentials hearing to conduct a second trial or to make wide new findings. They accepted liability for costs, but submitted that standard basis assessment, not indemnity costs, was the just order.

(3) The relevance of costs budgeting

88. The costs of the parties in this litigation were subject to costs budgeting in the usual way. The Claimants have placed reliance upon this as a factor militating against an order for indemnity costs. It is therefore necessary to set out the key aspects of the budgeting process.

89. The first case management hearing took place on 26-27 November 2024 at which I sat with Senior Master Cook ([2025] EWHC 106 (KB)) ("First CMC"). The Court considered the parties' proposed costs budgets for the proceedings through to trial. The combined budgets initially advanced by the parties would have resulted in total estimated costs of just over £38.8 million, which the Court concluded were manifestly excessive and disproportionate.

90. Following revised budgets and detailed consideration of proportionality under CPR 3.15 and CPR 44.3, the Court approved a single consolidated budget for the Claimants and a single consolidated budget for Associated, reflecting the substantial overlap between the claims and allowing for costs sharing between the Claimants. Ultimately, the Court approved total budgeted costs of £4.084 million for the Claimants and £4.445 million for Associated, covering the remaining phases of the litigation through to trial listed to commence in January 2026 and estimated at that stage to take 9 weeks.

91. Costs budgets were varied following a hearing on 10-11 November 2025 ([2025] EWHC 3207 (KB)). The Claimants' approved budget was revised to £4.434 million. Associated's approved budget was revised to £5,187,919.

92. The Claimants place significant emphasis on the fact that an order for indemnity costs would remove the ordinary costs-budgeting constraint and allow Associated to seek recovery beyond approved budgets. That is the effect of ***Burgess -v- Lejonvarn*** **[2020] 4 WLR 43** [92]-[93].

93. The Claimants submit that those practical consequences are not merely incidental. They submit that the costs management process gave the parties, and in particular the Claimants, an important framework for understanding potential adverse costs exposure. At the first costs management hearing, Associated had identified incurred costs of about £8.1 million and the Court ultimately approved future budgeted costs which, after later variation, resulted in Associated's revised approved budget of £5,187,919. The Claimants submit that, looking at incurred and budgeted costs together, the costs exposure that was being articulated through the budgeting process was in the region of £13 million, subject to such variations as might be made as the litigation developed.

94. Mr Bacon KC submitted orally that the Claimants arranged and increased their ATE cover against that background. He submitted that the Claimants obtained cover with responsible insurers, Temple Legal Protection, and that the level of cover was increased incrementally when the budgets increased. He relied on correspondence, in March 2025, in which the Claimants' solicitors referred to the approved budget and to the information about costs provided by Associated to date when considering the level of ATE insurance required up to trial. The Claimants submitted that Associated was aware that the level of ATE cover was being considered by reference to the costs information that Associated had provided and to the approved budget.

95. The Claimants' submission is that Associated subsequently incurred costs on a scale that bore no proper relationship to the figures being articulated through the budgeting process, without giving the Claimants timely notice of the scale of that increase. Mr Bacon KC submitted that, on 24 July 2026, Associated stated that its costs had reached nearly £34.5 million to 9 July 2026, a figure nearly £18 million above its original budget. He submitted that this was not a marginal overspend, but an

exceptional escalation in costs, and that the Claimants had taken decisions about ATE cover in ignorance of that escalation.

96. The Claimants also relied on the way in which Associated had presented its own approach to budgeting. In oral submissions, Mr Bacon KC referred to Associated's costs skeleton for the hearing in November 2025, in which Associated had stated that in its original Precedent H it had set out its total incurred and estimated costs and confirmed that those were the costs it considered reasonable and proportionate to incur in defending the claims. He also relied on Associated's statement that, in its Precedent T, it had been transparent about the costs it had incurred in each phase, including the extent to which incurred costs, since 28 November 2024, exceeded the approved budgeted sum. The Claimants submit that Associated was presenting itself as transparent about costs and as aware of the potential limits on recovery, but that the costs now claimed disclose a very different level of expenditure.

97. The Claimants further submit that this is relevant to the exercise of the Court's discretion whether to order indemnity costs because such an order would disconnect recoverability from the ordinary costs-budgeting controls. On a standard basis assessment, CPR 3.18 provides the usual budgetary protection: the Court will not depart from the approved or agreed budget unless satisfied that there is good reason to do so. The Claimants submit that an indemnity costs order would remove that protection and permit Associated to seek recovery of costs vastly more than the budgeted figures, notwithstanding that the Claimants' ATE arrangements had been made by reference to the costs information and budget figures available at the time.

98. The Claimants accepted that there is a limit to how far the budgeting point can be taken. Mr Bacon KC accepted in oral submissions that an indemnity costs order has recognised consequences, and that the fact that those consequences are significant does not, by itself, answer the question whether such an order is justified. But he submitted that the scale of the departure from the budgeted position, and the alleged lack of transparency about the total costs being incurred, were exceptional features that the Court should take into account when deciding whether to order indemnity costs at all, or whether to limit the consequences of such an order.

99. Associated's response is that the Claimants' submissions confuse distinct stages of the regime for costs. Associated contends that, if costs are assessed on the indemnity basis, the approved budget no longer operates as the CPR 3.18 constraint that would apply on a standard basis assessment. That, it argues, is the ordinary and well-understood consequence of an indemnity costs order, not a reason to refuse such an order where the legal test is otherwise satisfied. Associated submits that the question remains whether the conduct or circumstances of the litigation take the case out of the norm. If they do, the Claimants cannot avoid the ordinary consequences of indemnity costs by pointing to the fact that the budgetary guardrails would fall away.

100. Associated also submits that its costs will still be subject to detailed assessment. It emphasises that an indemnity assessment is not a blank cheque: Associated will have to justify that costs were reasonably incurred and reasonable in amount. Determination of the reasonableness of its costs should be carried out by an experienced Costs Judge, with the benefit of detailed schedules of costs, points of dispute and replies.

101. Associated further submits that there were significant developments after the original budgeting exercise which explain why the budgeted figures do not provide a reliable ceiling or benchmark for all costs ultimately incurred. In its written response on costs-capping, Associated identified matters for which the budgets had made no allowance, including pleading amendments and further disclosure consequent on late amendments, the PTR being split over three hearings in November 2025, December 2025 and January 2026, and multiple applications required to obtain the Research Team documents and review that disclosure in December 2025 and January 2026. Associated submits that it would be unjust to limit recovery by reference to earlier estimates without examining, on detailed assessment, whether later developments caused costs reasonably to be incurred.

102. Associated also disputes the Claimants' reliance on ATE. It submits that the Claimants' insurance arrangements were matters for the Claimants and their advisers. It says that the fact that the Claimants obtained ATE cover by reference to the costs information then available does not alter the question whether Associated is entitled to indemnity costs. Associated further submits that, insofar as the Claimants seek to rely on the asserted inadequacy of their ATE cover, that cannot operate as a substantive defence to an indemnity costs order if the legal threshold for such an order is otherwise met.

