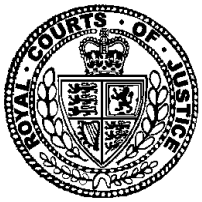

Neutral Citation Number: [2020] EWHC 1436 (Ch)

Case No: HC-2000-000004

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 04/06/2020

Before :

MR JUSTICE MANN

- -

Between :

Various Claimants	**Claimants**
- and -	
News Group Newspapers Ltd	**Defendant**

- -
- -

David Sherborne, Sara Mansoori and **Julian Santos** (instructed by **Hamlins LLP**) for the **Claimants**
Clare Montgomery QC, Antony Hudson QC and **Ben Silverstone** (instructed by **Clifford Chance LLP**) for the **Defendants**

Hearing dates: 20th 21st and 22nd May 2020

- -

Approved Judgment

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

.....

MR JUSTICE MANN

JUDGMENT ON AMENDMENT OF GPOC RE LIMITATION

Mr Justice Mann :

Amendment – limitation issues

1. This judgment deals with the second disputed area of amendments to the GPOC. This area deals with limitation. The claimants seek to add a new section to the existing GPOC headed "The Claimants' generic case on the issue of limitation", which comprises 22 paragraphs spanning 12 pages. Some of the paragraphs are very long. Because of that length I shall, on occasion, satisfy myself with citing paragraphs without quoting their content. The content is, of course, apparent to the parties.

2. The defendant has pleaded a limitation defence in relation to the claims in this tranche (Tranche 4) of this litigation, having not taken the point in previous tranches. The events giving rise to the claims in this litigation are capable of going back to 1996, and no events after 2011 are pleaded. Obviously far more than 6 years has passed since those events; all the cases in this tranche of the litigation were issued in the last couple of years. That leads to the possibility that limitation will be pleaded, and it now has been. However, the defendant has expressly conceded that it will not contest an averment by a claimant that for the purposes of section 32 of the Limitation Act 1980 time did not begin to run before May 2011. That is presumably because it acknowledges that the concealment extension of the limitation period in that section is capable of applying until then (though it disputes the concealment). It was in 2011 that serious publicity started to be given to the phone hacking allegations made in relation to the defendant, and in particular to the News of the World. In response to the limitation plea the claimants do indeed seek to rely on section 32 of the Limitation Act 1980, and the questions that arise on this part of the amendment application relate to how they should go about that.

Section 32

3. Section 32 of the 1980 Act provides:

> "**32 Postponement of limitation period in case of fraud, concealment or mistake**
>
> (1) Subject to [subsections (3) and (4A) [, (4A) and (4B)]] below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

The current form of the GPOC

4. The conventional way of dealing with limitation points and the invocation of section 32 would be for a claim to be made in Particulars of Claim, a limitation defence to be pleaded, and then section 32 to be pleaded in reply. However, in this litigation the claimants, in terms of pleading, have anticipated the limitation defence in the GPOC, which conventionally have contained only material which would otherwise be found in Particulars of Claim. The existing form of the document contains a summary of alleged acts of concealment and of destruction of evidence and paragraph 6 contains the following:

> ""

> "6. For the avoidance of any doubt, the Claimants will rely at trial upon such lies, concealment and destruction for the following purposes in this litigation:
>
> …
>
> 6.3 *As vitiating any reliance upon a defence of limitation*. The Claimants will rely upon NGN's deliberate concealment and destruction of evidence of its wrongdoing, as well as its breach of disclosure obligations and duties, as rebutting any attempt to seek to defend these claims on the basis that they fall outside the statutory limitation period and should therefore be statute-barred."

(The underlined words are sought to be introduced by amendment. The italicised words are in the original.) Although that does not refer in terms to section 32, it is a plain enough reference to it, and the defendant obviously thought so too because in its Defence to that pleading in its current form it "notes" paragraph 6.3 and sets out the concession referred to above "for the purposes of section 32 of the Limitation Act 1980".

5. Paragraph 3 contains a clear allegation of concealment to avoid matters coming to light:

> "3 … Senior NGN Employees took deliberate steps to lie about, conceal and destroy evidence of these habitual and widespread practices in in order to avoid the true nature, scale and extent of such activities being revealed and/or the subject of legal proceedings."

6. Turning to the rest of the GPOC in its current form, it starts by summarising the Claimants' case. It pleads, in general terms, the widespread misuse of confidential information by the defendant's newspapers (both The Sun and the News of the World), and its concealment. Paragraph 5 contains more summaries of acts of concealment relied on, including the deliberate destruction of documents in 2010 and 2011 (after claims had been intimated).

