Neutral Citation Number: [2020] EWHC 553 (Ch)

Case No: HC-2000-000003

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2020

Before :

MR JUSTICE MANN

- -

Between:

Various Claimants (as listed in the 3rd Group Register)	**Claimants**
- and -	
MGN Ltd	**Defendant**

- -
- -

David Sherborne and **Julian Santos** (instructed by **Atkins Thomson**) for the **Claimants**
Richard Spearman QC and **Richard Munden** (instructed by **RPC LLP**) for the **Defendant**

Hearing dates: 28th, 29th, 30th & 31st January 2020

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Approved Judgment

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

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Mr Justice Mann :

Introduction

1. This judgment relates to a large scale attack that the defendant mounts on a very significant part of the claimants' cases in this managed litigation. In it the defendant in effect seek to strike out the entirety of certain parts of what is called the generic case of the claimants and that part of their case which seeks to bring home knowledge of the existence of phone hacking and other unauthorised information gathering to board members and members of the Legal Department. If it succeeds it will have a material bearing on the future scope of this litigation. It has been made to arise in a less than straightforward procedural context as will appear.

2. The background to this litigation appears from my judgment in *Gulati v Mirror Group* [2015] EWHC 1452 (Ch). Cross-references will be made to that judgment where necessary.

History of pleadings and of the applications with which this judgment deals

3. The story starts with the pleaded cases of two claimants called Houghton and Leslie. They are two long-standing claimants whose claims have not yet settled. Like all claimants, they based their claims on alleged intrusions into their own particular lives and in the course of that relied on what is described as the generic case, that is to say matters going generally to the nature and scale of the unlawful information gathering activity in the Mirror Group, which can be used to bolster the case advanced in relation to personal invasions of privacy. The effect and significance of the generic case appears in my *Gulati* judgment and I do not set it out again here. The picture painted by the generic case is likely to be common to all claimants in this litigation, and indeed the same sort of facts have been pleaded by all of them since the generic case was first evolved.

4. In 2017 the defendant pleaded a limitation defence to Mr Leslie's claim, and in response he pleaded a Reply relying on fraudulent concealment by the defendant, relying on knowledge and acts of various levels of employee up to the Legal Department and Board level. The allegations raised were serious. One working day before the hearing of an application for disclosure relating to Board knowledge the defendant indicated that it

would abandon most of its limitation defence, in the presumed expectation that the Reply allegations would no longer be pursued. The response of Mr Leslie (and Ms Houghton) was to seek to introduce the Reply allegations into the Particulars of Claim as matters going to aggravated damages. In a judgment dated 24th October 2017 I allowed the amendment on an opposed application. Their pleadings thereafter contained allegations of Board and Legal Department knowledge. Some of the allegations were capable of going to the generic case as well as that aggravated damages point. It should be noted at this point that the permitted amendment contained allegations of knowledge on the part of the Legal Department which Mr Spearman QC, for the defendant, now seeks to strike out but which the defendant did not specifically object to at the time. The defendant pleaded to the new Particulars in some detail and, Mr Spearman says (plausibly) at considerable cost.

5. It turned out shortly thereafter that the introduction of the Board knowledge plea meant that a trial which was due to take place at the beginning of 2018 could no longer take place and, on the application of the claimants, the trial date was vacated.

6. Other claimants whose claims were being pursued and whose Particulars of Claim were due thereafter also made similar aggravated damages claims. From May 2018 their pleadings were more extensive on the point than had been those of Houghton and Leslie. They too made claims based on the knowledge of the Legal Department. Since those were de novo claims the defendant had no opportunity to challenge them on an amendment application. No application was made at the time to strike them out, though at the time the defendant did aver in correspondence that the revised (expanded) pleading was an abuse of process in circumstances in which (it said) the Houghton and Leslie cases, on their more limited pleadings, were supposed to be test cases.

7. In circumstances in which a large number of claimants were making the same or similar cases, and in which it was likely that each claimant would wish to rely on generic matters, and (it appeared) knowledge and concealment matters which other claimants propounded, the claimants generally proposed that such matters be pleaded in one generic pleading which any claimants who wished to do so (which is likely to be all of them) could adopt. That would unify approaches and mean that if it became apparent that an amendment was appropriate (which again was foreseeable, bearing in mind most of the information for these parts of the case come from the defendant as part of its disclosure obligations) it would be necessary to consider only one pleading and not "n" pleadings where "n" is the number of claimants who have already pleaded. I acceded to the creation of such a generic pleading in principle on 24th May 2019. I found that it would be a useful way of proceeding. I say "in principle" because at the time of the application the claimants did not present a form of generic pleading, and Mr Spearman understandably pointed out it would be wrong to give the claimants a blank cheque as to its contents, so

he was given an opportunity to object to the form when it was presented to him within a timetable. In due course the defendant did object to the generic pleading when it was produced, and those objections form the principal matters which have to be resolved on this hearing. The proposed new generic pleading (which on this application we have called the Particulars of Common Facts and Issues - "POCFI") was served on 28th September 2019.

8. It is worthwhile pausing at this point to consider the effect of the proposed generic pleadings on the various phases of the pleadings. If Ms Houghton and Mr Leslie wished to adopt that pleading they would require permission to amend their existing Particulars of Claim, because on any footing it goes beyond what they have pleaded. It was envisaged that the generic pleading would reproduce the wider expanded pleadings of later claimants. Although those claimants would also technically require permission to amend to rely on the POCFI, to the extent that the pleading covered the same ground then permission to amend would obviously be given. However, so far as it covered new ground they too would require a substantive application for permission to amend. So far as new claimants who have not yet served Particulars of Claim are concerned, their pleading is not subject to the constraints of an amendment procedure and they could just adopt the generic pleadings, or make all the allegations in them in their own pleading. Adoption by new claimants could only be prevented if it were established that the generic pleadings were impeachable on the grounds on which pleadings are impeachable generally.

9. By the time of the hearing at which the service of the POCFI was sanctioned in principle the defendant had made an application on 17th May 2019 to strike out the parts of the more recent pleadings which pleaded "aggravation pertaining to the knowledge of MGN/TMG Board and the Legal Department … pursuant to CPR rule 3.4", and also to strike out certain specific references to the Legal Department in the pleadings of Mr Leslie and Ms Houghton. This was very shortly before the CMC at which I gave permission in principle to serve a generic pleading. The defendant did not press for its application to be dealt with at that hearing (it was served far too late for that anyway) and it was left on the books, as it were. This judgment in part stems from its revival.

10. When the POCFI was served it appeared that it not only reproduced the material already contained in the more recent extended pleadings, it also added some new material. Mr Sherborne, for the claimants, accepts that insofar as that is the case (and the extent is disputed) he needs, in substance, permission to amend even the more recent expanded pleadings as well as the Houghton and Leslie pleadings.

A summary of the applications and of the issues which arise

11. In the context of that history the issues that arise are as follows. As will appear, they are inter-related.

> (i) The claim to strike out certain specific references to the defendant's Legal Department in the Houghton and Leslie Particulars of Claim - application notice dated 17th May 2019. The same application is made in another claim, but that does not affect the present application. This application is made on the basis of privilege.
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> (ii) The claim to strike out the pleading of aggravation (aggravated damages) made in the expanded pleadings served since the Houghton/Leslie claims were amended. This application does not, in terms, relate to the Houghton/Leslie claims.
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> (iii) By way of an apparent afterthought, Mr Spearman's application, made on his feet at the end of his submissions on this area, to strike out the whole of the board knowledge plea of Houghton and Leslie.
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> (iv) The claimants' application (not formulated in an application notice) to be allowed to rely on the actual draft POCFI. Technically this incorporates implied applications by those who have pleaded already (including Houghton and Leslie) to amend so as to rely on this document, and an application for an order made under the court's case management jurisdiction which allows further claimants to plead by reference to this document. This is countered by Mr Spearman's case that this proposed pleading is disproportionate, runs a case that cannot succeed and contains allegations about the Legal Department which are privileged and which trespass into the no-go area of privilege.

12. Although some of those matters were not the subject of formal application notices, and thus arose in a somewhat unstructured way, it seemed right to me to address them because (at least so far as the allowability of the POCFI was concerned) they raised real issues about the future of this case which needed to be resolved and there was no point in putting them off to a later occasion. That does, however, mean that there is some disentangling to be done.

