



Neutral Citation Number: [2021] EWHC 771 (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  
Rolls Building, 7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Date: 30/03/2021

**Before :**

**MR JUSTICE MANN**

**Between :**

**Various Claimants**  
**- and -**  
**MGN Limited**

**Claimants**

**Defendant**

s

**David Sherborne and Julian Santos** (instructed by **Shoosmiths LLP**) for the **Claimants**  
**Richard Munden and Ben Gallop** (instructed by **RPC LLP**) for the **Defendant**

Hearing dates: 25<sup>th</sup> February 2021

**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

## **Mr Justice Mann :**

### **Introduction**

1. 29 claimants in this litigation, all represented by Shoosmiths, seek to amend their Particulars of Claim to add new material. Some (but not all) of those amendments have been contested by the defendant. That contest has led to a number of issues, some generic, some case-specific (though giving rise to common underlying themes). To deal with all 29 applications individually would be very time-consuming indeed, so at my direction the parties chose eight of the cases (plus a couple of “spares” in case there was time to deal with them, which was always pretty optimistic) in the hope that they could be dealt with in more limited time and that the results could then be applied by the parties to the remaining cases in order to produce an overall outcome. As it turned out (and predictably, bearing in mind the number of issues raised) the argument on various points had to be somewhat curtailed because of the pressure of time, but I am satisfied that the situation was fair to both parties.
2. Mr David Sherborne argued the applications for the claimants; Mr Munden argued them for the defendant.

### **Background matters**

3. Underpinning a large part of the debate in this matter is the way the case has developed in terms of disclosure. The trial in this litigation in 2015 took place on the basis of disclosure which, in comparison with what has happened since, was relatively limited (though it seemed very significant at the time). Since then, as a result of a large number of applications, more and more disclosure has been provided, particularly in the area of private investigator (PI) material (invoices and contribution requests), which has enabled subsequent claimants to plead more and more extensively, in terms of the actual articles relied on, the scope of underlying allegedly unlawful activity and the underlying facts said to demonstrate unlawful information gathering. It needs to be borne in mind that because of the nature of the activity, and the probable destruction of contemporaneous documents, the cases of the claimants are built on a comprehensive jigsaw of material disclosed by the defendant from time to time. The widening scope of the disclosure (both generic and case-specific) not only enables more recent claimants to plead a wider and more particularised claim; it also (it is said) reveals new material to those who have already pleaded, leading to them seeking to amend to introduce that new material. That is what has happened in the matters before me.

## **Generic issues**

4. Certain points which arise across the board on these amendments have been treated as generic issues (for the purposes of these applications) on which my ruling is invited so that it can be applied to all instances covered by the issue. In the main I received generalised (generic) submissions, not geared to particular cases, which is a little unusual, but since the parties seem to have agreed on the approach, and since I believe generic rulings will be useful in that manner I shall deal with the points in that way. I shall do so before turning to more case-specific matters.

## **Pleading invoices and contribution requests in relation to associates outside the period of association**

5. The way the defendant describes this issue (encapsulated in the heading to this section) disguises the complexity involved in dealing with it. Each claimant has pleaded a number of associates (people with whom the claimant had a close relationship of some sort and frequent telephone contact – family, friends, agents etc) who it is said were trawled for details about the life of the claimant in question. The main pleaded case is that the claimant and associate each left messages for each other on their respective mobile phones, but that is not the only pleaded point. In many, but not all, cases there is a period of association which can be reasonably well defined - a period during which the associate was an agent of the claimant, or (often) a period during which claimant and associate were in a relationship.
6. Some of the material pleaded by the claimant as demonstrating activity in relation to the associate is in the form of invoices rendered by PIs, or contribution requests made requesting PI services, relating to the associates. Those materials are part of the jigsaw which the claimants say they have to put together to make their respective cases on covert and concealed unlawful information gathering. This part of the application relates to that material. It has come from generic disclosure given over time and, so far as concerns this application, since the claimants pleaded their respective cases.
7. This part of the application concerns that material. The claimants seem to plead it as material going to their cases on unlawful information gathering. It will be said that that material demonstrates or evidences that sort of activity in relation to the associate which is ultimately used to infringe the claimant's privacy rights. The claimants seek to add a number of hitherto unpleaded invoices or requests to their existing claims. The point that arises is a timing one. Where there is a defined period of association, or the period can be defined by extrinsic evidence, and the dates of invoices or

requests fall within that period, the defendant does not object to the amendment (at least under this head). Examples would be the period of a relationship, or the period during which the associate was an agent of the claimant. However, they take a point where that material relates to periods before or after a defined period of association. The defendant says that since that material is outside that period it cannot, by definition, be material marking an infringement of the claimant's privacy rights, so it should not be pleaded and the amendments to introduce it should not be allowed.