7. The document then goes on to plead a lot of material said to show the knowledge of senior personnel at the defendant of unlawful activities, giving examples of their involvement and knowledge. It also pleads acts of concealment of the facts – for

example, paragraph 11.3A contains a particularised allegation of concealment of the true nature of a contract under which an individual (Mr Mulcaire) was engaged to carry out unlawful information gathering activities. There is extensive pleading of what is said to be a deliberate policy of email deletion in 2011 in order to conceal activities from view, particularly in the light of a police investigation and incoming civil claims. Paragraph 16 refers to the destruction of evidence.

8. The list of acts and allegations are too extensive to produce here, and I do not really need to do so. The point which arises from them is that allegations are already made as to what it was that required concealment, what steps were taken to conceal them, that the steps were deliberate and that the result was that the facts would not be discovered for some time.

9. Paragraph 16 pleads further allegations of destruction (it contains some amendments which are objected to. They are shown underlined):

> "Despite its full knowledge of these civil claims, the MPS investigation into Operation Weeting, and the clear obligation and duty to preserve documents, NGN deliberately chose through its Senior Employees to destroy or permit the destruction of substantial amounts of highly material evidence. This was done with the deliberate intention of concealing facts relevant to Claimants' and potential Claimants' rights of of action and in circumstances in in which it was unlikely to be discovered, at least for some time."

10. Apart from the amendments that I have mentioned above, no objection was taken to all the pleading to which I have hitherto referred, including the implied references to section 32 (which, as I have indicated, were clearly understood as such by the defendant). This includes factual material proposed to be added by amendment. There has been no attempt to oppose reliance on section 32 in the pleading as it stood before the amendments despite the fact that it had stood (and had been pleaded to) for many months.

The opposed amendments

11. The main objection is to a whole new section from paragraphs 20 onwards, but prior to that there are still other objections. They are as follows:

(i) The introduction of a paragraph 5.7:

> "5.7. Further, during this litigation NGN has deliberately breached (a) its legal duty by filing false or misleading witness statements in the course of MTVIL (including failing to reveal the targeted deletions in January 2011), for the purposes of or at the Leveson Inquiry and during the MPS investigations; (b) its duty of disclosure by (i) not providing relevant documents, such as disclosure relating to unlawful information gathering at The Sun; and/or the Features Department of The News of the World; and/or commissioning by NGN journalists of private investigators to unlawfully gather information; and/or (ii) by deliberately redacting documents to conceal highly relevant information (see paragraphs 40.5 — 40.6 below), in circumstances where this was unlikely to be discovered by the Claimants, at least not for some time."

12. This introduces the concept of certain legal duties which are said to justify reliance on section 32(2) because they were broken.

(ii) The underlined words in paragraph 6.3, which I have set out above. This looks like an attempt to introduce the same point.

(iii) The parts of paragraph 16 shown underlined above. This again looks like an attempt to invoke section 32(2).

13. Then at paragraph 20, running through to paragraph 42, is a section headed: "The Claimants' generic case on the issue of limitation", all of which is objected to by the defendant. Paragraph 20 summarises the claimants' case:

> "20. The Claimants will contend pursuant to section 32 of the Limitation Act 1980 ("the Act") that as a result of the deliberate concealment by NGN or their agents and/or as a result of NGN's deliberate breach of duty of facts relevant to the Claimants' rights of action, the period of limitation did not

begin to run until a date less than 6 years before the issue of proceedings."

14. Paragraphs 22 and 23 contain further summaries:

> "22. NGN deliberately concealed facts relevant to the Claimants' rights of action when its journalists and third parties acting on their behalf, covertly and unlawfully obtained individuals' private information by voicemail interception and other unlawful means which commenced in about 1994 and continued until 2011.
>
> 23. NGN further deliberately concealed facts relevant to the Claimants' rights of action by (i) public lies and concealment of its wrongdoing and (ii) the destruction and concealment of incriminating evidence."

15. Paragraph 24 contains a further paragraph relevant to section 32:

> "24. Further or alternatively, NGN has acted in deliberate breach of duty in circumstances in which the wrongdoing was unlikely to be discovered, at least for some time, through its destruction of documents when it was under a duty to preserve the same and/or its non-disclosure of documents when it was under a duty to provide the same."

16. And paragraph 25 contains a paragraph which explains some of the detail which follows:

> "25. As a result of NGN's deliberate concealment at the time of the wrongdoing and its continuing concealment after the event, a very large number of Claimants have had to rely (amongst other matters) on inferences of voicemail interception and other unlawful information gathering in in order to plead and establish individual claims. Such inferences depend on the Claimants establishing relevant generic facts about the unlawful information gathering that NGN's journalists were engaged in both at NGN's The News of of the World and at The

> Sun, including the fact and nature of the wrongdoing; the time period when it took place; the modus operandi deployed; and the journalists/private investigators involved in the wrongdoing. The Claimants will on rely on their case on concealment and destruction by Senior NGN Employees and their case as set out below to demonstrate that the task of uncovering such facts in order to plead such inferences in the Generic case has been, and continues to be, an ongoing one."