103. Associated's position, therefore, is that costs budgeting is relevant to context but not determinative. It says that the approved budget would be relevant on a standard basis assessment and may provide background to the assessment exercise, but it does not prevent the Court from ordering indemnity costs if the Claimants' conduct took the case out of the norm. Associated also relies on the detailed assessment process as the proper safeguard against any unreasonable costs.

104. The dispute, therefore, is not whether an indemnity costs order has real consequences in a budgeted case. It plainly does. The dispute is whether those consequences are a reason to refuse indemnity costs, or to limit their scope, where the threshold for indemnity costs is otherwise met. The Claimants say that the scale of Associated's departure from the budgeted position, and the ATE decisions taken by reference to the costs information then available, are powerful discretionary reasons against an indemnity order. Associated says that those matters cannot displace the legal consequences of conduct which, on its case, takes the litigation outside the norm, and that the proper control on unreasonable costs is detailed assessment.

(4) Decision

105. For the reasons that I shall explain in this section, I am quite satisfied that an order for indemnity costs should be made in this case.

106. I do not intend to go through every point made by Associated in support of its application. Nor would it be proportionate to conduct, at this stage, a second trial of all the matters that were explored in the evidence and in the parties' written and oral submissions. I shall instead identify the principal matters which, in my judgment, when considered cumulatively, take this litigation well outside the norm and justify an order that Associated's costs be assessed on the indemnity basis.

107. I accept Associated's central submission. This was not simply a case in which serious allegations were made and failed. Nor was it merely a hard-fought piece of litigation in

which, after a lengthy trial, the Court preferred the evidence and submissions of one side over the other. The claims, and the manner in which they were brought, pleaded, pursued, maintained and publicly advanced, involved a combination of circumstances and conduct which took the litigation outside the ordinary and reasonable conduct of civil proceedings.

108. In reaching that conclusion, I have applied the cautions identified above. I do not proceed on the basis that the Claimants should pay indemnity costs simply because serious allegations failed at trial. Nor do I reason backwards from the fact of failure to the conclusion that the allegations were unreasonable when first advanced. I have considered whether the allegations were reasonably advanced and maintained by reference to what was known, or ought reasonably to have been appreciated, as the litigation unfolded. I have also been careful not to convert this consequentials hearing into a second trial. The matters on which I rely are either findings made in the Main Judgment, matters apparent from the procedural history of the litigation, or matters which the parties had a fair opportunity to address in their written and oral submissions. To the extent that I make any finding for costs purposes which was not necessary to the determination of liability in the Main Judgment, I do so only where the matter was identified by Associated, answered by the Claimants, supported by the material before the Court, and capable of fair resolution on this application without conducting a second trial. It is the cumulative effect of those matters, rather than any single criticism taken in isolation, which justifies the order I make.

109. Several features are important. They include: the speculative and substantially inferential character of the claims at their origin; the exceptional breadth of the pleaded case; the gravity of the allegations made against a large number of named individuals; the pursuit over an extended period, and up to and including closing submissions, of serious allegations of wrongdoing, including allegations amounting to criminal conduct; the pursuit of allegations which, in material respects, lacked a proper evidential foundation or were irreconcilable with contemporaneous documents; the failure voluntarily to withdraw serious allegations which could no longer properly be maintained; the deployment and continued reliance upon the Burrows material; the way in which the Leveson Lies allegations were introduced and pursued; the putting of unpleaded allegations of UIG to witnesses at trial; and the public presentation of allegations of serious criminality and impropriety which were not ultimately established. These are not isolated points. They are connected features of the way in which this litigation was conducted.

110. I accept Associated's submission that this is not a case in which the just order can be reached by treating each of these matters as a separate and self-contained episode. The conduct relied upon by Associated was not confined to a single stage of the litigation. It ran through the proceedings. In some respects, it was present from the outset. In others, it became more serious as the litigation developed and as the Claimants and their legal team had further opportunities to reassess the case in the light of disclosure, case management rulings, witness statements and the evidence at trial. In my judgment, it is the cumulative effect of these matters that is decisive.

111. The starting point is the breadth and character of the pleaded case. In the July Judgment, I described the original pleaded allegation of widespread and habitual UIG as "*exceptionally wide; indeed, it could hardly be wider*": [59]. That was not an incidental feature of the pleading. It was a deliberate forensic choice. The Claimants, and those

advising them, chose to frame the case in that expansive way. The object was, at least in part, to maximise disclosure from Associated in the hope that disclosure would provide evidential support for the individual claims advanced by each Claimant. That pleading choice mattered because the Claimants were not pleading from a position of established proof. With limited exceptions, the claims were substantially inferential and, in some areas, exclusively so. I do not use "*speculative*" as a synonym for hopeless, nor do I suggest that an inferential claim is necessarily unreasonable. Claims involving alleged concealed wrongdoing may properly depend on inference. The difficulty here is that allegations of the utmost seriousness were advanced before the evidential foundation for many of them had been established, and the case was then pleaded at the widest possible level to obtain disclosure and seek to substantiate the individual claims. That was a high-risk strategy. Once disclosure, case management rulings and witness statements exposed the limits of the evidence, the Claimants were required to reassess whether the allegations could properly be maintained. They did not do so.

112. I do not suggest that, of itself, the adoption of a broad generic or propensity case in litigation of this kind is necessarily unreasonable. The Claimants are entitled to point to earlier litigation against other newspaper groups in which generic evidence and disclosure have played an important role. In some cases, and on some facts, such evidence may be relevant and probative. But the existence of such litigation does not confer a licence to turn every subsequent claim against a newspaper publisher into a wide-ranging investigation of that publisher's conduct over many years. The Court must remain focused on the claims actually brought by the individual Claimants. Civil litigation is not a public inquiry.

113. There was also, however, a fundamental difference between this litigation and some of the earlier litigation against other newspaper groups on which the Claimants sought to rely. In those cases, admissions or established findings of widespread or habitual wrongdoing provided a foundation from which inferences might more readily be drawn in relation to particular articles or incidents. Associated made no such admissions. That difference mattered. In the absence of admissions by Associated, the Claimants could not treat the fact that private information appeared in an Article, or that there was no readily obvious lawful source for that information, as sufficient to bridge the evidential gap between suspicion and proof. Nor could they proceed as though generic findings in other litigation supplied a road map for proving article-specific UIG against a different publisher. The dynamic of this litigation was therefore materially different. It required the Claimants to establish, by admissible and probative evidence in these proceedings, the particular allegations they advanced against Associated and its journalists.