8. The response of the claimants is that all the material is properly pleaded. So far as material before the period of association is concerned it demonstrates that the claimant was interested in the associate at that time, and therefore supports an inference that the associate was trawled during the subsequent period of association. It is also capable of demonstrating that the defendant had had a prior opportunity to get material which could be deployed during the period of association - for example, a date of birth which tends to be useful in guessing PIN numbers. Furthermore, this material demonstrates a pattern of unlawful behaviour which again supports an inference that the claimant and his/her associates were part of that pattern. So far as post-period of association material is concerned, the cesser of a period of association does not necessarily mean a cesser of contact between the individuals concerned, so material covering this period should be allowed to be pleaded as well. Furthermore, targeting an associate in a later period is capable of supporting an inference that that associate was of interest and targeted in an earlier period. In support of their case the claimants pointed to an earlier judgment of mine, on 14<sup>th</sup> July 2016, in which I am said to have required disclosure of pre-period call data.
9. Mr Munden for the defendant said that this was not a sufficient justification for the pleading of dozens and dozens of invoices and contribution requests (across all 29 claimants). He says it is the pleading of evidence, and the relevance of the material is tangential at best, and non-existent at worst. He refers to a particularly striking example of a wish to plead material in relation to an associate of Mr Danny Cipriani, with whom had a personal relationship for a time, which dates from when he was 12. In relation to Ms Abigail Crouch, she wishes to plead as many as 20 or so invoices/requests in relation to 3 individuals who did not become friends until 3 or 4 years after some of the documents in question. This sort of material, he says, cannot possibly be justifiably pleaded. In the case of Ms Anthea Turner, she wishes to plead an invoice relating to a Mr Shalit who was her agent until 2003, when the invoice dates from 2005, at which point of time (and indeed before) he was the agent for a number of public figures and there is no indication at all that the invoiced services had anything to do with Ms Turner as opposed to one of his many other clients. Indeed, another claimant is said to rely on the same invoice.
10. I will begin my consideration of this by dealing with the significance of my earlier judgment. I have re-read that judgment and it is indeed apparent that I accepted that pre-association period call data might be relevant and I therefore ordered disclosure of

it. However, I did not order disclosure of post-period call data because the claimants did not press for it (though I did acknowledge that in theory they might be able to make a case for it). I also expressed caveats about extending the logic of my order into other disclosure areas. I consider that call data presents a much clearer case of relevance than the disputed material in this case. If there is call data showing voicemail interception in an earlier period, it clearly tends to show that the defendant had access to the voicemail box, and that is plainly relevant to the later period of association. The same does not obviously apply in relation to the material in the present case because it is different. In the circumstances I do not in any way take that judgment as a starting point for resolving this rather different debate.

11. Mr Sherborne sought to make his case by taking the disputed articles from some of the eight sample cases, and Mr Munden met at least some of those instances. In some cases he abandoned his opposition having heard what Mr Sherborne had to say, and he took one or two instances which were not dealt with by Mr Sherborne. Counsel did not deal with all the disputed entries in all the eight sample cases - there was no time to do so.
12. The hope was that a generic approach could evolve from the debate on this topic, even though in many instances the factors which are operating in relation to invoices/requests are capable of being case specific. For example, part of the debate in Ms Kerry Katona's case turned on entries involving "S Walker" and "Stuart Walker". Part of Mr Munden's case is that it was not clear who "S Walker" was, and "Stuart Walker" was said to be potentially interesting in his own right. That part of the debate was not just about when the invoice/request was made in relation to the period of association (in this case it was said to be after it); it was partly a relevance debate. So the timing of the material is not necessarily the only touchstone. And in the context of Mr Ryan Giggs' case there was debate on the pleadability of invoices/requests relating (it was said) to judges involved in hearing a claim for a so-called super-injunction. The material evidenced and instruction to provide background ("b'ground") on Eady J, who was the first instance judge, and unspecified information about some unspecified members of the High Court and Court of Appeal. This, again, was as much a relevance debate as a timing debate.
13. So since timing is not the only touchstone, and relevance in particular cases is capable of playing a part, one wonders about the value to the litigation as a whole of deciding a range of specific amendments, because relevance is likely to be case-specific. For example, I do not consider that Ms Turner has made out a particularly strong case for the Shalit invoice being likely to be of much assistance at all at a trial (at least in the way the case was presented to me). On the other hand, Ms Katona presents an example of a stronger case. Some of her associates are members of the band of which she was a member (Atomic Kitten) and the period of association is roughly the period in which they worked together. She seeks to plead invoices/contribution requests relating to those associates in the period after the period of association. She seeks to