The striking out of claims other than the claims about the Legal Department

13. I shall deal with the claims to strike out allegations about the Legal Department (issue (i)) in a separate section of this judgment. This section deals with some of the broader claims to strike out. It will be useful to deal with the applications by starting at the farthest extreme of Mr Spearman's case and working back to the least extreme, though the various elements relevant at each stage can be seen to be common. In what follows it is necessary to bear in mind that two elements are in dispute – first, the pleading of board knowledge, and second, the other common matters pleading in the POCFI.

14. Mr Spearman's high point is his late averment that the original Houghton/Leslie board knowledge pleas should be struck out. His justification for that at this stage, when I have already ruled on the the pleas and allowed them in, is that it can now be seen that the board knowledge case is far more extensive than was originally perceived to be the case. His client has already spent almost £300,000 pleading to it, giving disclosure and providing further information, and it can now be seen to be disproportionate to run it at all in the light of the way the case is put in the later pleadings and now in the POCFI.

15. I do not accept this striking out afterthought on the part of Mr Spearman. The scope of the pleaded case was considered when I granted permission to amend on 24th October 2017. It is true that the context of that was one in which Mr Spearman said the case could not be got ready for the forthcoming trial date, but nonetheless the point arose. In that context it was rejected by me. The defendant has since pleaded to it, and did not suggest that the case as set out in that pleading could be seen at that time to become too big to be appropriately tried in this case. Furthermore, in a letter dated 9th July 2018, whose contents were explicitly relied in the formal application to strike out, the defendant's solicitors expressly said:

> "The proportionate way of dealing with the Board knowledge issue in new claims is for the Claimants to repeat and rely on the material paragraphs of the Particulars of Claim in Lesley and Houghton and for MGN to repeat and rely on the material paragraphs of the Defences in those two claims. Thereafter, once those claims have been tried (and subject to such further case management as may be required in the meantime), and after judgement has been obtained on those pleaded issues, those findings will resolve those pleaded issues as between the parties to future MNHL , and will thus replace those formal pleadings."

16. Thus the defendant was, at that stage, expressly accepting that the issue should go forward, and that it should do so on the basis of the Houghton and Leslie pleadings. It

also expressly acknowledged that "… we cannot prevent the claimants from pursuing the Board knowledge case (the threshhold for a strike-out action being too high) …".

17. Unless there has been a material change of circumstances, there is no justification for going back on the result of my judgment, particularly in the light of the express acceptance just referred to. I do not consider that there has been any such change. All that has happened is that the claimants have put forward 2 forms of amplified pleadings. Whether those amplifications are allowed or not has to be addressed in the context of the attacks on them. If they are not amplifications then nothing has changed since the original form. If amplifications are not allowed then by the same token nothing has changed. If and insofar as they are allowed then they are allowed on their merits and there would be no basis for striking out the earlier claim. I do not accept Mr Spearman's protestations that it can now be seen how widely the case is to be put and that was not apparent two years ago. That original case is as wide as it always was. The new pleadings do not demonstrate a new width to the old case. If they seek to widen it then that widening needs to be addressed. It is no reason for striking out the original pleading which has already been ruled on and allowed.

18. That forms the background to the next level, which is the form of expanded pleading used by claimants subsequent to Houghton and Leslie. I was not given precise numbers for these, but they must number in their tens. The application notice pursuant to which a striking out of these claims was attempted based its complaint (via the letter of 9th July 2018) on the fact that it had previously been intended that the Board knowledge claim should be tried within the Houghton/Leslie cases as test cases. Permission to plead Board knowledge had been given on the footing that the pleading would not derail the forthcoming trial and it was said that the issue was sufficiently contained so that it would be possible to have it tried in January 2018. The cases were intended to be test cases on the point, whose decision would help in the resolution of the cases coming after them. On that basis the trial date was not vacated. It then transpired that a trial would not be possible after all, so the date was then vacated but the cases were still presented as test cases in a subsequent costs management hearing before the Master. Mr Spearman submitted that the attempt to broaden the scope of the claim in the expanded pleading for later litigants was contrary to that intention, was undesirable and was unfair. The claimants ought to have brought forward their case on the point in one go, and using new claimants to expand it in the way they were doing was procedurally wrong in the circumstances. He made a sort of *Henderson v Henderson* point. In effect it enabled Houghton and Leslie to amend their claims without going through an amendment application. Paragraph 12 of the letter which set out the grounds listed a large number of paragraphs which were said to contain additional facts and matters to those pleaded in Houghton and Leslie. It did not place the strike-out application on the clear footing that the Board knowledge claim had become disproportionate in its new form, though a proportionality point in relation to the whole Board knowledge claim was made in one of the background paragraphs.

19. In his submissions Mr Spearman firmly adhered to the points made in the letter and the other points just referred to but also placed greater emphasis on the proportionality (or lack of it) of the Board knowledge claim. He pointed to what he says is an additional level of detail in the expanded claims which he said would require days more trial time, making the whole thing less proportionate.

20. There are two issues involved here. The first is whether in the circumstances the court should allow any departure from the Houghton/Leslie pleading, and the second is whether, if it should, the new pleading can be said to introduce a level of disproportionality such that it should be disallowed on that basis.

21. As to the first, I consider that the argument fails. The circumstances of the amendment to introduce the plea in the first place contained nothing which should lead to that pleading being as enshrined or ossified as Mr Spearman's submissions would require. It is true that at the time of the amendment no further amendments were on the commonly shared horizon, and if there had been a trial in January 2018 it would have been on the basis of that pleading, but that is because that was the pleading that was in play. It seems to be true that, to a degree, Houghton and Leslie were regarded as test cases on the point in that a determination at the trial would have been expected to operate for all cases in the future, and the court might have been minded to prevent further claimants running a different case without just cause. However, it was not absolutely inevitable that a different case would have been barred, and in any event the case was not tried. So one can look at the problem in this way - suppose that Houghton and/or Leslie had applied to amend after the abortive trial, to include an expanded case. Such an application would not have been bound to fail by dint of the fact that they had pleaded it once and it had been envisaged that there would be a trial on that pleading. An application to amend would have been considered on the usual basis applicable to such applications, taking into account the position of those cases in this managed litigation. There is no branch of the rule in *Henderson v Henderson* which requires a party to put forward one version of a claim pre-trial and then no more. In this sort of case one has to bear in mind that the likelihood of a justifiable amendment is increased by the fact that virtually all the relevant documents, and knowledge, are likely to be in the hands of the defendant (a fact I have adverted to more than once) and that disclosure presents a foreseeable prospect of an application to amend. Amendments in those circumstances might require a more sympathetic approach than in other cases. That makes it even fairer not to proceed on the footing that the claimants only have one go at pleading. It would also be wrong and unfair, in the circumstances, to say that further claimants should be stuck with the original pleading of the first claimants to take the point and who had not had a trial on it. Nothing that happened after the abortive trial suggests that an expanded pleading is in any way an abuse, or prejudices a fair trial of the issue.

22. Mr Spearman's second point is an equally serious one. He invited me to take various matters in to account. His points were advanced mostly in the context of the yet more expanded claim in the proposed POCFI, but they arise under this head as well.

23. He relied on the weakness of the case of aggravated damages and went so far as to describe it as a lawyer's construct which was put before clients to, in effect, bolster their damages claims. He said it was highly unlikely that the client would have suffered actionable disappointment, anger or distress sounding in damages as a result of Board concealment before it was pointed out that they might have a claim. Concealment by Mirror group in terms of concealment at various levels of journalist was already known, and indeed there was a finding to that effect in my *Gulati* judgment. Any distress (or other actionable feeling) would flow from that and concealment at the higher Board level would not add anything, and indeed was a contrivance. He submitted that the whole aggravated damages claim was a contrivance, and particularly so in relation to the knowledge and activities of the Legal Department.

24. Furthermore, Mr Spearman submitted, the aggravated damages claim, and especially any added value to the claim arising from the knowledge of the Board, was very small, and too small to justify the enormous time, effort and cost that would go into proving and meeting it (or, in this context, the additional time, effort and cost arising out of the expansion of the originally pleaded claim). There was no indication from *Gulati* that the claims had significant value, if indeed they had any value, when wrapped up in the damages claims as a whole in relation to any claimant. The effort was simply disproportionate on a cost-benefit assessment. Mr Spearman emphasised more than once the amount that the defendant had already spent on pleading, disclosure and particulars, as though that money would be wasted by an amendment.