114. That point was made repeatedly in the case management judgments and was reflected in the Main Judgment. There, I treated the generic and TPI material as relevant context, but not as a freestanding route to liability. I emphasised that neither party's general account resolved any particular claim, and that the Court had to avoid generalisation and decide, for each pleaded Article or incident, whether UIG was proved on the balance of probabilities, bearing in mind the limits of propensity evidence and the need to avoid inference upon inference reasoning. The same point applied to Mr Whittamore's evidence: without a sufficiently close link to the particular pleaded Article or incident, such material had limited evidential value in proving any specific

allegation: see Main Judgment, Section E(3), and in particular the discussion of what could properly be inferred from TPI evidence and Mr Whittamore's evidence.

115. The Claimants were, of course, entitled to pursue admissible and probative evidence of propensity where it related to the particular journalist or TPI concerned with a pleaded Article or incident. But the original pleaded case went substantially beyond that. It sought to litigate whether Associated had, over many years, widely and habitually carried out or commissioned UIG across its newspaper titles. If litigated on the footing on which it was pleaded, that issue would have required an investigation resembling a public inquiry. It was therefore necessary for the Court, by case management and evidential rulings, to impose limits upon the case.

116. That in itself is a significant feature. The expansive way in which the case was pleaded imposed a substantial burden on Associated. It required Associated to investigate and respond to very serious allegations against a large number of journalists, editors, executives and third parties, many of whom had no direct connection with any pleaded Article relied upon by any Claimant. Associated was required to meet allegations which were very serious in character and very wide in scope. The breadth of the case was not simply a matter of scale. It affected the whole character and cost of the litigation.

117. The Ward Allegations provide one illustration. The allegation was extremely serious. It related to a burglary said to have been commissioned by Associated journalists. But it had no connection with any Claimant's individual claim. Even if the allegations had been true, they could not have established that any Claimant's private information had been obtained by UIG in relation to any pleaded Article or incident. Following the July Judgment, in which the Court clearly set out the parameters of admissible propensity evidence, the Ward Allegations could not be maintained. Yet, the Claimants did not withdraw them. Associated was required to apply to strike them out, and the Claimants opposed that application. As I observed in the 10 October 2025 judgment [49]: "*The Claimants' insistence on maintaining the Ward Allegations as part of their case reflects a continued and fundamental misunderstanding of the proper scope of this litigation – despite the clarification provided in the July Judgment. It also reveals an unreasonable approach to the costs implications of litigating in this way*".

118. The same broad point applies to other parts of the generic case, including Operation Oxborough. Their inclusion demonstrates the extent to which the litigation had been framed on a canvas substantially wider than was justified by the individual claims.

119. The Claimants submit that these matters were ultimately controlled by the Court's case management. That is correct as far as it goes, but it is not an answer to Associated's costs application. The need for active case management arose because of the way in which the claims had been framed and pursued. The fact that the Court imposed limits does not render the original breadth of the case reasonable. Nor does it deprive Associated of the ability to rely on the width of the case as part of the cumulative picture for costs purposes.

120. A second and related feature is that the Claimants failed adequately to reassess the scope and strength of their case as the litigation developed. After disclosure, the Claimants were required to consider whether the allegations they had made could properly be maintained. Following the July Judgment, they were required to consider the effect of the Court's rulings on the proper parameters of the litigation and the limits of propensity

evidence. After the exchange of witness statements, they were required to confront the fact that a significant number of Associated's journalists denied UIG and, in many cases, supported their accounts by contemporaneous notes or other documents.

121. In my judgment, those were important moments in the litigation. An inferential case may properly be advanced where the evidence supports it. But an inferential case must be tested against the evidence as it emerges. As the litigation progressed, the Claimants could no longer proceed as though the initial pleading could simply be maintained in full. They were required to take a critical and realistic view of each allegation, particularly where a journalist gave a direct denial supported by contemporaneous notes or other documents, or where the contemporary documents were inconsistent with the allegation advanced. There is no evidence that they did so. That conclusion is reinforced by the Article-by-Article analysis in the Main Judgment, where the recurring difficulty was not merely that the evidence fell short at trial, but that the Claimants often sought to move from generic or contextual material to article-specific findings without a sufficient evidential link to the pleaded Article or incident.

122. It is striking that not a single allegation of serious wrongdoing was voluntarily withdrawn by the Claimants. As I have noted, the Ward Allegations had to be struck out. Other allegations were not pursued at trial, or were not put to witnesses, but were not formally withdrawn. A clear example is the group of approximately eight Schedule C journalists whom the Claimants had maintained they wished to cross-examine, but in respect of whom they simply notified Associated during the trial that cross-examination was no longer required. The allegations of UIG against those individuals were not withdrawn, were not acknowledged to have fallen away, and were not accompanied by any explanation or apology. That matters. Serious allegations of criminality or grave impropriety cannot properly be left hanging over individuals in that way. If a party no longer advances such an allegation, or no longer has a proper evidential basis for advancing it, the allegation should be withdrawn clearly and in terms. The Claimants' failure to do so was not ordinary forensic judgment. It was not a proper or disciplined way to deal with serious allegations. It was unreasonable to a high degree.

123. I do not accept that the Claimants can answer this point simply by saying that the litigation was hard-fought or that Associated also advanced serious arguments that failed. Both sides did litigate forcefully. Associated did not succeed on every point it advanced. The limitation camouflage allegations were serious, and had only limited success. But the conduct for which the Claimants are criticised is different in character and degree. It concerns the making and maintenance of very serious allegations against many individuals, the failure to reassess those allegations when the evidence required reassessment, and the continued pursuit of allegations which were unsupported or had ceased to be realistically maintainable. In my judgment, that conduct was unreasonable to a high degree.

124. A third major feature is the Burrows material. The allegations based on Mr Burrows were among the gravest allegations in the case. They included bugging, live-call interception, hardwire tapping and phone hacking. They featured prominently in the Claimants' case and in the public launch of the claims. By the time the claims were issued, however, the Claimants' camp knew that Mr Burrows had effectively withdrawn cooperation. They also knew that the circumstances in which his 16 August 2021 statement had been obtained were problematic and that his evidence was largely (if not entirely) unsupported by any contemporaneous documentary material.

125. Despite that, allegations based on Mr Burrows were included in the letters before action, in the press release launching the claims, in the statements of case, in response to the Limitation Application, and in the case advanced at trial. The August 2021 statement was certified as compliant with PD57AC. In the Main Judgment, I found that certification to have been a serious error of professional judgment ([A2.125]). That finding is not a finding of dishonesty against the Claimants. But it is nevertheless a serious matter when considering the way in which the litigation was conducted.