17. There then follows a section describing "Deliberate Concealing of the Wrongdoing at the time by NGN" which in general terms describes just that. That is followed by a section describing "The Continuing Deliberate Concealment" which over many paragraphs and subsections describes further acts of concealment. These include false public statements and the mass deletion of emails.

18. Paragraph 38 contains an averment of various duties owed by NGN and its personnel – a duty to preserve documents in the light of civil and criminal claims, a duty not to make false statements in litigation, a duty to produce documents and material to the police, and various professional duties said to be owed by two in-house lawyers (one a barrister and one a solicitor). Paragraph 39 alleges breaches of those duties before and in the course of this litigation with some particular complaints about a failure to disclose documents.

19. Paragraph 40 sets out "The Discovery of Relevant Facts that had been concealed". It starts by saying:

> "40. The Claimants have, through the process of this litigation, and through their persistence in obtaining disclosure orders against strenuous resistance by NGN, have [sic] managed to uncover facts that are relevant to their rights of action. These include relevant facts which had been concealed by NGN and which have been discovered by the Claimants since May 2011 and could not with reasonable diligence have been discovered any earlier. It would be disproportionate to set all such facts, however examples are set out in paragraphs 40.1 to 40.7 below. This is without prejudice to the right of each individual Claimant to advance a case that he or she was unaware of any of these facts (and could not with reasonable diligence have discovered such facts) until a later date than the date set out below (particularly when the date to disclosure in in these proceedings, as opposed to a public statement)."

20. There then follow examples said to justify that statement, which include revelations said to come from disclosure (for example, the use by the Sun of information obtained by Glen Mulcaire, a known hacker, as a result of a witness statement of Mr Mulcaire dated 7th January 2016).

21. Paragraphs 41 and 42 contain summaries of the nature of the case based on section 32:

> "The effect of NGN's Concealment on Claimants
>
> 41. As a a result of of NGN's deliberate concealment of wrongdoing at the time, and NGN's deliberate continuing concealment after the event, as set out above, NGN concealed relevant facts which were required by the Claimants to appreciate that they had a particular cause of action against NGN and to plead it. Without prejudice to any additional facts and matters which may be relied upon by an individual claimant, the following relevant facts which were concealed by NGN are common to many individuals with actual or potential claims against NGN in the MTVIL:
>
> (1) The identities of the potential claimants;
>
> (2) The identities of the journalists involved in voicemail interception and other unlawful information gathering;
>
> (3) The identities of the private detectives instructed to carry out unlawful information gathering on behalf of NGN;
>
> (4) The nature of the wrong-doing and relevant facts relating to it (i.e. voicemail interception, blagging or unlawful surveillance and particulars relating to the same);
>
> (5) The information from the SAP system relating to when individuals were targeted; by whom and/or in relation to which published articles;
>
> (6) The information from the call data relating to when an individuals' or one of their associates' mobile telephones was called;

> (7) The existence of articles, some of which have been removed from publicly accessible databases (such as LexisNexis) by NGN;
>
> (8) The interpretation of incriminating evidence – such as codes on documents, or euphemisms used by journalists in emails and payment documents — which can only be understood by reference to other evidence not disclosed by NGN; and
>
> (9) The time period during which the unlawful information gathering at The News of the World and at The Sun took place.
>
> 42. The Claimants will rely on the aforesaid facts and matters to the extent that they are relevant to any individual claim, or any part of it, in support of their case that they did not discover and could not with reasonable diligence have discovered facts relevant to their rights of action until a date which is within six years before the claim was brought. Accordingly, by reason of Section 32(1)(b) and/or (c) of the Limitation Act 1980, any defence of limitation relied upon by NGN affords no defence to their claim."

22. According to Mr Sherborne, the material which he pleads in this new section of the pleading is a gathering together of material from the previous section, including material which is introduced into that earlier section by his new proposed amendments. What he has done, he says, is bring it all into a new section to give a new focus to the fact that this particular material is relied on in support of his clients' reliance on section 32. He has not introduced anything new, factually speaking, into this section which has not already appeared. I have not myself checked the extent to which that is correct save in one respect, which appears below, but his summary was not challenged by Ms Montgomery and I shall take it to be accurate. Mr Sherborne accepted that his amendment was to that extent repetitious, but he justified it on the basis that it made his clients' case clear and focused.