25. The first of those two points (contrivance and hopelessness) fails. It is a repetition of a point made on the application to introduce the plea back in October 2017 and on that occasion I rejected it as being a matter for trial. Having had the point decided in that context, Mr Spearman cannot raise it again absent some change of circumstances. There has been no relevant change of circumstance. Furthermore, the answer still holds good - it is a matter for trial, not one for decision on the sort of occasion on which it has been made to arise again.

26. The second point requires closer scrutiny. Since a sort of base case on Board knowledge in Houghton and Leslie has already survived an attack on it (see above) the point must be

that the expanded case has acquired a disproprtionate character by virtue of its expansion. That is the point which I shall consider.

27. Before doing so it is necessary to reflect on the scope of the remedy. It was again part of Mr Spearman's case that any aggravation element is not likely to be great in any particular case, and the suggestion is that that is the damages amount which has to be borne in mind in terms of proportionality. He pointed out that in *Gulati* there was no apparent amount awarded for aggravation of this kind, because any aggravation claim was wrapped up with other damages, but the suggestion is that the additional element from Board knowledge (as opposed to the existing aggravated damages claim) could not be very great at all, and certainly not great enough to justify the extra expenditure that the expanded claim will involve.

28. In my view it is certainly conceivable that in any individual case the extra aggravated damages arising from the additional Board knowledge material in the expanded pleadings may not be very great, but that is not a cogent factor for two reasons. First, the expanded pleadings do not so much increase the scope of the aggravation as opposed to pleading a more particularised, or substantiated, case for the sort of Board knowledge that was already pleaded in Houghton and Leslie. It does not so much increase the damages as plead out a fuller way in which the claimants seek to prove Board knowledge. Second, it must be remembered that I am not dealing with an individual case. I am dealing with the manner of pleading a number of cases, so that increases the actual financial significance of the point overall. While the amount of aggravated damages potentially attributable to any given claimant might be relatively small, in aggregate the sum is capable of being much bigger, and it is that bigger figure which has to be born in mind (in general terms - one cannot put an actual figure on it at this stage) in considering proportionality.

29. If there is a proportionality point of the kind raised by Mr Spearman then one has to assess the scope and nature of the claim made. The overall nature of the original and expanded claims of Board knowledge is to set out a number of events from which the court will be invited to draw an inference that the Board must have become aware of an underlying level of unlawful activity. Some of the material is said to be direct evidence of unlawful activity (usually in the form of statements by those claiming to know, or to have done it); some of it is allegations of incidents said to involve unlawful activity and which it will be said must have come to the attention of the Legal Department and the Board; some of it is public pronouncements in reports and the like; some of it is material apparently demonstrating a casual awareness of some senior employees; and there is other material. There is no pleaded material in the form of a direct record of Board knowledge (for example in board minutes) and the defendant has pleaded that there are no board minutes going to the issue which demonstrate the point (and the claimants have not drawn attention to any disclosure of that nature). The claimants' case is one of

inference from accumulated factual material with little or no board material going directly to the point.

30. In Mr Leslie's claim this material (the original claim) occupies about 8 pages of his Amended Particulars of Claim. The expanded version occupies some 20 pages (I was shown the Particulars of Claim of Mr Ray Winstone). Some of the expansion comes from an expanded narrative of some of the events in the original pleading. Much of it is new material but in the same vein as the categories of the original material that I have described. In the light of the analysis conducted above, I am invited to consider whether it is disproportionate to allow the new material to be deployed or whether it should not be allowed to stand to the extent of requiring it to be struck out. I bear in mind that this is a striking out claim in relation to those claimants who have already pleaded the expanded claims.

31. No authority for this course was advanced, and it is a strong thing to strike out on this sort of proportionality basis, but I consider that I have jurisdiction to do it. CPR 3.1(2)(k) entitles me to "exclude an issue from consideration" and CPR 3.4(2)(b) allows me to strike out part of a pleading that would "obstruct the just disposal of the proceedings". *Jameel v Dow Jones* [2005] QB 946 allows the striking out of claims which might have some sort of value but where bringing them would be an unjustifiable use of litigation resources bearing in mind the very limited scope of possible benefits from the claim - "the game is not worth the candle". This last case is not directly on point, but it does demonstrate the point that a claimant is not entitled to run a claim just because he/she has or might have one. In relation to any given part of the case I consider that a court is entitled to make a proportionality judgment in relation to its likely effect on the case in the light of the resources and effort which would have to be put into running or meeting (and deciding) it.

32. Having said that, there is a serious difficulty in limiting a claimant's case of the present nature in the way proposed by the defendant. If there is a concealment case of this nature to be run then it will usually, or at least often, be the case that there is no direct evidence of the concealment and knowledge available to the claimant, and a claimant will be driven to mounting the sort of case that the claimants seek to mount in this case - one of inference from accumulated material. The claimant will say that it is necessary to plead the detail to overcome the fact that there is no direct evidence available to him/her of the knowledge or other matter relied on. The defendant will say there is no direct evidence because there never was the knowledge or other matter relied on. That dispute can only be resolved at trial. The question that arises in this case is: Should there be any, and if so what, limits on what the claimants ought to be able to allege, as a matter of proportionality?

33. I need to consider the sort of exercise that the defendant is going to have to do to meet the point. The nature of the allegations is such that the claimant will have to do little more pre-trial other than analyse the disclosure given. The defendant on the other hand, as I accept, will have to do a lot more work to counter the new instances alleged against it. It has not yet pleaded to any of the expanded allegations, but judging by the level of detail with which it has met the original case, and assuming it will wish to do the same in relation to the expanded allegations, I can see, and accept, that it will have a lot more work to do in order to investigate, plead to and in due course give disclosure in relation to the new material. There is no doubt that if the expanded allegations stand this substantial part of the case will get a lot more substantial.

34. It is also necessary to bear in mind the prize. I have already reflected on the extent to which this part of the case will contribute to real financial benefits for the claimants. For any claimant who has claims based on the actual offending activities, it will be a subsidiary part.

35. I have considered whether the size of the case in those sort of terms means that it should be cut down as a matter of proportionality, because that is what the defendant's strike-out application requires. I have concluded that it should not. I have read the expanded case with care, and none of it strikes me as extravagant. The aggravation claim itself is properly pleadable, as I have already held. So far as the bricks for the edifice are concerned, the claimants have found some new bricks , and I do not consider it is disproportionate to allow them to seek to construct their edifice with them. I will not enumerate them all here. As appears above, their nature varies, and some will require more work to meet than others, but overall there is a properly pleaded case which I do not consider it right to strike out on the grounds of proportionality, abuse of process or the like. It is inevitable in a case such as this that a claimant has to go about matters in the way in which they have in this pleading, and while that does not justify them pleading whatever they like it is right for the court to be realistic about that and to be very wary about cutting down the case on the basis of proportionality.

36. I shall have to return to proportionality when I come to consider the new generic pleading proposed by Mr Sherborne. I shall, as foreshadowed, also return separately to the allegations relating to the Legal Department.

The proposed generic pleading

37. The overall purpose is to have one document, to which claimants can subscribe, which contains material which all claimants are likely to wish to plead. That material falls under two heads. First, there is generic material which goes to individual cases on liability. Putting the matter broadly, that is material showing unlawful activity in matters other than the claimants' own individual cases which is said to be capable of justifying or reinforcing a conclusion that the claimants have themselves been the victims of unlawful information gathering. It is a very important part of the litigation. Second, there is the common case on Board knowledge and concealment. The fact that the POCFI is propounded for the latter purpose suggests that all claimants will want to rely on it for the purpose, but if any do not they would be free not to adopt that part of the pleading.

38. Pursuant to my ruling in principle, Mr Sherborne put forward a 44 page 101 paragraph document. In part it picks up the generic and Board knowledge and concealment items which have already been pleaded in the expanded claims (and of course the Houghton and Leslie claims). However, it also adds a very significant amount of material which is not currently in those pleadings. Those who have pleaded so far would want to adopt this document, so they have in effect to seek permission to amend to do so insofar as it adds that new material. The form of order that Mr Sherborne seeks is that the present and future claimants have permission to rely on the POCFI.

39. That is resisted by Mr Spearman on the same sort of proportionality grounds as I have referred to above. He submits that the extensions in the proposed generic pleading introduce an even greater degree of disproportionality than already exists, because it contains yet further incidents and matters which will require further investigation and work out of all proportion to the possible benefits that might accrue in the litigation. The same applies to the pleading in relation to the Board knowledge and concealment plea. He also has his point about pleadings against the Legal Department. Then there are points related to limitation and some points taken in relation to the unsatisfactory nature of the pleading.