bolster that by saying that she was still in contact with them even though they were no longer “associates”, so inquiries into the former associates might still relate to her (as well as demonstrating the pattern of unlawful behaviour on which she relies). I would consider that to be a rather more plausible case.

14. There are 29 cases (or so) in which the issue arises, though I think that some of the points of dispute have faded. I have to decide what is the best way of dealing with that issue across all 29 cases. I have decided that, as a matter of case management, I will not decide the particular instances in the particular cases that have been shown to me, or that have been raised in the skeleton arguments (far more items are raised in the skeleton arguments on the 8 plus 2 chosen cases than were actually argued before me), in the hope that principles will emerge from those decided cases. That is because I think that various other points have arisen which make that course inappropriate. What the hearing revealed was the following:
- (a) The potentially fact-sensitive nature of some of the argument.
  - (b) When more facts emerged, the defendant (properly, in my view) abandoned its resistance in some cases.
  - (c) There is the potential for (b) to be repeated if relevant facts are made clearer.
  - (d) Even the evidence in these applications, extensive though it was, and even when coupled with the skeleton arguments, did not always make the relevant facts sufficiently clear.
  - (e) There was sometimes a dispute as to what the pleaded period of association actually was.
  - (f) I have been left with the distinct impression that the claimant has not given enough thought as to how much of the pleaded material really needs to appear in the pleading. I have got the impression that an insufficiently discriminating judgment has been brought to bear on the point. For example, if the claimant is seeking to make the point that pre-association invoices/requests are needed to establish a prior interest, one does not need 6, 8 or 10 items to establish that. 1, 2 or 3 ought to be enough. If the claimant is seeking to establish a pattern of unlawful conduct, then to a large degree that is unnecessary because it has been found in my judgment in *Gulati*; and if it is necessary to establish the pattern any more widely than that then that is a generic point which is not dealt with by pleading specific invoices/requests in an individual case.
  - (g) There is scope for the pleadings to get too long and too complicated in all these cases.
  - (h) It is arguable that a lot of the material is on the cusp of evidence which does not have to be pleaded.
  - (i) The pleadings that I have seen do not justify the pleading of the out of period invoices/requests on the basis suggested by Mr Sherborne (as one of Mr Munden's submissions reflected), or at least not in relation to the pre-period material. Taking Ms Turner's case as an example, in paragraph 20(k) she pleads that the defendant commissioned the inquires of the PIs “to obtain details about the claimant and her private and family life”, and she then relies on (inter alia) the disputed material. So far as pre-period invoices/requests are concerned that cannot be the case. This may or

may not be a manifestation of a “kitchen sink” approach to the introduction of this material; it is possible, but I do not have to decide whether it is the case or not.

(j) The sample invoices/requests argued before me were very limited number of the overall number across all the cases. I do not propose to labour for many hours working my way through each of the other invoices (dozens) listed by the parties in their skeleton arguments and evidence to make the sampling more representative. That would not be a sensible use of judicial time, particularly if (as would be plausible bearing in mind what happened at the hearing), a further justification advanced by the claimant led to the defendant conceding the point.

15. Bearing all that in mind, and bearing in mind the case management aspects of the matter, I consider that the appropriate course is as follows. Permission to plead the disputed “out of period” items should be granted but subject to the following additional requirements or matters.
16. First, in relation to all of those matters the claimant must plead, in a separate column in the table, a clear description of the manner in which the item in question is said, or will at the trial be said, to be relevant to the action; in other words, as precisely as possible, what will be said about it at the trial. While acknowledging that the descriptions will to some extent be repetitive and formulaic, it will not do just to say something like “Shows X to be a person of interest”, or something like that, in respect of every pre-period item. The claimants must go further and explain how it is said that item will assist. I take a couple of examples. One of the disputed items in Ms Turner’s case is a pre-association period item concerning Ms Gloria Hunniford. It is a contribution request relating to the instruction of Fraser Woodward Ltd, with the following details:

“Description: Gloria Hunniford. The People (Pics News Excl & MBU) Ordered By: Deena Bowers

Level 1: Authorised by: Paul Bennett.