126. The situation regarding evidence corroborating Mr Burrows' evidence did not improve as the claims moved towards trial. By the time of trial, the difficulties with the Burrows evidence had become acute. As explained in Appendix 3 to the Main Judgment, by the end of the trial the remaining relevance of Mr Burrows' evidence was confined to Article (5), Article (8), Article (23) and Article (24), and his evidence did not support the allegation that, in relation to any of those Articles, he was instructed by Associated, or someone acting on Associated's behalf, to obtain information by UIG, or that he did in fact obtain information by such means. Mr Burrows denied involvement in those Articles, denied having worked for Associated, denied having been commissioned by Paul Henderson to undertake UIG, and denied that the disputed 16 August 2021 witness statement was his statement. Nor was there independent corroboration for the core allegations in his account on which the Claimants continued to rely. The person alleged to have been his principal point of contact at Associated, Mr Henderson, comprehensively denied the allegations. Yet the Claimants did not even put to Mr Henderson the full extent of the allegations on which they continued to rely. Nor did they withdraw those allegations.

127. That was not an ordinary incident of evidential failure at trial. It was the culmination of a decision to maintain very serious allegations in reliance on evidence that the Claimants knew, or ought to have appreciated, was seriously compromised. The continuing reliance on the Burrows material, particularly after it became clear that Mr Burrows would not cooperate and that his account lacked independent corroboration, was unreasonable to a high degree.

128. A fourth feature is the way in which the Leveson Lies allegations were advanced. The allegation that Paul Dacre, Peter Wright and Elizabeth Hartley had lied to the Leveson Inquiry was of the utmost seriousness. It was an allegation of deliberate dishonesty by senior individuals, made in relation to evidence given to a public inquiry. It featured prominently in the public presentation of the claims and was relied upon by each Claimant.

129. The difficulty is not simply that the allegation failed. The difficulty is that it was introduced and pursued in a way that went far beyond what was required for the determination of the individual claims, and was then pursued at trial in a manner materially different from the pleaded allegation. In the Main Judgment, I addressed the Leveson Lies allegations at [1574]-[1604]. I recorded that the pleaded case alleged lies, not merely inadequate investigation, incomplete disclosure to the Inquiry, or evidence which, with hindsight, might be criticised as too broadly expressed. I also accepted Associated's complaint that, as the trial progressed, the issue became less clearly anchored to the pleaded allegations, and that fairness required the relevant allegation to be put squarely to the witnesses, particularly where the allegation was one of knowing falsehood.

130. When the Particulars of Claim were served, the Claimants pleaded reliance on deliberate concealment because they anticipated that limitation would be raised. In the ordinary course, matters responsive to a pleaded limitation defence would be developed in a Reply, once the Defence had been served. The Claimants' decision to plead reliance on deliberate concealment in anticipation of a limitation defence is not, of itself, necessarily a matter of criticism. The difficulty is that the Leveson Lies allegations were pleaded at the outset as part of the Claimants' positive generic case, and in a form which alleged knowing falsehood by named senior individuals. They then formed part of the broader public and forensic narrative by which the claims were advanced. If and insofar as the allegations were relevant to limitation, they required careful pleading and disciplined pursuit, closely tied to the issues to which they were said to relate. That is not how the allegations were pursued. At trial, for example, the cross-examination travelled well outside the pleaded Leveson Lies case and into matters concerning the adequacy of Associated's response to the Leveson Inquiry, rather than the pleaded allegation of knowing falsehood: see Main Judgment [1581], [1602].

131. I would pause to note that this conclusion is not inconsistent with the approach taken on the Limitation Application. At that very early stage, before the Defence, the question was whether the Claimants had a real prospect of relying on s.32 to defeat any limitation defence. I held that they did. That was not a determination that the Leveson Lies allegations, as pleaded and later pursued, were properly confined, sufficiently particularised, or reasonably maintained through to trial.

132. The "*Operation Bluebird*" memorandum (see [33] above) provides relevant context for the way in which litigation against Associated was envisaged by those involved in the wider campaign against Associated. The Claimants themselves were not responsible for that memorandum. It pre-dated these claims and the individual Claimants' involvement. I therefore approach it with caution. But it is nevertheless a reliable snapshot of a strategy that contemplated a coordinated media and litigation campaign designed to drag Associated into the spotlight, challenge its position at the Leveson Inquiry and use legal claims as part of a broader campaign.

133. What is striking is the extent to which the strategy actually adopted in this litigation echoed that approach. The claims were launched publicly by high-profile individuals. They advanced allegations not only of UIG in relation to individual Articles, but of widespread and habitual UIG by Associated over many years, including methods said to be criminal or seriously improper. They included the Leveson Lies allegations. They sought to expose the alleged extent of wrongdoing and cover-up by Associated and expressly contemplated that other individuals might have been similarly targeted. At trial, as I have noted, the Claimants sought to explore the adequacy of Associated's response to the Leveson Inquiry, which went well beyond the case on Leveson Lies.

134. I do not need to find, and I do not find, that any individual Claimant subjectively pursued the litigation for an improper collateral purpose. The point is objective. The case as pleaded and pursued went substantially beyond what was necessary for the adjudication of the individual claims. The Claimants were entitled to seek adjudication of their claims and to rely on admissible and probative evidence to support them. They were not entitled to use those claims as a vehicle for a wide-ranging inquiry into Associated's conduct generally, or to advance allegations whose prominence was disproportionate to any legitimate role they could play in resolving the pleaded claims.

The inclusion and pursuit of the Leveson Lies allegations is the clearest example of that impermissible widening of the litigation.

135. A fifth feature is the conduct of the trial. The Main Judgment records the general problem. In the introductory framework to Section F, I stated that, where an allegation of UIG was advanced at trial in a form that had not been clearly pleaded or sufficiently particularised in advance, I treated that as a matter of forensic significance because serious allegations of that kind should have been identified in the pleaded case and supported by some proper evidential basis before they are put to a witness: [164]. The Article-by-Article findings provided examples. In relation to Article (13), I stated that it was not permissible to confront a witness for the first time in the witness box with a materially different and more serious mechanism of UIG than had been pleaded: [482]. In relation to the allegation concerning Ms Cohen, in relation to Article (4), the specific suggestion of voicemail interception advanced in cross-examination of Ms English was not part of any clearly articulated pleaded case, was withdrawn after objection, and had no sufficient evidential foundation: [274].

136. Putting unpleaded allegations to witnesses in the witness box was therefore wholly unacceptable. It was contrary to the Court's pre-trial rulings and contrary to the orderly and fair conduct of the trial. It placed witnesses in an unfair position. It also created real difficulties for Associated and for the Court in managing the trial. The seriousness of this conduct is increased by the nature of the allegations. These were not minor factual suggestions. They were allegations of criminal or seriously improper conduct. Associated was also entitled to point to the reputational consequences of such allegations being put in open court, under the protection of absolute privilege, in proceedings liable to be reported. Where allegations of this character are put without proper pleading or evidential foundation, the unfairness is not merely procedural. It carries a real risk of reputational harm to individuals who have not been given proper notice of the case they are said to have to meet.