40. Again it is necessary to separate out the two elements of the proposed POCFI - the generic claim and the Board knowledge and concealment claim. I shall take the generic claim first.

POCFI - the generic claim

41. Mr Sherborne provided a marked up version of his POCFI, purporting to show what was added in this respect by POCFI to the expanded version of the generic case (so far as it

was expanded) in the expanded pleading. Mr Spearman did not accept that what was marked was the entirety of what was new, and he drew attention to what he said were one or two new matters which were not marked as such, while suggesting that there were other areas in which Mr Sherborne had not marked up all the new bits successfully. I do not propose myself to carry out a line by line comparison and for these purposes I will consider what Mr Sherborne accepted was new, considering the odd bits that Mr Spearman said were new as well.

42. The new parts can be summarised as follows:

(a) Paragraphs 1 to 6 contain a summary of the nature and effect of the allegations made on both parts of the case. It contains some new allegations - the extension of the alleged hacking period to 2011 and a bit more particularisation of the senior corporate officials said to have knowledge of what was going on. Paragraph 6 summarises how the pleaded matters will be relied on at trial - as proof of wrongdoing, supporting inferences of the scale of the activities, vitiating limitation defences and giving rise to aggravated damages. Mr Spearman suggested that there was new material here. I do not consider it contains material quantities of new material.

(b) Paragraph 7 extends the period of alleged widespread unlawful activities to 2011. That introduces new material in that it extends the period said to be covered by the activities.

(c) Paragraph 8.1(b) pleads the existence of a database of information in Mr Nick Buckley's Palm Pilot. This has become apparent from disclosure given by the MPS to the claimants following a third-party disclosure order.

(d) Paragraph 8.3(a) pleads extensive use of private investigators by six desks from 1991 to 2011, relying "amongst other things" on private investigator invoices and contributor requests. The documents referred to have been disclosed on disclosure, but I expect that if this pleading is allowed it will lead to wider disclosure requests.

(e) Paragraph 8.3(b) adds the identities of a number of other private investigators to the names of those already identifed as having been used, and material from books of Mr Steve Whittamore who is said to have misused private information. This is pleaded as a result of disclosure of these matters.

(f) Paragraph 8.3(e)(i) and (ii) pleads specific examples of occasions on which unlawful information gathering was said to have taken place as demonstrating how systemic, extensive and routine the activities were. Sub-paragraph (iii) pleads that it went on until 2011, with names of those instructed. Sub-paragraph (iv) pleads the use of identified private investigators even after their convictions for unlawful

activities.

(g) Paragraph 8(f) brings in the knowledge of the Legal Department where legal complaints were made.

(h) Paragraph 8(g) adds a particular individual to the list of senior people who knew about the unlawful activities.

43. The main objection to this part of the pleading is that the claimants have enough of a generic case anyway and to add this material adds little of benefit. They have the benefit of my findings in *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), which are pleaded and admitted in all the present cases. The disproportionality argument is that it is not necessary or proportionate to pile further general allegation on further general allegation in the manner in which this pleading seeks to do. The claimants have enough already and the extra allegations add insufficient to their case to make it worthwhile pleading and meeting in detail.

44. Mr Sherborne's answer to this is that the legal landscape has changed. The present actions are not proceeding on the footing as to the unlawful source of the articles sued on, unlike the *Gulati* cases where there were admissions as to that in relation to practically all the articles. In relation to most articles there is a denial of unlawful information gathering, or a non-admission, so he has to prove his case in relation to each of them, in the face of many pleadings that there is "no proximate invoice". He therefore says he needs a greater level of "granularity" about the activity of private investigators, and a greater degree of specificity. The expanded generic case will help on that front, and it will also assist in forging links between unlawful information gathering by desks, or journalists, or both, and an individual claimant and his/her stories. It will, for example, assist in demonstrating the involvement of a department with which unlawful activity was not linked in *Gulati* (because of the admissions). The expanded generic pleading reflects the wider case which is supportive of the claims in individual cases. Furthermore, the more widely pleaded generic case is necessary to support his plea that the unlawful information gathering covered a much longer period than the few years covered by the *Gulati* cases and admissions.

45. By and large I accept Mr Sherborne's arguments in relation to this matter. I accept the justification for his pleading the case more widely. His case is served by extending the allegations to other private investigators, and some of this material arises out of disclosure and could not necessarily have been pleaded before. In some instances the pleading is catching up with the disclosure.

46. I do not, however, accept that it is necessary to illustrate the point with the specific example of the Milly Dowler case. It is just an example of something provable otherwise, and it adds nothing except an appreciable amount of time (though measured in hours, not days) to the trial and a degree of sensationalism. It is not suggested, and cannot reasonably be suggested, that this example (which is what it is pleaded as) is capable of finalising the proof of something that would otherwise be lacking a bit of proof. I therefore do not allow the pleading of paragraph 8.3(e)(i) of POCFI.

47. That view does not extend to the other "examples" of the "systematic, extensive and routine" use of private investigators indulging in unlawful activity. Those others are not isolated examples; they are more part of the overall picture. I rather suspect that much of the material could be relied on without pleading, but I have not heard argument on that.

48. Dealing a little more specifically with the matters referred to above at (a) to (f), so far as is necessary:

(a) The material in (a) is largely a summary, save for the extension to 2011, which I allow. There is no good reason for not allowing it, including the extension to 2011, and good reasons for allowing it in terms of clarification. Mr Spearman objected to some specific matters which he said were inadequately pleaded. I do not think that those matters bar this as a pleading. In some cases the criticism is a bit technical; the case is still comprehensible. If there are any pleading uncertainties they can be pursued through a request for further information.

(b) I have dealt with this.

(c) This material has emerged on disclosure. It is entirely fair to allow it to be pleaded.

(d) This has become a justifiable pleading for the reasons given by Mr Sherborne. This pleading of involvement goes a long way beyond the *Gulati* admissions. Whether any further disclosure is required, however, is a different matter. It should not be assumed that allowing in this material creates a gateway for a lot more disclosure. Proportionality will certainly come in again were such applications to be made.

(e) This is a proper addition to the case, for the reasons given above.

(f) This paragraph pleads out the greater degree of involvement of private investigators, which is relevant for the reasons given above. To that extent it is justified. The Miller Dowler pleading is not justified.

(g) This is dealt with separately.

(h) The material addition here is the addition of a further senior individual alleged to have knowledge of the use. It is material to the underlying allegation - the knowledge (and participation) of senior employees is capable of going to the extent of the use of illicit techniques in the organisation and the likelihood of their use in any individual case.

49. It follows that I allow the POCFI so far as it adds to the generic case, subject to the Legal Department point, and subject to the exclusion of the Milly Dowler paragraph.

POCFI - Board knowledge and concealment

50. In order to make their case for saying that the Legal Department and the Board knew of unlawful information gathering the claimants have hitherto relied on what they say were incidents where there was a background of unlawful information gathering and that the circumstances were such that the Legal Department, and thence the Board, would be likely to have been made aware of the matter and of the unlawful conduct in question. These are incidents which occurred before 2006/2007 when phone hacking came to light in the circumstances referred to in *Gulati*. Some of them are instances of claims being intimated followed by settlements of claims, or articles not being published, in circumstances in which it is said it is inevitable that the Legal Department and then the Board (or its members Mr Vickers and Mr Partington) would have acquired knowledge of the circumstances, and the end result was because the defendant did not want the unlawful information gathering to be exposed. Mr Leslie's amended Particulars of Claim has a limited pleading of this nature, but the expanded version has rather more instances.

51. A major part of the new parts of POCFI adds similar further instances. They are James Hewitt (holding very sensitive information about a sensitive story, said to have been acquired unlawfully), Prince Michael of Kent (settlement because it had been ascertained that information had been obtained unlawfully), Amanda Holden and Les Dennis (settlement because a fight risked exposure of unlawful information gathering techniques), and Garry Flitcroft (similar). The defendant objects to these (and indeed to the already pleaded matters) on the footing that they vastly increase the scope of the action because they would require as many mini-actions as there are instances relied on.