23. Other than the three paragraphs in the first section which I have identified, Ms Montgomery did not object to any of the material in that first section, including other material added by amendment. Insofar as that material is repeated in the section from 20-42, she therefore does not object on the grounds that it contains new factual material (but she did say the pleading of section 32 itself was new). Her objections lie elsewhere.

The defendant's objections to the amendments

24. Ms Montgomery concentrated on the amendments introduced by paragraphs 20 to 42, though she did have separate short submissions to make in relation the introduction of the duties and breaches added by paragraphs 38 and 39 and the earlier amendments that I have identified above. She submitted that the pleading was an inadequate or improper pleading of section 32. Her main points were:

> (a) The claimants were relying not so much on lack of knowledge of the facts of their causes of action, as on lack of knowledge of the concealment thereafter and of the evidence necessary to prove the facts of their causes of action. In this respect the pleading was not only faulty, it was also unnecessarily prolix and not concise enough to be a proper form of pleading.
>
> (b) When taken with Replies which have been served, and which rely on the totality of the GPOC as it stands, it can be seen that the GPOC is a document which is too general to stand as a proper pleading of section 32, whose application is fact sensitive and particular to individual claimants. All claimants cannot all properly be relying on all the facts pleaded in the document, yet none of them discriminate between facts they rely on and facts that they do not.
>
> (c) Individual claimants should plead the facts which have been concealed from them, when and how those facts were discovered by that claimant, and the basis on which it is said that those facts were not discovered, and could not reasonably have been discovered, by the particular claimant before the date which is 6 years prior to the issue of their proceedings. None of those matters have been pleaded in the GPOC (or the Replies which have been recently served – see below).
>
> (d) Ms Montgomery did not accept that section 32 had been pleaded until the amendments, which she said introduced it. Accordingly the amendments were introducing something very materially new.
>
> (e) The attempts to rely on the duties referred to in paragraph 5.7, and repeated elsewhere, did not add anything to the case and relied erroneously on duties owed to persons other than the claimants.

25. I shall deal with these points in a different order from that just set out.

Whether section 32 has already been pleaded

26. This question is distinct from the question of whether it has been adequately pleaded (which is within points (b) and (c) above). It goes to the question of whether Mr Sherborne is effectively introducing new matter when he pleads reliance on section 32. Given that the new section (paras 20 to 42) do not introduce new factual material, or new factual material which is objected to, her point requires an analysis of whether section 32 has already been pleaded. If it has then this objection loses its force; it is not newly introduced by the new section of the pleading.

27. In my view it is clear that section 32 is already in play in the original form of the pleading, and that the original pleaded material would be available in order to run that case. It is true that section 32 is not itself identified by number, or the Act by name, but the ingredients are sufficiently referred to – see paragraph 6.3, and also paragraph 3. As observed above, the defendant understood the pleading as relating to section 32. Furthermore, previous events in this case would have justifiably led the claimants to believe that section 32 was, in general terms, accepted as being put into play by the generic pleading. In the lead up to a CMC in November 2019 the defendant seemed to be seeking some sort of order that the claimants serve a reply on limitation. At the hearing that relief was not pursued, but there was a discussion as to whether the claimants needed to serve a Reply in order to be able to rely on limitation. Ms Montgomery said:

> "… we accept that the claimants are not under an obligation to reply if the answer to our limitation plea is in the generic pleading, and that is all they want to say by way of answer to our limitation plea, then there is no obligation to file a reply …
>
> …
>
> … technically they ought to. What we're more concerned about, and what caused us to seek the order, is where there are individual facts relevant to their answers to our limitation plea that need to be set out, and so certainly we regard it as being a matter of obligation, and that is what is between us. We say they must plead them by way of reply, and Mr Sherborne still wants it to be optional even if there are individual pleas that he wishes to advance in answer to the limitation defence.
>
> MR JUSTICE MANN: Is your position that whatever the strict position on the pleadings may be, you will treat .. whenever you plead limitation you will treat any party – well it is all of them actually – who have pleaded the concealment claim, that they may rely on those matters in relation to limitation without serving a reply.
>
> MS MONTGOMERY: Yes.
>
> …

> MS MONTGOMERY: As long as the position is clear: we are expecting replies where individual facts are relied upon. We are not expecting replies where generic facts are relied on."

28. The point about the need for individual pleadings, which became clearer in the opposition to the amendment, was not a suggestion that the existing pleading did not raise section 32. It was an averment that individual claimants would have to plead individual relevant section 32 facts if they relied on them. Section 32 as such was not referred to in the argument, but it was the assumed background of the debate. Paragraph 16 of the defendant's skeleton on that earlier occasion demonstrated that it was taken to be a general understanding that a claimant would wish to rely on section 32, though again taking a point that individual claimants ought to be advancing individual cases particularly linked to their individual circumstances.