137. The trial was also marked, in important respects, by a changing case. Allegations were advanced in a form different from the pleading. Some allegations were put but not pursued, yet not withdrawn. Others were not put but remained unwithdrawn. New and unpleaded allegations were advanced in cross-examination. In closing submissions, the Claimants advanced some cases in a way that did not correspond with the case put to witnesses. In the language of ***Three Rivers***, the Claimants resorted, during the course of the trial, to advancing a constantly changing case in order to justify allegations which they had made. This was not the disciplined presentation of serious allegations that the Court was entitled to expect, particularly after repeated case management rulings designed to ensure that the case was properly confined.

138. A sixth feature is publicity. I accept that this litigation was bound to attract publicity. The Claimants include individuals with substantial public profiles. The allegations concerned newspaper publishers and alleged UIG. Publicity was inevitable. But the publicity relied upon by Associated goes further than that. The press release launching the claims used highly charged language. It referred to abhorrent criminal activity, crimes, and terrible and reprehensible covert acts. It placed at the forefront allegations based substantially on Mr Burrows, including bugging and live-call interception, at a time when the Claimants' camp knew of serious problems with his evidence and his cooperation.

139. Publicity of serious allegations is relevant to costs where the allegations fail and where the publicity has been actively courted. The seriousness of the allegations publicly advanced against Associated and its journalists increased the burden on Associated. It also increased the reputational consequences for named individuals. Associated also relied on a statement issued on behalf of Baroness Lawrence and Prince Harry after judgment (see [51] above). I have not set out the statement in this judgment. Its material effect, for present purposes, was to assert publicly that the allegations of serious wrongdoing against Associated and its journalists remained true, notwithstanding their rejection by the Court after trial. That was regrettable. However, I decline to rely on that statement as a factor supporting an indemnity costs order against all Claimants. It was made on behalf of only two of them, not all. It would not be fair to attribute its contents to the Claimants collectively. I therefore put it to one side. The point which remains relevant to the overall assessment is the public way in which the allegations were initially advanced and maintained, the failure of those allegations at trial, and the absence of any clear withdrawal or acknowledgement as allegations fell away.

140. I have considered carefully the Claimants' contrary submissions. I accept that no Claimant has been found dishonest. I accept that the Claimants had genuine concerns about how private information about them had appeared in Associated's newspapers. I also accept that the Main Judgment contains findings about Associated's use of TPIs and about circumstances in which there were legitimate questions as to how information had been obtained. In respect of a few of the Articles, there were serious issues to be tried. I do not disregard those matters. But they do not answer Associated's application. Genuine concern did not justify the breadth of the case pleaded. Generic findings about the extent of TPI use did not justify maintaining article-specific allegations in the absence of evidence capable of proving them. The fact that some allegations required careful assessment did not justify failing to withdraw allegations that were no longer being pursued or could no longer properly be maintained. Nor does the absence of any finding that a Claimant was dishonest mean that the manner in which the claims were conducted was within the norm.

141. Nor do I accept that Associated's failure to apply earlier to strike out the claims, or parts of them, is a sufficient answer. Associated did make several applications to control the scope of the litigation. In any event, in litigation of this scale and complexity, involving extensive factual disputes and serious allegations, the absence of a strike-out or summary judgment application does not demonstrate that the case was reasonably pursued. The question now is whether, standing back at the end of the trial and considering the conduct of the proceedings as a whole, the Claimants' conduct and the circumstances of the litigation were outside the norm. In my judgment, they plainly were.

142. I have also considered the Claimants' reliance on previous costs orders. Some procedural episodes were the subject of specific applications and costs orders. That is relevant, and I have been careful not to double count. But the point relied upon by Associated is not simply that each procedural episode should now be re-penalised. The point is that those episodes form part of the overall history and illustrate the way in which the litigation was conducted. Where an earlier costs order has already addressed a specific episode, that affects the weight to be given to that episode and prevents double counting. But it does not require the Court to ignore the broader pattern.

143. The same applies to the submission that the litigation was hard-fought on both sides. I have taken Associated's conduct into account. Associated advanced some serious allegations and arguments which were not accepted. That is a relevant part of the background. But it does not neutralise the features of the Claimants' conduct which I have identified. In particular, it does not answer the combination of the breadth of the pleaded case, the pursuit of grave allegations against many named individuals, the failure to reassess and withdraw, the reliance on compromised evidence, and the putting of unpleaded allegations at trial.

144. I also bear in mind the consequences of an indemnity costs order in a budgeted case. Such an order has real consequences. It removes the ordinary protection that the costs budget would provide on a standard basis assessment. The Claimants also submit that they made decisions about ATE cover by reference to the costs information and budgeted figures available to them. Those are matters which I have considered. They do not, however, alter the threshold question whether the case is outside the norm. Nor do they provide a reason to decline to make an indemnity costs order where, as here, the threshold is clearly crossed.

145. I have considered whether different conclusions, or a different order, should be reached as between the individual Claimants. I do not consider that they should. I do not treat every Claimant as personally responsible for every episode relied upon by Associated. Nor do I ignore the individual differences between the claims. Some of the matters relied upon by Associated applied only to particular claims or particular issues. In particular, I have not proceeded on the basis that all Claimants were implicated in the limitation issues identified in the Main Judgment, nor have I made any finding of dishonesty against any Claimant where no such finding was made in the Main Judgment. The reason for the order I make is different. The features which justify indemnity costs were features of the common case advanced by all Claimants: the breadth of the generic case, the reliance on serious allegations of widespread and habitual UIG, the Leveson Lies allegations, the Burrows material, and the manner in which the common case was maintained and pursued. Those features drove substantial common costs and affected the conduct of the litigation as a whole. That conclusion is consistent with the structure of the Main Judgment, which addressed each Article and incident individually, but did so against the background of the common generic case and the recurrent reliance on TPI, propensity and other background material. Any allocation between common and individual costs is a matter that can be addressed on assessment, consistently with previous costs orders and any order made as to common and individual costs.

146. I do not accept that this is a case for an issue-based indemnity costs order. The matters which justify indemnity costs cannot sensibly be confined to one or more issues. The speculative and inferential foundation of the claims, the breadth of the generic case, the Burrows material, the Leveson Lies allegations, the failure to reassess, the maintenance of serious allegations without withdrawal, and the conduct of the trial were interlocking features of the way in which the litigation was framed and pursued. They affected more than one phase of the proceedings. Attempting to isolate particular issues for indemnity assessment would risk an artificial and expensive exercise on detailed assessment. Like Joanna Smith J in ***The New Lottery Company Ltd***, I do not consider that there is any principled basis on which to "*salami slice*" the indemnity order by reference to individual issues.

147. Nor would a temporal order meet the justice of the case. Some of the most important matters were present from the outset. The claims were conceived and pleaded at origin on the widest possible basis. The press release publicly advanced allegations of grave criminality. The Burrows allegations were relied upon from the beginning. The Leveson Lies allegations formed part of the case from an early stage. The breadth of the pleaded case drove Associated's early investigation, pleading and disclosure work. Had it not been for the Court's case management, the case would have become an unreasonably extensive factual inquiry, akin to a public inquiry, into Associated's conduct generally. To limit indemnity costs to a later date would fail to reflect the nature and effect of the conduct which took the case outside the norm. That conclusion is, of course, subject to any discrete costs orders already made.