52. There are additional instances of what are said to be inquiries in which the Legal Department would have been involved, which incidents are said to have involved unlawful information gathering and which it is said would have attracted the attention of the Legal Department and then (in some cases) the Board. Thus it is said that the arrest of a Mr Kempster would, in the circumstances, have led to the involvement of the Legal Department and the Board because of the seriousness of the allegations made.

53. Then there is some supplementary material supporting an allegation already made about what the Legal Department and the Board would have known about in relation to a claim made by David Beckham and his wife; some specific pleading from a witness statement of Mr Brown (where the witness statement is already in issue); some conclusory remarks about concerns expressed by a Mr Montgomery; some follow-on remarks about matters already pleaded; some alleged reasons why the Board would want to suppress discovery of unlawful activity; and an express allegation of concealment by Mr Vickers (a Board member). Last there is an allegation of deliberate destruction of documents, with particulars given of the destruction.

54. The most significant point is the expansion of the case by the introduction of the new specific examples. There are already half a dozen or so examples of a similar nature. I accept that in their own separate ways they introduce the potential for a lot of extra work and evidence. For example, the case of James Hewitt starts with the allegation that:

> "From 1995 onwards, and particularly throughout 1998 and 1999, the *Daily Mirror* under the editorship of Piers Morgan, carried out a campaign of vilification against James Hewitt …"

and specific aspects of this campaign are highlighted. That sort of allegation would require extensive evidence to make it good, and would be capable of attracting extensive material in rebuttal. The trial of the allegations in relation to Mr Hewitt, as pleaded, would indeed require a mini-trial. That would be disproportionate and probably unnecessary anyway for the central point which the claimants seek to make. The key allegations are that a story or stories were published on the basis of unlawfully gathered material, the lawyers knew about it, and the board is likely to have discovered that as a result. That is a much narrower field of inquiry. I shall postpone for the moment whether this additional allegation is capable of adding anything proportionately worthwhile to the picture which is pleaded anyway.

55. The Prince Michael of Kent event does not present the same vice. The allegation of misuse is relatively self-contained. What is added in this case is an allegation that since the case settled with an apology, and was so sensitive, the Legal Department and the Board are likely to have known about it and about the underlying (alleged) unlawful

conduct. That requires a significant inquiry but not as extensive as that in the pleaded case of Mr Hewitt.

56. The Amanda Holden/Les Dennis instance refers to a story, a protest, an apology from the newspaper and a subsequent admission that the story was obtained by voicemail interception (as pleaded). There is then an allegation that it was settled on the basis that the Legal Department knew about the unlawfulness. That involves a relatively limited inquiry.

57. Mr Flitcroft's case is more complicated. It involves an injunction application by Mr Flitcroft in 2001 (which ultimately failed) and the publication of a story in 2002, a privacy claim in 2013 based on phone hacking and an attempt by MGN to strike it out on the basis that it could demonstrate that the story was obtained by normal investigative journalism. That application failed and the case subsequently settled on the basis of the payment of compensation. It is said that Mr Partington of the claimant's Legal Department had pressed during the injunction proceedings for Mr Flitcroft's phone records, and it is now said that he did that because (in essence) he wanted to cover up the fact that he already had them and knew they had been unlawfully obtained. There is said to be a private investigator invoice which is evidence of the unlawful conduct. The claimants say that the evidence in support of the striking out application can now be seen to be carefully crafted to make a case without disclosing all relevant information, and the settlement was brought about by the Legal Department to prevent it coming to light that there was an underpinning of unlawful information gathering. There is no express mention of the Board or Mr Vickers in this instance.

58. This is a serious allegation, because it involves an allegation of an attempt to mask the fact that information had been unlawfully obtained, and then an attempt to remove the risk of exposure in the phone hacking litigation, and then a suppression of risk of exposure by settling the case. It will not, as Mr Spearman suggested, involve trying the whole Flitcroft case which has now been settled but it will nonetheless involve a significant inquiry which will require significant disclosure and take up hours of trial time.

59. Thus the POCFI seeks to introduce four more specific claim-related incidents. The expanded claim already contains another five. Some of the incidents already appearing in the expanded claim seem to me to be capable of involving extensive inquiries and a lot of trial time. I acknowledge that a case such as that mounted by the claimants will depend on putting forward a number of incidents which they say must have come to the attention of the board or other senior personnel, and using them as bricks to make a significant wall. In that context the sort of incidents which I am currently considering are a

legitimate type of brick. However, I do not think it right that the claimants should be able to find brick after brick of this kind and use them all. A common sense judgment needs to be made in the light of what proportionality requires. If the claimants make their case on a few, they do not need the rest. If they cannot make their case on their best few, the addition of more is unlikely to improve matters.

60. I therefore consider that in this part of the case proportionality and proper case management requires a trimming of the case that the court should be invited to try. I shall allow the claimants to select what they regard to be their best five instances and the remainder will not be tried or allowed in pleadings. However, I accept that it would be unfair to require the claimants to make a judgment on that until after disclosure, so disclosure will be given in relation to all of them. After that the claimants will have to elect which five instances will be taken to trial. In this context there is a special point to be made about the Hewitt matter. As I have observed above, this pleading starts with a generalised pleading about a compaign mounted against Mr Hewitt. Disclosure does not need to be given in relation to that allegation. Disclosure should be confined to the documents relating to the publication which lies at the heart of the allegation and allied matters.

61. It logically follows from this that the class of this kind of evidence should be considered as closed. It is unlikely that amendments will be allowed to add or substitute any further allegations of this kind. The claimants' election should take place within 6 weeks of disclosure being given.

62. I can deal more briefly with the other additions to the expanded claim.

(a) Paragraph 40 contains an added reference to a recently disclosed invoice in support of the case. It is a proper pleading and should be allowed in.
(b) Paragraph 56.11 contains a reference to evidential material which has been disclosed by the defendant and which is said to support part of the case relating to Abbie Gibson and the Beckhams which is said to support the allegation that the newspaper intercepted the voicemail messages of the former Beckham nanny. It is right that the claimants should plead this evidential point if it has become apparent from the other side's disclosure and if it will be relied on by the claimants.
(c) The same is true, in a different context, of paragraph 69.
(d) Paragraph 80.6 contains an observation as to the correctness of a concern expressed by a former director, together with cross-references to other non-new material already pleaded. This should be allowed.
(e) Paragraph 92(f) pleads deliberate destruction of documents as part of the

concealment plea. This is a relevant (and serious) allegation, and ought to be allowed unless it is going to involve a disproportionate amount of effort. I do not think it will and I shall allow it.

(f) Paragraph 92(g) pleads that the defendant tactically sought to avoid generic disclosure which would generate the true extent of wrongdoing. This is a relevant allegation and I shall allow it as an amendment. It may in many ways merely be a matter of comment on existing known facts. I am highly unlikely to allow it to be a doorway to extensive disclosure applications which would be disproportionate.

63. Paragraph 94 adds cross-references back to the specific allegations of deliberately settling claims to avoid exposure. The pleading may stand, though in due course some of the cross-referenced matters may not be allowed to be pursued if they are not within the five incidents to which the claimants will be confined.

64. Paragraph 95 refers back to the already pleaded matter of Mr Brown and his claim, which is of itself not a new matter. It refers to the suppressive motivation of settling with him. This is not really new material, and it is relevant. I allow this addition.

65. Paragraph 96 identifies other motives for wishing to conceal knowledge of phone hacking. It essentially pleads that the activities were highly profitable insofar as the resulting scoops increased sales, to the benefit of the executive shareholders. It strikes me that this could probably have been alleged without a specific pleading, and it is pleading the obvious. I shall allow it.

66. Paragraph 98 pleads a report by Mr Vickers in which there is said to have been concealment of the fact that Mr Vickers (allegedly) discovered widespread use of private investigators but concealed it, and that company policy was changed to avoid detection of wrongdoing. This allegation is material and prima facie ought to be allowed, but it is also said to be "Pending further disclosure". That leads to fear that it will generate an application for extensive further disclosure. I have misgivings about that because I have concerns about proportionality. I think the correct course would be to allow this as (in effect) an amendment and control matters thereafter by a close scrutiny of disclosure.

67. Paragraph 100 is a repeated allegation of destruction or non-preservation of documents. This is already in play in this litigation and this paragraph does little more than flag up submissions that will be made, which will be of a similar nature to those made in the *Gulati* trial though with more documents being the subject of the complaint. I shall allow this "amendment".