29. In all the circumstances while the GPOC in their current state are not a particularly elegant pleading of the section, in the circumstances I would hold that they are enough to indicate reliance on it and factual matters relied on in support of that plea.

30. That has the effect that the defendant does not have available to it the fact that the new paragraphs are pleading new material (other than the new duty or duties to which I will come). In one sense that is largely an end of the resistance. If all that Mr Sherborne is doing is recasting something that is already pleaded, in the interests of clarity (as he would put it) then it is hard to see what valid objection there could be, or why permission should not be given. However, in case I am wrong about my view of the previous pleading, and in any event because some of Ms Montgomery's other submissions go to an application which she has made to strike out Replies that have now been served in these actions, I will consider Ms Montgomery's other points about these amendments and the way section 32 is pleaded.

Whether the concealment alleged is of the "fact[s] relevant to the cause of action" as opposed to concealment of the evidence necessary to prove those facts

31. Under this head Ms Montgomery scrutinised the pleadings in the amendment (for these purposes, the detailed amendments in paragraphs 20 to 42).

32. The key distinction for Ms Montgomery's purposes is between the "statement of claim" facts which encapsulate the cause of action on the one hand, and the evidence

necessary to prove it, and other facts relevant to the claim, on the other. She submitted that it is the "statement of claim" facts that have to be the subject of concealment for the purposes of section 32, and once a claimant knew of those facts, or could have discovered them with due diligence, then it mattered not that he/she did not know of the other matters because of concealment even if those facts enabled, or facilitated, or improved the chances of proving the statement of claim facts at the trial. She cited extensively from *Arcadia Group Brands Ltd v Visa Ltd* [2015] Bus LR 1362, which itself cited extensively, and applied, earlier cases and in particular *Johnson v Chief Constable of Surrey* The Times 7th March 1984; [1984] Court of Appeal (Civil Division) Transcript No 84. It suffices for present purposes to cite from Russell and Neill LJJ in *Johnson* set out in *Arcadia*:

> "34. "The wording of section 32(1)(b) of the Limitation Act 1980 in my judgment is such that a narrow interpretation is necessary. In order to give relief to the plaintiff any new fact must be relevant to the plaintiff's 'right of action' and is to be contrasted with a fact relevant, for example, to 'the plaintiff's action' or 'his case' or 'his right to damages'. The right of action in this case was complete at the moment of arrest. No other ingredient was necessary to complete the right of action. Accordingly, whilst I acknowledge that the new facts might make the plaintiff's case stronger or his right to damages more readily capable of proof they do not in my view bite upon the 'right of action' itself. They do not affect the 'right of action', which was already complete, and consequently … are not relevant to it.
>
> 35. "Neill LJ said:
>
> "In one sense it is true to say that the tort of false imprisonment has two ingredients; the fact of imprisonment and the absence of lawful authority to justify it. It is to be noted that in his speech in Weldon v Home Office [1992] AC 58 , at 162 Lord Bridge spoke of the tort as having those two separate ingredients. Indeed at a trial these two aspects of the tort are likely to be investigated. But as I understand the law, the gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious; he establishes a prima facie case if he proves that he was imprisoned by the defendant. The onus is then shifted to the defendant to prove some justification for it. If that be right, one looks at the words in section 32(1)(b) , 'any fact relevant to the plaintiff's right of action'. It seems to me that those words must mean any fact which the plaintiff has to prove to establish a prime facie case."

That sets up the distinction that Ms Montgomery seeks to draw. I accept that distinction as a matter of law.

33. The basic facts which give rise to the cause of action (the "statement of claim" facts) are said to be:

(a) Was there a reasonable expectation of privacy in relation to the information accessed, utilised and/or published by the newspapers?

(b) If so, was that privacy wrongly intruded upon, or breached, by the acts in question.

34. Ms Montgomery submitted that the invasion (if any) by publication would be known to the claimant when the article was published (unless the claimant did not know of the publication at the time), so in most cases that piece of knowledge of the "statement of claim" facts would have been known for a much longer period than 6 years prior to the issue of proceedings. There was no concealment of that fact. The acts of intrusion (if any) underpinning the articles (phone hacking or other unlawful information gathering exercises) would not have been known to the claimants at the time (on their case, and on the concession of the defendant); nor would any intrusion which did not result in articles. However, there would come a time when it would be known that that sort of activity had gone on, and from that time the limitation clock would start running. It is concealment and then discovery of those facts that were significant for the purposes of section 32. The concealment of the means of proof, or of evidence bolstering the case about those facts, was not relevant concealment. She submitted that the amended pleading confused the two and pleaded a lot of concealment of facts that made the case stronger, which was irrelevant and confusing.