148. That conclusion does not mean that every step taken by the Claimants was unreasonable. Nor does it mean that every allegation was hopeless from the start. There were aspects of the case that required close examination. Some points had substance. But standing back, the overall conduct and circumstances are clear. This was litigation conceived and pleaded on an unjustifiably wide canvas. With limited exceptions, it was speculative at origin and depended substantially on inference. Serious allegations, including allegations amounting to criminal conduct, were maintained over a prolonged period and pursued up to and including closing submissions, in circumstances where the evidential foundation for many of them was inadequate, where some were inconsistent with contemporaneous documents, and where the Claimants failed to take the steps that a reasonable litigant should have taken to narrow, withdraw or abandon allegations as the case developed.

149. For completeness, I should make clear what I have not decided. I do not decide, and do not need to decide, whether any individual Claimant subjectively brought these proceedings for an ulterior or collateral purpose, whether the October 2022 publicity was subjectively intended by any individual Claimant as part of such a strategy, or whether any Claimant or legal representative deliberately advanced a case known to be false. Nor do I rely on any broader allegation of dishonesty or bad faith beyond the findings made in the Main Judgment. My decision is based on the matters identified in this judgment: the objective breadth and character of the case as advanced, the speculative and inferential foundation on which many serious allegations rested, the maintenance of serious allegations after the evidential position should have been reassessed, the way in which unpleaded or unsupported allegations were put at trial, the failure to withdraw serious allegations when they were no longer being pursued, and the cumulative effect of those matters.

150. In my judgment, the cumulative effect of these matters takes the case well outside the norm. The conduct was unreasonable to a high degree. The just order is that the Claimants pay Associated's costs of the action, save where costs orders have already been made, to be assessed on the indemnity basis.

B: A cap on recoverable costs under the indemnity costs order?

151. During argument, a further issue arose as to whether, if the Court ordered that Associated's costs (or any part of them) should be assessed on the indemnity basis, the Court had power to impose a limit or ceiling on the amount recoverable following detailed assessment. This was a point that had not been raised by either side prior to the

hearing, so I invited further submissions. The Claimants and Associated provided supplemental written submissions following the hearing.

152. The point arises because the consequence of an order for indemnity costs in a budgeted case is potentially very significant. The Claimants accept, correctly, that if costs are ordered to be assessed on the indemnity basis, the receiving party is not confined to the figures in its approved costs budget (see [92] above). But the Claimants submit that it does not follow that Associated should be permitted to seek recovery, subject only to detailed assessment, of the full amount now said to have been incurred. Associated's response is that there is no power, or at least no principled basis, for imposing a retrospective cap of the kind proposed, and that any such order would be unfair and arbitrary.

(1) The competing submissions

153. The Claimants submit that the Court has power to make an order limiting the maximum amount of costs recoverable by Associated following detailed assessment. They rely on CPR 44.2. CPR 44.2(6) identifies several orders which the Court may make, including an order that a party pay a stated amount in respect of another party's costs. The list is not exhaustive. The Claimants rely particularly on the Court of Appeal decision in ***SCT Finance Ltd -v- Bolton*** **[2003] 3 All ER 434** [25], in which Wilson J, with whom Waller and Rix LJJ agreed, held that the Court could identify the amount payable as "*such costs as are calculated by detailed assessment but subject to a quantified ceiling*".

154. The Claimants also rely on ***Equitable Life Assurance Society -v- Ernst & Young*** **[2003] EWCA Civ 1721**. In that case, Rix LJ accepted that ***SCT Finance*** recognised a discretion to limit costs by a cap. The order made in ***Equitable Life*** was not a simple arbitrary limit. It was, rather, a practical method of distinguishing costs attributable to an unsuccessful summary judgment application from costs which were part of the general costs of the litigation.

155. The Claimants submit that the difficulty identified in ***SCT Finance*** does not arise here. In that case the Court of Appeal set aside the cap because the judge had already ordered detailed assessment on the standard basis. The judge had imposed the ceiling because of perceived disproportionality, but proportionality was already built into standard basis assessment. The Claimants submit that if I were to order indemnity costs, there would be no corresponding double counting of proportionality because proportionality is not the same controlling feature of indemnity assessment. Their submission is that the proposed ceiling would not be a disguised proportionality assessment, but a response to the particular unfairness said to arise from the costs management process, Associated's costs information, and the Claimants' ATE arrangements.

156. Associated submits that the Court has no power, or that it is at least very doubtful that it has power, to impose an after-the-event costs cap at the end of proceedings outside CPR 3.19. Associated contends that the modern CPR contains a specific costs-capping regime, confined to future costs and subject to strict procedural safeguards. Associated submits that it would be wrong to outflank that specific regime by recourse to the general discretion as to costs in CPR 44.2.

157. Alternatively, Associated submits that, if the Court does have jurisdiction, it should not exercise it. Associated says that a cap imposed because the Court considers the costs

unreasonable would duplicate an issue for the Costs Judge on detailed assessment. A cap imposed because the Court considers the costs disproportionate would be inconsistent with an order for indemnity costs. Associated also emphasises procedural fairness. The issue of a cap was not raised in the Claimants' original skeleton argument, or in the composite draft order, but arose during oral argument. Associated says that it has not had a proper opportunity to adduce evidence or make detailed submissions on the reasonableness of the costs it has incurred, and that detailed schedules for assessment are still being prepared.

(2) Decision

(a) Jurisdiction to make a capping order

158. In my judgment, the Court does have jurisdiction, in principle, to make an order that costs otherwise subject to assessment should be subject to a quantified ceiling or "cap".

159. The starting point is the breadth of CPR 44.2. The Court has a wide discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. CPR 44.2(6) identifies examples of the types of order the Court may make. Those examples include orders for a proportion of costs, costs from or until a particular date, costs relating to particular steps, and costs relating only to a distinct part of the proceedings. The rule is expressly inclusive, not exhaustive.

160. ***SCT Finance*** is binding authority that the Court's general costs discretion is wide enough to permit an order for detailed assessment subject to a quantified ceiling. At [25], Wilson J said that although the wording of what is now CPR 44.2(6)(b) might not, on a strict view, be apt to cover an order for detailed assessment subject to a stated ceiling, the categories of order identified in the rule were not exhaustive and the Court could properly identify the amount payable as costs calculated by detailed assessment but subject to a quantified ceiling.

161. The order in ***SCT Finance*** was set aside, not because the Court lacked jurisdiction, but because the discretion had been exercised in an unprincipled way. The judge had already ordered assessment on the standard basis. The very features that led him to impose the ceiling, namely concerns about proportionality and means, were already matters to be addressed within the standard basis assessment. The cap therefore risked cutting down costs which the costs assessor had concluded were proportionate and recoverable.