68. It follows that I shall allow the POCFI to stand in its current form, with the above caveats and subject to what follows in relation to pleading about the Legal Department. I do, of course, bear proportionality in mind. I do not consider the existing expanded pleadings to be disproportionate under this head. Insofar as existing claimants wish to adopt it I shall allow them to do so as amendments to their existing cases.

69. It is, however, important that there should not be a further burgeoning uncontrolled expansion of the matters covered by POCFI by later pleadings which add to the matters in it in the individual Particulars of Claim, which future claimants would otherwise be able to do as a de novo pleading without amending anything. I shall therefore direct that claimants who hereafter plead their Particulars of Claim shall not be allowed to plead additional material going to matters in the POCFI without the consent of the defendant or an order of the court.

70. I record that Mr Sherborne invited me to bear in mind a public interest in these matters. This is a piece of civil litigation, not a public inquiry, so that factor has little or no part to play. I have not taken it into consideration.

The Legal Department point

71. This point started as a complaint about the pleading in the Leslie and Houghton original pleadings (and in another case since settled) but has broadened into being part of the debate about the POCFI. The application was to strike out the words "and the Legal Department" where they appeared in four places in the Leslie/Houghton pleading. The first comes under particulars of matters relied on as aggravating the damage sustained by the claimant and it pleads:

> "The Claimant will refer to the fact that both the MGN/TMG Board ("the Board") and the Legal Department were aware of the habitual or widespread use [of unlawful information gathering techniques],
>
> and complains that the Board and Legal Department took steps to conceal the activities, gave false statements to the Leveson Inquiry, and could have stopped the practices.

72. The second reference is one which says that the editor and the Legal Department knew that a particular story had been obtained by voicemail interception, as part of the case of knowledge built up from what they must have discovered from various incidents. The third is in the context of pleading the investigation, verification and settling of the claim of Mr Brown's employment claim "by MGN and its Legal Department", (Mr Brown had provided a witness statement referring to widespread phone hacking and use of private investigators), "thereby demonstrating the Board and its Legal Department" were well aware of these illegal activities being habitual or widespread". It seems that it is only the second of those references which is sought to be struck out.

73. The fourth is a conclusory paragraph after the pleading of particulars of Board and Legal department knowledge (para 26(9)):

> "(D) In the premises, the discovery that the Board and the Legal Department must have been aware of these illegal activities …"

74. The stated basis for this striking out (in the application notice) is that the legal advisers were at all times subject to confidentiality and privilege obligations, and the knowledge gained from their role was and remains the subject of legal professional privilege. The claimants were not entitled to seek aggravated damages on the basis that the legal advisers should have broken their obligations to maintain privilege. Accordingly those parts of the claim should be struck out as disclosing no reasonable grounds for bringing a claim and/or as an abuse of process and likely to obstruct the just and proportionate disposal of these proceedings.

75. The scope of Mr Spearman's points about the Legal Department was extended in the light of the POCFI because that contained a greater number of references to the Legal Department albeit largely in the same vein. I can summarise the relevant references as follows:

> (i) Paragraph 4, part of the summary, refers to "Senior Executives" who it is alleged knew of unlawful activities since 2002, and they included Mr Marcus Partington, Head of the Legal Department who worked closely with and reported directly to Mr Vickers, the Group Legal Secretary and a Board member
>
> (ii) Paragraph 6.4 (part of the summary) pleads knowledge of Senior Executives "within the Board and/or Legal Department" who took no steps to prevent, and who concealed, unlawful activities as being a matter which aggravates damages.

(iii) Paragraph 8.3 pleads various factors as demonstrating the widespread use of private investigators to carry on unlawful activities, and sub-paragraph (e)(iv) refers to "The fact that MGN chose to use private investigators even though (as MGN and in particular the Legal Department, was aware) these investigators had been convicted for illegally obtaining private information". Sub-paragraph (f) refers to the fact that some instructions to investigators were for stories which became the subject of legal complaints, "and therefore their existence was known to the Legal Department as referred to herein below."

(iv) In relation to the story about James Hewitt, paragraph 14 pleads that given the highly sensitive nature of the story "the MGN Legal Department (including Mr Partington and the Group Legal Director and Board Member Mr Vickers) was or must have been made aware of the existence or contents of" certain bank records. Paragraph 15 pleads that a member of the Legal Department accompanied Mr Piers Morgan to a police interview about certain aspects of the story.

(v) In relation to the Prince Michael of Kent story, it is pleaded (paragraph 19) that the Prince made a claim and the Legal Department sought confirmation from a journalist as to how the Prince's banking information had been obtained, and shortly afterwards the claim settled with an apology. Paragraph 20 pleads that "the MGN Legal Department and the Board (which included Mr Partington and Mr Vickers) were or must have been aware that private financial information had been obtained by a private investigator and as a result the claim could not be defended."

(vi) Paragraph 22 contains an averment that the context of the seriousness of the arrest of Mr Kempster, a senior journalist meant that the Legal Department and the Board would have investigated payments by Mr Kempster to a private investigator said to be a known unlawful information gatherer.

(vii) Paragraph 25 pleads that a legal complaint made by Sir Paul McCartney about a voicemail left for this then wife Heather Mills was highly senstive and "the Legal Department (which included Mr Partington and Mr Vickers) was or must have been aware of the existence or contents of this voicemail message and the fact that it had been obtained unlawfully".

(viii) Paragraphs 26 to 29 plead that MGN investigated and settled a claim Ms Amanda Dennis and Mr Les Dennis (with an apology) and that the Legal Department investigated and settled the claim because it was aware of the unlawful source of the story. There is no reference to the Board here.

(ix) Pargraphs 30 to 38 plead a more elaborate story about a claim by Mr

Garry Flitcroft which settled and again pleads that in that context Mr Partington of the Legal Department knew that the relevant story arose from unlawful information gathering. There is no reference to the Board here.

(x) Paragraph 40 pleads that the Legal Department "must have been aware" of the true unlawful source of a story involving Sven Goren Erikssn and Ulrika Jonsson because of its sensitivity. Paragraph 49 makes a similar claim in relation to story a about Mr Rio Ferdinand. Paragraphs 50 and 51 do the same in relation to a story about Ms Michelle Collins, this time partly on the basis of the Legal Department's participation in a particular telephone call.

(xi) Paragraphs 53 and 54 plead the notification to the Board and the Legal Department of two significant investigations by the Metropolitan Police and the ICO, and the likelihood of certain aspects being notified to and considered by the Board and the Legal Department during which they would have discovered unlawful activities.

(xii) Paragraph 56 and its sub-paragraphs contain similar allegations arising of a claim by David Beckham and his wife. Paragraph 56.9 pleads:

> "Further, given its size and potential importance, the Claimants will contend that the complaint from the Beckhams' solicitors to MGN in July 2005 was investigated and its settlement (which included the payment of a substantial sum by way of compensation) was known about and approved of by the Legal Department (and particularly the Head of the Legal Department at the time, Marcus Partington) as well as the Board, at least Paul Vickers, who (as he confirmed in his statement to the Leveson Enquiry dated 13 October 2011) held the authority to settle such legal claims and operated a "no surprises rule" with Mr Partington in relation to legal complaints."

76. Paragraph 56.10 goes on to make further allegations about what Mr Partington and Mr Vickers must have been aware of as to the source of the relevant story. Paragraph 56.11 relies on investigations by the Legal Department, which it is said discovered or already knew that MGN could not defend the claim because the story had been obtained by voicemail interception and needed to be settled.

77. Paragraph 57 pleads that the conclusions of a report as to unlawful commissioning and obtaining of private information "was or must have been notified to and discussed by MGN's Legal Department and the Board."

78. Paragraph 61 pleads that the court will be invited to infer that certain statements made by a journalist as to phone hacking being "widespread" at tabloid newspapers, and the use of those unlawful activities, was discussed at the time with the Legal Department (including Marcus Partington) and with members of the Board (including Mr Vickers). Paragraph 62 refers to a meeting attended by inter-alia Mr Partington after the conviction of Mr Goodman and Mr Mulcaire.