35. I accept Ms Montgomery's dichotomy in principle for present purposes, stated baldly as above and without additional subtleties that might be propounded at the trial. However, while I accept that there is probably a certain amount of pleading of supporting material, rather than "statement of claim facts", the pleading does make it clear enough what the basic facts are, and what the acts of concealment of those facts are.

36. Paragraphs 22 and 23 set out the claimants' case on concealment in the correct terms. There is then a significant amount of pleading of the concealment of the unlawful activities generally. This would seem to me to be at least a proper pleading of concealment techniques, as part of the case on particular concealment to be advanced by each claimant. There is nothing wrong with that. It is true that what is pleaded as being concealed is facts relevant to the generic case made against the defendant as to

the widespread use of unlawful information gathering techniques, but that is relevant because the concealment of activities generally includes concealment of the particular act affecting individual claimants. What is indeed pleaded is concealment of "statement of claim" facts in the unusual circumstances of this litigation.

37. Paragraph 40 then pleads:

> "40. The Claimants have, through the process of this litigation, and through their persistence in obtaining disclosure orders against strenuous resistance by NGN, have managed to uncover facts that are relevant to their rights of action. These include relevant facts which had been concealed by by NGN and which have been discovered by the Claimants since May 2011 and could not with reasonable diligence have been discovered any earlier. It would be disproportionate to set out all such facts, however examples are set out in paragraphs 40.1 to 40.7 below. This is without prejudice to the right of each individual Claimant to advance a case that he or she was unaware of any of these facts (and could not with reasonable diligence have discovered such facts) until a later date than the date set out below (particularly when the date refers to disclosure in in these proceedings, as opposed to a public statement)."

38. Various documentary disclosure events are then pleaded which are said to reveal unlawful information gathering which was previously not so clearly evidenced. This would seem, at least to an extent, to be pleaded as supporting a case which was already pleaded, even if in general terms and of the "subject to disclosure the best particulars the claimant can give are…" variety. If that is the correct analysis then there is much to be said for Ms Montgomery's case that this is pleading concealment and then revelation of supporting material, not "statement of claim" facts. However, I am not minded to disallow this particular part of the claim. When matters are developed at trial it may well be that the sophistication of the exposition of the generic case, and the inferences to be drawn from evidence from time to time, will reveal that this part of the pleading has a greater part to play in the operation of section 32 than currently appears.

39. On any footing there is plenty of properly pleaded concealment of the facts and matters which are properly within section 32. I can cite as examples paragraphs 35 and 36. I do not regard this attack on the amendments as a justification for not allowing them.

The lack of proper individual pleading

40. Under this head I take together Ms Montgomery's points described at (b) and (c) above. At one point it was perceived that her point was that each section 32 riposte is an individual claim by a claimant and it is inappropriate for a claimant to plead by way of reliance on a generic pleading. It was said that in a previous hearing she had already accepted a claimant could rely on a generic pleading and could therefore not take that point now. However, closer inspection of what she had said reveals that she was not propounding that proposition, but was rather saying that in every case there were going to be different claimant-specific facts which meant that relying just on this generic pleading was insufficient. Those individual elements do not, by definition, appear in a generic pleading. They are matters on which the claimants are said to bear the burden of proof – *Cave v Robinson Jarvis & Rolf* [2003] 1 AC 384 at para 60 per Lord Scott. Since they do not appear anywhere else (not even in the Replies which have been served, and which are the subject of a separate strike-out application), Ms Montgomery says these amendments should not be allowed.

41. I agree that each claimant who seeks to run a section 32 riposte to a limitation plea has a claimant-specific case to run in relation to the section. That case will involve proving the facts relevant to the claim, and the concealment and ignorance of at least one of those facts with the relevant intention to conceal. I also agree that the claimant will have the burden of proof of those matters. What Lord Scott said in *Cave* was:

> "60… A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question."

42. It follows that the claimant will also have to plead those facts. However, at the moment it seems to me that each claimant who wishes to adopt the amended GPOC will have pleaded those matters. All those claimants will rely on the same facts because that is the nature of the case. I do not consider there is any difficulty with the GPOC there.

43. The third part of section 32 (the point of time at which the claimant discovered the facts relevant to the claim or could with reasonable diligence have discovered them)

requires a bit more consideration. I accept that there may be more variables as between claimants under this head. Claimants might actually have discovered their claims at times which varied according to their personal circumstances. The GPOC does not cater for that at all, so far as it remains a relevant matter. However, it is not intended to. It is a generic pleading to which all those who wish may subscribe, in whole or in part. It is intended to set out common facts in one pleading to save their having to be set out in every case.