162. The same distinction appears from ***Equitable Life***. Rix LJ accepted the existence of the jurisdiction recognised in ***SCT Finance***, but the limit imposed in ***Equitable Life*** was anchored in a causation analysis. The Court was seeking to distinguish the costs of a particular application from costs that would have been incurred in the litigation in any event. That is a different exercise from selecting a figure simply because total costs appear high.

163. I do not accept that the existence of CPR 3.19 deprives the Court of this jurisdiction. CPR 3.19 is concerned with costs-capping orders in relation to future costs. It contains a specific regime for prospective control of recoverable costs during the life of proceedings. That regime is plainly relevant to the caution with which a court should approach any form of costs cap. It also demonstrates that costs capping is exceptional.

But CPR 3.19 does not, in terms, address the Court's jurisdiction at the conclusion of proceedings to decide what costs order should be made under CPR 44.2. Nor has any authority been cited to me which holds that CPR 3.19 abrogates the jurisdiction recognised by the Court of Appeal in ***SCT Finance***.

164. I would therefore hold that the Court has power, in an appropriate case, to order that costs be assessed, including on the indemnity basis, subject to a quantified ceiling. But the existence of the power is only the beginning of the inquiry. The power is a broad discretionary one, and it must be exercised in accordance with principle. It should not be used to avoid the ordinary process of assessment, nor to impose an arbitrary figure in place of the evidence-based scrutiny that is the function of the Costs Judge.

(b) The limits on the exercise of the power

165. Three points of principle are important.

(1) First, a cap cannot properly be imposed merely because the Court considers the amount of costs claimed to be very high. That was the vice identified in ***SCT Finance***, at least where the concern was proportionality and the costs were already to be assessed on the standard basis. The broader principle is that the Court must be careful not to duplicate, or pre-empt without evidence, matters that properly fall for assessment.

(2) Second, the fact that costs are to be assessed on the indemnity basis does not mean that there is no protection for the paying party. Even on the indemnity basis, the receiving party does not recover costs that were unreasonably incurred or are unreasonable in amount. The difference lies in the treatment of doubt, and in the absence of the same proportionality control that applies on the standard basis. The Costs Judge remains required to scrutinise the costs claimed. Indemnity assessment is not a blank cheque. Associated itself accepts that even on an indemnity assessment the Costs Judge must consider whether the costs were reasonably incurred and reasonable in amount.

(3) Third, if a cap is imposed, the Court must be able to explain why the selected figure is principled. The danger is that the figure becomes no more than a broad impression of what the Court considers "*too much*". That is not a sufficient juridical basis. If the cap is based on causation, reliance, conduct, a distinct stage of litigation, or some other identifiable factor, the Court must identify the factor and explain how it leads to the figure selected. Otherwise, the cap will be vulnerable to the criticism that it is arbitrary.

166. ***Morgan -v- Spirit Group Ltd*** **[2011] 3 Costs LR 449** is a useful warning. The Court of Appeal held that the judge could not simply fix a global contribution toward costs without undertaking a summary assessment or ordering detailed assessment. But Black LJ also recognised that a trial judge may shape the costs order in other ways, including by ordering only a proportion of costs, directing that costs be approached on a particular basis, or giving indications relevant to the assessment. The distinction is between principled directions affecting the assessment and an impermissible broad-brush substitution of the Court's own figure for the assessment process.

167. ***Challinor & others -v- Juliet Bellis & Co* [2013] EWHC 620 (Ch)** is also instructive. Hildyard J recognised the tension between the trial judge's role in making a costs order and the Costs Judge's role on assessment, particularly where issues of proportionality, unreasonable conduct and abandoned issues overlap. He emphasised the need to avoid double counting and the importance of careful wording.

(c) Whether a cap should be imposed in this case

168. After careful consideration, I decline to impose a cap in this case.

169. I accept that the Claimants' submissions raise matters of real concern. Associated now says that it has incurred costs of £34,481,622.54 to 9 July 2026. That figure is very substantially in excess not only of the approved budget, but also of the figures that Associated itself put forward during the costs management process. The Claimants' supplemental skeleton records that Associated's grand total at the first costs management exercise was £19,850,282.40, comprising incurred costs and estimated costs as then claimed. The Claimants' annex also records that the approved and varied figure was £13,313,299.40, and that the incurred figure now relied on is £34,481,622.54.

170. Those figures are striking. In ordinary language, the costs appear exceptionally high. They are largely unexplained. I noted at the hearing that costs of this order are unprecedented in the Media & Communications List. Standing back, as the Judge who case-managed and tried these claims, I regard a claim for costs in excess of £34 million as, on its face, excessive and as giving rise to real concerns as to whether all of the costs now claimed by Associated were reasonably incurred and are reasonable in amount. That observation is not a summary assessment, still less a determination of any issue that will arise on detailed assessment. It reflects the scale of the costs now claimed when set against the issues in the proceedings, the assumptions underlying the costs management process, and the Court's previous attempts to impose discipline and proportionality on the conduct of the litigation. The reasons for the increase have not yet been tested in the way they will be tested on assessment. Whether, and to what extent, those costs are recoverable will be a matter for the Costs Judge if the costs are not agreed.

171. I also recognise that much changed after the original costs management process. The litigation did not unfold precisely on the basis assumed when the budgets were originally prepared. Significant additional work was generated by later developments. By way of example, there were the various episodes relating to Mr Burrows' evidence. The trial itself lasted 11 weeks rather than the 9 weeks originally anticipated. There were also further case management developments, disclosure issues and trial preparation consequences. These matters may provide explanations, in whole or in part, for increases in expenditure. Whether they do so, and to what extent, will have to be considered on proper evidence.

172. It follows that it would be unsafe for this Court, at this stage, to select a maximum recoverable figure. The Court does not have before it the materials that would be required to undertake anything approaching an assessment. I do not have a bill of costs. I do not have the detailed schedules that will be prepared for assessment. I do not have points of dispute or replies. I do not have evidence explaining, phase by phase and item by item, why the costs were incurred, what work they represented, whether that work

was caused by developments in the proceedings, and whether the amounts claimed are reasonable.

173. The Claimants propose a cap in the range of £18–£20 million. I understand why that range is advanced. It is said to be anchored to the costs information Associated presented during the budgeting process and to the Claimants' ATE position. But I am not persuaded that I could select any figure within that range, or any other figure, in a principled way on the material before me.

174. A cap of £18 million, £20 million, or some different figure would inevitably be broad brushed. It would risk being no more than a judicial estimate of what appears, at this stage, to be a reasonable maximum. That would be vulnerable to the charge that it was arbitrary. It would also risk unfairness to Associated, because it would deprive Associated of the opportunity to demonstrate, on evidence and in the proper forum, that costs above the cap were reasonably incurred and reasonable in amount.