79. Paragraphs 68 to 72 refer to the likely involvement of the Legal Department and the Board following allegations made by a Mr Brown in the course of wrongful dismissal proceedings as to the use of unlawful information gathering techniques. It avers that inter alia Mr Partington and Mr Vickers were aware of that evidence and knew it was correct and that it would be highly damaging if it became public. Paragraph 69 refers to markings on a witness statement of Mr Brown, which markings were made on a copy of Mr Brown's witness statement on which Mr Partington had made a note (subsequently held to be privileged) which are said to demonstrate particular concern about his evidence. Paragraph 70 pleads that the court will be invited to draw the conclusion that MGN settled Mr Brown's claim because "Mr Partington and/or Mr Vickers" knew that Mr Brown's evidence about widespread unlawful activity was true and therefore needed to be concealed. Paragraph 72 pleads that in the circumstances set out in the preceding paragraphs "the Legal Department and the Board were well aware by this time" of the widespread or habitual use of unlawful activities at MGN.

80. Paragraph 89 pleads:

> "In further support of the contention that Mr Partington (and Mr Vickers, to whom he reported all legal complaints or potential risks under their "no surprises rule") was or must have been aware of the widespread use of… unlawful activities at the time they were taking place…"

the claimants would rely on certain admissions made by the Chairman of the Board in May 2015.

81. Paragraph 91 sets out a conclusion:

> "91. In the circumstances, the Claimants will contend for the reasons set out above, as well as the fact that MGN was incurring and authorising at senior levels enormous expenditure across a lengthy period of time for the services of numerous private investigators, that at the very least:
>
> (a) members of the Legal Department, including Marcus Partington and Paul Mottram, and
>
> (b) members of the Board and Executive Committee Members, Sly Bailey and Paul Vickers (who oversaw the Legal Department and to whom Mr Partington directly reported and with whom he operated a "no surprises rule")
>
> knew or must have been aware of the habitual and widespread use of these unlawful information-gathering activities at the time they were being carried out, as well as taking no steps to prevent them continuing."

82. Paragraph 92 pleads that "the Legal Department and/or Board" knew of the activities and failed to stop them and instead sought to conceal the wrongdoing including by settling claims. There is then a repetition of some of the things that "the Legal Department and/or the Board" knew and failed to stop.

83. Mr Spearman had various complaints about what is pleaded about the Legal Department. His main one was rooted in privilege. He took me to various authorities containing uncontroversial provisions about the sanctity of privilege and submitted, in summary, that allegations about the knowledge of the Legal Department about unlawful information gathering was an attempt to rely on privileged communications, and indeed an investigation into privileged matters which was an impermissible and extreme incursion into a forbidden area. Thus, for example, in relation to the Prince Michael of Kent matter, there was an attempt to infer the content of privileged communications. The same was true of all the other instances. By the same token, communications between the Legal Department and the Board are privileged and cannot be the subject of investigation and inference. No adverse inference can be drawn from a failure to waive privilege.

84. Mr Spearman is basically right about the privileged nature of the communications and much of the activities of the Legal Department. If the Legal Department was receiving communications in the course of gathering information, and then passing on advice to the Board, then those communications are likely to be privileged (subject to the application of the "iniquity principle"). However, it does not follow that the claimants cannot seek to rely on the presence of knowledge in the Legal Department and the Board, where relevant, as a fact which it seeks to prove in the case. The law of privilege protects communications. It does not, as a doctrine, protect an inquiry as to what a solicitor knows at any particular point of time. The question of what a solicitor knows is not, per se, a no-go area in litigation. By and large privilege will create a formidable obstacle to trying to prove it, because the communications (and resulting documents) will be privileged and the inquiring party will not be able to penetrate that privilege to get proof. However, if the knowledge can be proved another way then I cannot see a reason in principle why the inquiring party should not be able to seek to do that. In the present case the claimants seek to draw an inference from the likelihood of the involvement of the Legal Department and the likelihood of its passing knowledge on to the Board. Whether it can succeed on that basis will be a matter for trial. There may have to be further argument, in the proper trial context, as to how privilege operates. It may well not be an easy road for the claimants. It may be that fuller argument in the context of actual evidence will throw up additional difficulties (or conceivably make the route easier) but at this stage it is not possible to stop the inquiry on the basis that it is bound to fail (which is not how Mr Spearman actually put it) or on the basis that the inquiry is impermissibly going into privileged territory (which is not wholly accurate).

85. Mr Sherborne sought to say that the privilege argument could be met by the "iniquity principle", which can be summarised by saying:

> " … that if a person consults a solicitor in the furtherance of a criminal purpose then, whether or not the solicitor knowingly assisted in the furtherance of such purpose, the communications between the client (or his agent) and the solicitor do not attract legal professional privilege." (per Longmore LJ in *Kuwait Airways Corporation v Iraqi Airways Company (No 6)* [2005] 1 WLR 2734)

86. Curiously, Mr Spearman seemed keen that I should resolve that point (in favour of his client) at the hearing before me. That is simply inappropriate. The application of the iniquity principle is not straightforward and, at least in the present case, would require some evidence (I am not sure there was technically any evidence at all) and a proper analysis of exactly what the iniquity was in each instance and whether it fell within the principle. As I understand it, it is unlikely to be sufficient that the solicitor was advising in a matter said historically to involve a fraud or illegal conduct. Were it otherwise the

principle would apply in most cases where fraud was alleged, and would in effect prevent the solicitor acting confidentially at all. If the principle is to be invoked the acts said to give rise to it must be clearly identified, and they must be acts which amount to a furtherance of the iniquity, not just advising about historic aspects of it. Nobody even began to embark on that exercise. So the iniquity principle, if it arises at all, must await another day. I would add that if Mr Sherborne were right about its application in the present matter it would enable him to get disclosure of all sorts of solicitor/client documents, and despite his enthusiasm for wide-ranging disclosure applications he has never sought those.

87. One particular privilege matter needs to be dealt with separately. Part of the claimants' case involves a Mr Brown, a journalist who was dismissed by the Mirror Group. He brought wrongful dismissal proceedings and in the course of that provided a witness statement in which he referred to prevalent unlawful information gathering activities. Mr Partington of the Legal Department made a note on a copy of that witness statement, and there was a dispute as to whether the claimants were entitled to see it. The defendant claimed privilege. Norris J ruled in favour of the defendant. The claimants then made an application to be able to see the original, accepting that the note would be obscured from view. I acceded to that application and made an order accordingly. The claimants' solicitors then inspected it and saw that on it were underlinings and highlightings that had not been obscured. At POCFI paragraph 69 the claimants have pleaded that the markings demonstrate particular areas of concern of the marker which are of relevance to the claimants' case as to what the Legal Department knew.

88. Mr Spearman sought to say that that reliance by the claimants on that material should not be allowed. He said the highlightings and markings were material which gave a clue to, or indicated the tenor of, legal advice, and so "the document was privileged" - *Imerman v Tchenguiz* [2009] EWHC 2902 (QB) at para 16. The claimants were seeking to make another wrongful incursion into privilege. The order that I made was "without prejudice to claims for privilege in respect of amendments or markings upon it" (see my judgment on the inspection application), and since the markings are privileged the claimants should not be allowed to plead or rely on them.

89. I reject this submission. I accept for these purposes that the markings would be capable of being privileged. However, if they once were they have now lost that character. When the claimants made their application for inspection of the document itself that inspection was not resisted on the footing that the document itself was privileged (a point which Mr Spearman now seems to take). It was resisted on the footing that there was privileged material on it other than Mr Partington's note. That was the first time that that possibility had been mentioned as far as I am aware. The additional material does not

seem to have been the subject of any debate before Norris J, and he indicated in his judgment that:

> "45. Accordingly, all that needs to be done is
>
> (a) for MGM forthwith to provide the lead solicitor for the Claimants with a copy of the Brown Statement which bears the Partington Note (but with the Partington Note itself redacted in such a way as to indicate its precise location in the document); …"

So he was obviously unaware that there was any further dispute about the contents of the document, let alone a dispute about inspection of the document as a whole.

90. Mr Spearman now relies on a remark in my judgment of 23rd May 2019 to the effect that I would order inspection "… without prejudice to claims for privilege in respect of amendments or markings upon it…" (paragraph 9). He says that that means that the privilege in markings is preserved notwithstanding the inspection that then occurred, as if my order protected privileged material even though the document was inspected with that material present.

91. He is wrong to do so. If the markings ever were privileged, that privilege must now have been lost by the waiver resulting from inspection. His quotation from my judgment is unduly selective, and ignores its context which makes it quite clear that the true situation is the opposite from that which he propounds. In paragraph 6 I observed:

> "6. I accept that if there is other privileged material on those documents, then they have not lost their privilege by reason of the matter not being debated before Mr Justice Norris. He was considering something entirely different. But those privileged parts may be obscured by the defendant before inspection is permitted."