44. Accordingly, it is not a sound basis for resisting the amendment of this pleading in a generic document that it does not contain claimant specific material. That may pose a problem for the claimants at trial if it turns out that they are forced to rely on some claimant-specific material which ought to have been, but which was not, pleaded. That was flagged up by Ms Montgomery herself at the hearing in March 2020 when she confirmed (or perhaps warned) of this consequence:

> "MR JUSTICE MANN: So what is underpinning your submissions is -- well, you are flagging that you may take the point that any defendant who does not plead individual matters relating to them will be faced at trial with an argument that they are not allowed to because they actually haven't served a reply.
>
> MS MONTGOMERY: Correct. And as Mr Sherborne said when I made that point last time, "It is up to us, it is our choice". And I accept that, it is their choice but they are on risk …"

45. It is not, however, a reason for rejecting this as a generic pleading. Ms Montgomery said that the limitation issues that arise out of all this need to be dealt with now, and that the appropriate way of dealing with them was to say that the points had not been adequately pleaded. I am sure that there are limitation points that arise and will need deciding, but deciding them on the basis of the fate of this generic pleading is not the way to do it. I think it likely that there will be significant questions of fact as to when an individual first knew, or ought to have known, of the claim. Within that there may be interesting questions of what is knowledge of a claim for these purposes when there are or may be so many individual causes of action if the claimants are right – each individual article, and each intrusion into privacy by unlawful information gathering techniques, may be distinct (but in some cases linked) causes of action. Each claim tends to be pleaded on the basis that not all unlawful intrusions are known, yet a pleading is possible. All this provides a seedbed for potentially significant questions of knowledge and limitation, leaving aside the state of knowledge of individual claimants. But these are questions which are best grappled with at a trial,

on the basis of actual facts and real evidence, and not anticipated by disputes on the pleadings.

46. That is not to say that pleadings are not important. It may well be that Ms Montgomery's warning needs to be heeded, and that claimants will have to re-think their view of the pleading. They remain, however, entitled to rely on a pleading of a generic nature if and insofar as they wish to do so. Since this is such a pleading, and particularly since all or most of the material is already pleaded (and in my view, it is already pleaded in a context which allows it to be relied on in a section 32 riposte) the pleading should not be disallowed on that basis.

47. I therefore find that the potential need of claimants to be more specific as to their individual section 32 cases is not a reason for disallowing a generic pleading of the matters pleaded in the proposed amendments to the GPOC.

The subsequent service of Replies and the application to strike them out

48. It may be Ms Montgomery's warning that has induced a change of tack on the part of the claimants. A number of claimants have served Replies since Ms Montgomery first raised her attack on the proposed amendment at the March CMC. Those pleadings introduce the concept of when the particular claimants were aware, or ought to have been aware, of various acts, described by reference to the generic document (presumably on the assumption that the amendment would be allowed). Three sub-paragraphs end with the words:

> "The Claimant was not aware of [the facts just referred to] until a date within 6 years prior to the issue of these proceedings."

49. One further sub-paragraph ends with the words:

> "The Claimant was not aware of these facts, and could not with reasonable diligence have discovered them, until a date within 6 years prior to the issue of these proceedings."

50. There would therefore now seem to be an attempt to meet Ms Montgomery's point. Ms Montgomery has sought to meet those pleadings with an application to strike out on the basis that the pleading is not enough, or is faulty, and ought not to be allowed. This application was made late (due in part to the fact that not all the Replies had been served until the end of April) and Mr Sherborne claimed he had not had sufficient time to include meeting it in the hearing which resulted in this judgment, and in any event there was no time to deal with the application at the hearing. I have therefore not heard full argument on whether the Replies should be allowed to stand. The plan is to have further argument on that, if necessary, at an already scheduled continuation hearing, with the benefit of the parties having had this judgment at least in draft before that hearing, so that they could assess the impact of my reasoning on the amendment application when considering how to deal with the striking out application.

51. I do not know what the parties will seek to draw from the above in relation to that striking out application, but I will provide some preliminary observations in case it assists in the disposition of the application:

(a) There is to be a trial in this litigation in October of this year. Time is now precious and I doubt that it is best spent arguing about pleadings.

(b) As Ms Montgomery frequently said, as did Mr Sherborne, the section 32 point in this case (as in all cases) is capable of being intensely fact-sensitive. That usually means that it is best dealt with at a trial. Of course, if the pleadings are not set up so as to generate or permit the relevant factual dispute then there would be no facts to be sensitive about, but such fact-sensitivity often makes detailed disputes about pleadings unhelpful.