175. The Claimants submit that a cap would avoid years of expensive wrangling and would conserve court resources. I see the force of that submission. There is a real danger that any detailed assessment in this case will be lengthy, expensive and contentious. But that cannot justify replacing the assessment process with an unparticularised ceiling unless the Court can identify a principled and fair basis for doing so. The fact that detailed assessment may be difficult is not, of itself, a reason to deprive the receiving party of the opportunity to justify its costs.

176. Nor do I consider that the Claimants' ATE position provides a sufficient basis for a cap. The Claimants say that they obtained ATE by reference to the costs information available to them and that Associated's later disclosure of costs has left them exposed. Associated disputes that there was any representation or reliance sufficient to justify a cap. Associated also points to the 5 November 2025 request that Associated confirm it would not seek to recover above budget, which Associated did not accept, and to the fact that no application was made at that stage.

177. I do not need finally to resolve every point in that exchange. Even assuming in the Claimants' favour that they reasonably used the approved budget and the costs information provided by Associated as important reference points when considering ATE, that does not produce a principled figure for a cap. It also does not establish that the proper remedy is to restrict Associated's recoverable costs, rather than to leave reasonableness and recoverability to detailed assessment.

178. I have considered whether a more limited form of order might be appropriate: for example, a cap by reference to particular phases, a date, or categories of work. In principle, such an order may be permissible. But the same difficulty arises. Without the evidence that would be available on assessment, I cannot identify the figure or figures in a way that would be principled, fair and non-arbitrary.

179. The proper protection for the Claimants lies in the detailed assessment process. That assessment will be rigorous and evidence based. Associated will have to justify the costs it claims. The Costs Judge will be able to scrutinise whether particular work was reasonably undertaken, whether the hours claimed were reasonable, whether the level of fee earner was appropriate, whether there was duplication, whether work flowed from developments in the litigation, whether costs were caused by matters for

which the Claimants should fairly be responsible, and whether the sums claimed are reasonable in amount. On an indemnity assessment, doubts are resolved differently, but the receiving party is still not entitled to recover unreasonable costs.

180. I would expect the detailed assessment, if it takes place, to engage closely with the history of the litigation and the assumptions underlying the budgets. The costs management orders and the budgets will not cap indemnity costs, but they may provide useful context. The Costs Judge will be able to consider the extent to which later developments explain departures from earlier assumptions, including, but not limited to, the additional work generated by Mr Burrows' evidence and the fact that the trial lasted 11 weeks rather than 9. Equally, the Costs Judge will be able to consider whether any departures remain unexplained, excessive, duplicative or unreasonable.

181. In those circumstances, I have decided not to impose a ceiling on Associated's recoverable costs. I do so not because the Court lacks jurisdiction, but because this is not a case in which that jurisdiction can fairly and properly be exercised on the material presently before the Court. The imposition of any cap would be too broad brushed, would risk unfairness, and would be vulnerable to the charge that it was arbitrary.

182. The consequence is that Associated's recoverable costs will be determined by the ordinary process of assessment, applying the basis of assessment ordered by the Court. That process provides the appropriate safeguard against unreasonable costs. If Associated seeks to recover costs which were not reasonably incurred or are unreasonable in amount, the Claimants will be entitled to challenge them and the Costs Judge will determine those issues on evidence.

183. I therefore refuse the Claimants' application, made in the alternative, for an order imposing a maximum cap or ceiling on Associated's recoverable costs.

C: Payment on account

184. The final issue to be resolved is the sum to be paid on account of the costs ordered in favour of Associated.

185. It is common ground that Associated is entitled to a payment on account. By the conclusion of the hearing, the dispute about interest on costs had been resolved by agreement and the dispute about the division, for present purposes, between Individual Costs and Common Costs had also fallen away. The Claimants accepted that the Court could order a global sum on account, leaving any final allocation between Individual and Common Costs to be resolved later, whether by agreement or on detailed assessment. The Claimants also accepted that the payment on account should include 90% of Associated's approved budgeted costs. I made clear that the sum I ordered to be paid on account must be paid by 28 August 2026. The only issue that remains to be resolved is the appropriate percentage of Associated's incurred pre-budget costs that should be included in the payment on account.

186. Associated seeks a payment on account calculated by taking 65% of its incurred pre-budget costs. The Claimants contend that only 40% of Associated's incurred pre-budget costs should be ordered. I accept that the payment-on-account exercise is necessarily broad brush. It is not an assessment of costs and the Court is not required to identify the irreducible minimum that will be recovered. The question is what sum is

reasonable, taking account of the likely recovery on detailed assessment and the uncertainties inherent in that process.

187. I accept that the Court's earlier budgeting decisions are relevant context. They demonstrate that very substantial reductions were made to Associated's estimated costs, and they explain why the Claimants say caution is required. But I do not accept that the same percentage reduction should simply be applied to incurred pre-budget costs for the purpose of a payment on account. The exercise is different. At the budgeting stage the Court was dealing with estimates of future costs. The pre-budget incurred costs now in issue were incurred in responding to very wide and serious allegations, before the Court had imposed the later case-management structure and before the issues had been narrowed. The statements of case and disclosure work undertaken in that period was substantial and, at least in broad terms, explicable by reference to the very wide generic case then being advanced. Those matters do not determine the sums recoverable on assessment, but they are relevant to what is a reasonable sum on account.

188. Equally, I do not accept Associated's submission that 65% should be ordered simply because it falls within a range sometimes seen in cases involving unbudgeted costs. This was highly unusual litigation. Associated's costs are exceptionally large. The detailed assessment will require careful scrutiny of the reasonableness of the work done, the time spent, the level of fee earners deployed, hourly rates, duplication, and whether the costs claimed were reasonably incurred and reasonable in amount. Those matters would usually justify a substantial margin for the uncertainties of assessment.

189. However, the fact that I have ordered the costs to be paid on an indemnity basis is a relevant factor when determining the appropriate sum for payment on account. Doing the best I can on the material presently available, I consider that the reasonable sum on account is £9,544,355. Rounded down to the nearest pound, that figure comprises 90% of Associated's approved budgeted costs, namely £4,669,127.10, and 60% of Associated's incurred pre-budget costs, namely £4,875,228.24. The selection of 60%, rather than the 65% sought by Associated, reflects that substantial margin and the *prima facie* concerns I have identified about the scale of Associated's overall costs, while also recognising that costs have been ordered on the indemnity basis.

190. I do not regard it as appropriate to determine, for the purpose of this interim payment, any final division between Individual Costs and Common Costs. The payment will therefore be ordered as a global payment on account, without prejudice to the parties' rights on detailed assessment (including Associated's right to apply for further payments on account) or any later determination of allocation.

191. I order that payment on account be made by 28 August 2026. That is the date I indicated at the conclusion of the hearing. The Claimants and their advisers have been on notice, since the hearing, that this would be the date for payment on account.