Level 3: Authorised by Len Gould.”

17. The amount is £15,000, which is very much out of line with the normal amount in other requests, which are typically a few tens of pounds or a few hundred. Fraser Woodward are known to be photographers, not PIs. It is said that they used the services of Steve Whittamore, who was found to have indulged in unlawful information gathering, but I find it hard to see how that is likely to be relevant to Ms Turner’s case. If it were the case that all that could be demonstrated is that the defendant paid some photographers a large sum of money 2 years before Ms Hunniford became an associate of Ms Turner, then it would seem to me (without formally deciding the point - that will be a matter for the trial judge) that the claimant will not have established anything useful. If the item has a significance beyond that it needs to be pleaded out. I also take as an example the item relating to Mr Cipriani’s former girlfriend which relates to a period when he was 12. It is not his junior age

which is significant but the fact that the item is so long before the period of association can have begun. It does not seem to me to be particularly relevant that the instruction was given in relation to someone who subsequently became an associate of Mr Cipriani, at a time when the association could not be anticipated. The argument must be more than that, and it needs to be pleaded fully. By way of a third (unspecific) example, some of the items shown to me indicated that what was being paid for may well have been pictures (“Pix”), the taking or provision of which may not be sinister at all in terms of unlawful information gathering. That sort of item needs to be justified by more than just a pleading of the item.

18. In that way it can be made apparent to the defendant just what is said about each item. If the instance becomes clearer and justified (as happened on some occasions in argument) then the case is advanced accordingly. If the claimant cannot plead much of substance, the defendant will know that and will be able to manage its case accordingly.
19. Second, the claimants need an incentive to plead only that which is material and which is going to advance the case, and not to adopt a kitchen sink approach to these detailed matters. That incentive should come in the form of a costs order. I shall order that the claimants shall not have any of the costs of and relating to these amendments unless the trial judge, or any other judge on the occasion on which those costs have to be dealt with in the future, specifically allows them. This is more than just reserving those costs. It is reserving them with a presumption. I hope it makes the claimants think carefully about what they need to plead. So far as the costs of the defendant are concerned, I propose that they should be reserved. If it turns out that the amendments are justifiable and useful, then since the material to make them only emerged on disclosure and could not conceivably have been available to the claimant before, it would not be right to make the normal order - see the reasoning below.
20. This is not the sort of order that would be made in “normal” litigation. Were this one single case then the judge would be expected to consider each of the amendments on its merits, if necessary one by one. However, this is not “normal” litigation. It is managed litigation in which a large number of cases have to be managed by reference to some common principles and bearing in mind the proper application of judicial resources, and the resources and costs of the parties. I acknowledge that my solution is a broad-brush solution to a huge number of amendments, a large number of which have not been placed before me in any form, and others of which have been technically before me but have not been considered in detail. I consider that my orders are a proportionate manner of dealing with the problem.
21. I acknowledge, however, that this solution leaves a potential difficulty unresolved. It presupposes that in every case the period of association is properly defined and that



there is no dispute. The form of the pleading tends to be to plead that there was an association across the “Relevant Period”, which is generally defined as being 1991-2011. That makes sense in the case of (for example) a family member. It makes less sense in respect of a short or medium term relationship in the period, and indeed in many if not most cases the longer period is indeed then further defined as being to a confined number of years within that period. Where that latter course is taken then there is no problem in identifying the period. Where there is plainly a justification for the whole Relevant Period then the “out of period” point cannot arise. However, there are some instances where there is an association relationship pleaded which cannot plausibly have been for the whole of the Relevant Period but the actual period is not clearly specified. Where that is the case then the claimants must define the period of association properly before embarking on the amendment process set out above, so that the period is properly defined. I would not expect the claimants to use this as a device for avoiding the extra column by extending the period improperly to reduce the number of items which are outside the period. There may be some bumps in the road in this part of the process which the managing judge will iron out if necessary, but if the parties behave properly this should not be a significant problem.

22. In practical terms it may be that the more convenient way of dealing with this solution to the problem is not to add rows with an additional column to existing tables of associate items, but to deal with the newly added items in a separate table, either in the body of the pleading or a schedule. The claimant should adopt whichever technique seems best to fit each individual case.