(c) If Ms Montgomery takes the view that the Replies do not provide any necessary pleading as to knowledge or means of knowledge, then it would seem to me at first sight to be open to her to make a request for further information. That may well be a better way to pursue this litigation than an application to strike out for want of particularity (which I think is an element of her case). While I accept what *Cave* (and *Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400) say about the burden of proof in relation to section 32, I do not think that either of them necessarily determine what might be quite interesting questions of a shifting burden of proof on discovery of concealment and "reasonable diligence" discovery, and what might be necessary as a matter of pleading for a claimant to raise those points. While not encouraging yet more pleadings in this pleading-rich litigation, it occurs to me that both sides might have to plead in relation that. So far as the defendant is concerned, if it is going to advance a positive case that a claimant discovered the relevant facts, or ought to have discovered them if he/she had exercised reasonable diligence, more than 6 years before his/her claim form, I would have thought that that ought to be pleaded too.

The section 32(2) point

52. This is Ms Montgomery's point (e). It is based on various parts of the pleading. I have set out some (paras 5.7, 6.3 and 16), and then there is paragraph 38:

> "38. Further or alternatively, NGN has acted in in deliberate breach of duty in circumstances in in which its wrongdoing was unlikely to be discovered, at least for some time, through its destruction of documents when it was under a duty to preserve the same and/or its non-disclosure of documents when it was under a duty to provide the same. In each case the duty arose as a result of notification to NGN of legal claims/the legal process and/or requests for documents by the MPS and/or individual professional duties (as set out below)".

53. There then follow particulars of occasions when NGN is said not to have preserved documents, to have destroyed them, made false statements about documents, and in which employees who were legally qualified are said to have broken professional duties.

54. It is pleaded that breaches of the various duties relied on were deliberate breaches which were unlikely to be discovered for some time, and that that amounted to a deliberate concealment of the facts involved in that breach of duty within section 32(2) of the 1980 Act for the purposes of section 32(1).

55. As far as I can see, this particular plea is something that is new in the pleading, introduced by the proposed amendment. I cannot see the plea being made before, so Mr Sherborne cannot say that it is something that was already there and which has been recast. Ms Montgomery did not seem to challenge this reliance on section 32(2) in her skeleton argument, but made short submissions in her oral argument (after I had raised a point about it during Mr Sherborne's submissions).

56. I am troubled by this reliance on section 32(2). As Ms Montgomery said, the duties relied on are not duties owed to the claimants – they are (if they exist at all) duties to the police, to the court (or "legal process") or generally as professional lawyers. However, more significantly to my eyes, they are none of them duties which are sued on in these proceedings. Section 32(2) seems to me to me to apply in a case where a

claimant is suing for breach of a duty and alleging the facts referred to in section 32(2) in relation to that duty. It does not obviously apply to some sort of free-standing duty in the case which is then broken and which can then be used in a section 32(2) plea. I was not convinced by Mr Sherborne's reliance on authority (*Cave* and *Giles v Rhind (No 2)* [2009] Ch 191), both of which are cases in which the duty which was sued on was the duty which was the subject of section 32(2) debate. They do not bear on the point which troubles me.

57. Unfortunately this point, or these points, received scant attention in argument before me. Ms Montgomery took only the point about the person to whom any duty is owed. Little time was devoted to it overall, and in the light of both parties' attention to it (or lack of it) it did not, and does not, seem to me to be fair to disallow the amended plea on the basis of my misgivings. Although it seems to be the case in relation to this aspect of the case that the claimants have introduced some new material (including some factual material) which was not present in the pre-existing pleading (at least to my eyes), Ms Montgomery did not complain that new material was introduced. I shall therefore not disallow his amendment either.

Other points

58. Ms Montgomery also had a point about the absence of conciseness in the pleading. I agree that "concise" is not a word one would readily apply to it, but I do not think it is unnecessarily verbose, or that it lacks conciseness to the point of its being an abuse. Much if not all the pleading is necessary as material which the claimants have to set out to meet the extensive non-admissions in the case. If they did not set out with clarity the allegations of wrong-doing they would be met at trial with an objection to evidence being adduced and submissions being made about them. The proposed amended pleading is, as I have already pointed out, repetitive, but that is said to be in the interests of producing clarity in Mr Sherborne's case. I accept that that is a justification for it in this particular instance.

Conclusion on the limitation-based amendments

59. This part of this judgment has focused mainly on the opposition to the amendment rather than what the amending party has to establish to be allowed it. That is because that is where the debate lay. Having considered the amendments, I consider that they are necessary to do justice between the parties, that there is an evidential foundation for the amendments, there is not much pleading of new fact in any event (or none

complained of), and that the pleading serves a useful and proper function in clarifying the case of the claimants.

60. It follows from that and what I have said above that I shall allow the amendments related to the section 32 riposte.