And then in paragraph 8:

> "8. I shall therefore order inspection of the document which ought to be available for inspection, but at the same time making it quite clear that any privileged material may be obscured in some

> appropriate way before it is produced for inspection, and of course the claimants must make no attempt to penetrate whatever obscuring mechanism is adopted. The inspection may even have to be supervised for these purposes." (The emphasis is mine for the purposes of this judgment).

In those circumstances it is quite wrong to present my remarks in paragraph 9 as being intended somehow to preserve privilege beyond a disclosure on inspection. If the defendant had wished to maintain privilege for the markings on which it now relies, it was open to the defendant to devise some sort of obscuring mechanism prior to inspection. It did not do so. It is now too late to assert privilege. Privilege must have been waived as a result of the inspection. Accordingly, this particular attack on the POCFI fails.

92. Before turning to Mr Spearman's last point, which is more substantial than his argument suggested, I get another couple of other points out of the way.

93. Mr Spearman sought to say that the POCFI on knowledge and concealment was not necessary to rebut a limitation defence because limitation has been pleaded only in relation to the publication of the article, and not to any underlying activities of phone hacking or otherwise. Since the publication (said in each case to be of private information) was known to the relevant claimant at the time, the claimant knew all facts necessary to complete the cause of action so there could be no relevant concealment. Board knowledge was therefore not necessary appropriate or relevant to rebut that limitation defence. No limitation defence was run in relation to any other activity, so concealment was not necessary to rebut it.

94. Whether this argument about limitation is right or not (and Mr Sherborne claimed to have an answer to it) is not something that can or should be resolved on a CMC of the nature of that conducted before me. This is capable of being a substantial point requiring a fuller analysis of the cause or causes of action than occurred before me. It occupied only a small part of significant submissions which dwelt more heavily on other matters. It would not be appropriate to rule on it in this judgment and I shall not do so. It is almost certainly a matter for trial, not for a pre-trial determination.

95. Mr Spearman also had some detailed points about want of particularisation and poor pleading. He has, to a degree, a point about the former, but the proper way to deal with that is not on a detailed paragraph by paragraph consideration at this stage but to leave that to a request for further information if the defendant really feels it needs to lengthen the pleadings in this litigation.

96. That brings me to the last point or gathering of points raised by Mr Spearman. It can be summarised under the description that the pleading of knowledge of the Legal

Department does not add anything material to the case, and certainly nothing which justifies its pleading and investigation in proportionality terms.

97. In order to consider this point it is necessary to consider the separate points within it and the issues to which the knowledge is said to go. They seem to be the following:

(a) Aggravated damages. Paragraph 6.4 pleads its knowledge and its failure to take steps to prevent the activities and to conceal them, as giving rise to aggravated damages. Mr Spearman submitted that it was implausible that the knowledge of the Legal Department would add anything material to such damages if knowledge was proved on the part of other senior figures, and the claim was flawed insofar as it was predicated on some sort of duty on the part of the Legal Department to do anything about it. I must say that there seems much to be said for Mr Spearman's case on this point. If there is an aggravating factor it is likely to be the persistence of the defendant as a whole in the activities, denials and concealment, which (if it occurred) is likely to have been at a senior level anyway. It is not particularly plausible that knowledge of the Legal Department would add anything to such claims as would have to exist anyway, and Mr Sherborne came close to acknowledging that at the hearing on 19th October 2017 when I allowed Houghton and Leslie to plead the Board knowledge plea. However, having reviewed the transcript it seems to me that he did not completely concede it. I suppose that if any claimant chooses to plead some mechanism under which the Legal Department knowledge adds something to his or her aggravated damages claim I could not quite strike it out but it is not particularly plausible. Neither is the claim that the Legal Department failed to stop the activities something with any immediately perceivable force. It is not clear what steps the Legal Department (which is not the Board) would have had to stop it in the sense referred to in the pleading. However, in the light of the fact that (as appears below) references to the Legal Department will remain in the pleading in any event I shall not take the otherwise prima facie tempting course of striking it out in relation to this allegation.

(b) Part of the pattern of widespread and systemic use of unlawfully gathered information, which is part of the claimants' generic case. The claimants seek to rely on the fact that private investigators were used even after some of them have been convicted of unlawful activity (paragraph 8.3(e)(4)), "as MGN, and in particular its Legal Department, were aware", and that some payments or instructions to private investigators were related to legal complaints "and therefore their existence was known to the Legal Department". Again, I am not sure that this allegation against the Legal Department adds very much to the case of widespread use by others in the company, and it is little more than an allegation of it being part of the overall pattern, though I did not receive detailed argument on the point by either party. However, once again, since the allegations about the Legal Department survive on another basis, I shall not strike this out. I do not think it will add anything material to the length or conduct of the trial.

> (c) There are a lot of references under the heading "B. Examples of unlawful activities and the knowledge of "the Legal Department and/or the Board". These references are of much more potential significance. They are mainly the pleaded matters described above in the POCFI from paragraph 10 onwards involving the knowledge of the Legal Departments of claims or disputes which would (it is said) have thrown up knowledge and use of unlawful informatoin gathering techniques. When the comparable amendments were orginally introduced into the Houghton and Leslie pleadings Mr Sherborne confirmed in argument that under this head the significance of knowledge in the Legal Department is not so much the knowledge which was acquired or resided there as such, but that it was a route to bringing home knowledge to the Board. He accepted that going "sideways" to the Legal Department alone did not advance his case. It is apparent to me that Board knowledge is significant to the generic case and to concealment, aggravated damages and limitation. It is a plausible and relevant allegation (where made) that some matters were so significant, whether matters of publication or matters of settlement, that the Board, or a Board member (sometimes identified as Mr Vickers) are likely to have become involved at the behest of the Legal Department and are likely to have been briefed on the alleged dangers of unlawful information gathering being exposed. Hence the allegation of the "no surprises" rule that operated between Mr Partington of the Legal Department and Mr Vickers, a Board member. I find that that is a justification for pleading the knowledge of the Legal Department.

98. There is, however, a bit of a problem over the manner in which that last point is pleaded. The references to the knowledge of the Legal Department are not always couched in those terms. There are various ways in which it is pleaded, sometimes with a reference to the Board and sometimes not. Sometimes there is an "and/or" reference. For example, in paragraph 92(a) it is pleaded in support of an allegation of concealment of wrongdoing by MGN) that:

> "The Legal Department and/or the Board knew that these unlawful activities were habitual and widespread and not only failed to stop them but deliberately avoided taking proper steps to investigate the full extent of such activities."

99. I am not at all satisfied that that form of pleading (which is repeated elsewhere) is satisfactory in this context, particularly in the light of a previous averment in argument by Mr Santos, on behalf of the claimants, that "serious misconduct" was not alleged against any Legal Department member. There is also a problem about references to the Legal Department settling claims. For example:

> "92(c) Further, the Legal Department and/or Board deliberately settled David Brown's Employment Tribunal proceedings in 2007 … [to avoid publicity for his allegations]".

100. The allegation that the Legal Department somehow acted off its own bat and perhaps without instructions is strange, unless serious misconduct is indeed alleged against an individual in the Legal Department who would do such a thing. If no serious misconduct is alleged, then the Legal Department must have acted on someone's instructions. If that is correct then it is not right to say the Legal Department settled the claim. The person (or body) giving the instructions settled it, even if via the Legal Department. The allegation of the "no surprises" rule as between Mr Partington and Mr Vickers may be the explanation for the references, but the more casual way in which the matter is pleaded in specific instances needs to be dealt with and not left as it is.

101. This sort of thing needs clearing up, and the claimants must clarify in these sort of instances (which occur throughout the latter part of the proposed pleading) exactly what they are alleging against the Legal Department - whether it is a channel for bringing home acts and knowledge to the Board (or someone else) or some other allegation is made against the Legal Department per se. I do not myself propose to identify all the points at which there is a problem of this nature, and the claimants will have to get their pleading into shape without that detailed indication. I am sure they will have no difficulty in identifying the points at which their case requires clarification in the light of the above.

Conclusion

102. All that means that the POCFI (or Generic Particulars of Claim, as it calls itself) can be deployed subject to the tidying up and clarification to which I have referred. To the extent that any existing claimant wishes to adopt it, he or she has such implicit permissions to amend as are necessary to enable them to do so. I do not intend that an order should be made in each set of proceedings where that adoption occurs.