### **The public domain declaration**

23. In my order of 31<sup>st</sup> January 2020 I dealt with some of the consequences of a largely failed application by the defendant to strike out a number of claims based on articles across a number of separate actions ([2019] EWHC 2122 (Ch)). The defendant had expressed concern, as indeed had I in my judgment, about some claims that had been pleaded when it appeared that the claimant had himself/herself put the material in the public domain. In order to discourage that the following order was made:

“2. In Individual particulars of claim, served from the date of sealing of this order, Claimants shall:

- a. specify that to the best of their knowledge and belief that they had not directly or indirectly introduced any of the private information complained of in respect of any pleaded article into the public domain, whether by themselves or their family or agents; and

b. distinguish between articles which are relied on merely as marking occasions of unlawful information gathering and articles whose publication is itself the subject of a claim.”

24. The obvious effect of that is that in future claims the claimant in question should provide the certification required in (a). It is, I think, envisaged that it should take the form of a modified statement of truth. It would also apply to any claims added to then existing claims by amendment. The question that arises on this application is whether the certification should apply to cover existing claims so that when the amendments currently sought are made (and the defendant does not oppose some of them) the claimants will have to provide the certification of the existing claims as well as claims added by amendment.
25. I do not consider that the current order requires that to be done, on its true construction. I consider that its likely purpose is to make sure that proper thought is given to future claims. I doubt if thought was given to future amendments introducing new privacy infringements at the time of my order (though paragraph 3 of the order does relate to claims added by amendment, for different purposes) but despite that I think that the order also covers future claims in that sense. But I do not think that the order requires backwards-looking certification whenever any amendment is made, merely because a new statement of truth has to be made in respect of the amended pleading. If it were otherwise then any amendment, no matter how trivial, would require the certification to be provided even if it did not introduce any new claim at all. The order itself demonstrates that retrospectivity was not required because it refers only to the future, and I do not think that the happenstance of an amendment requires the introduction of the retrospectivity sought.
26. However, I have not stopped my consideration of the matter there. I have considered whether, in the case of a claimant who is introducing new claims, and therefore having to provide the certification for those new claims, should nonetheless be required to look backwards and certify in respect of existing claims, as a matter of proper pleading and case management. Mr Sherborne pressed on me the significant and (as he would say) inappropriate amount of effort that would have to go into that certification, because the claimants in question would have to go back and consider all the old claims (articles) again, and some of them had a lot of articles. He further pointed out that the certification refers to the acts of family and agents, and I think the suggestion was that checks would have to be made of all those people.
27. I think that Mr Sherborne over-stated the extent of the exercise that would have to be carried out for the historic claims. The certification is qualified by a “best of knowledge and belief” proviso, and it refers to the claimant’s belief as to what family and agents did or did not do, which does not require a certification that elaborate

checks were carried out with those people. And one would have thought that if a claimant could not give the certification then they had no business pleading the claim in the first place.

28. However, notwithstanding that, I do not think that circumstances have changed since I made my order such as to require a reconsideration of what claimants should expressly certify. I did not order a retrospective certification, and I do not think that an amendment is a relevant change of circumstance which requires non-retrospectivity to be reconsidered. I shall therefore not require retrospective certification, but claimants should be clearly aware that if they know of disclosures made by themselves or by their families or other agents then they would have to think very carefully before signing or authorising the signing of the statement of truth on the amended particulars of claim.
29. I therefore determine that the certification process in paragraph 2(a) of the order shall not apply to pre-amendment claims already pleaded in actions existing at the date of the order.

#### **Pleading Associate PI payment records which refer to birth certificates, car details and the like**

30. This is a description of apparently disputed items which appears in Mr Sherborne's skeleton argument. It was referred to briefly by him at the hearing. However, Mr Munden's skeleton argument did not address it as a generic item, nor did he address it in his oral submissions. I shall therefore not rule on it, though I will indicate that it seems to me that as described they are matters which would be capable of being turned to account in guessing PINs, blagging information and tracking movements in relation to the claimant in question. Whether, in any individual case, they have a relevance is likely to be fact-sensitive.

#### **The costs of pleading additional associates**

31. Various of the claimants have sought to amend by adding new associates to the previously enumerated associates relied on. The defendant does not oppose those amendments, but says that the normal rule for amendments should apply, namely that the defendant should have the costs of and occasioned by the amendments. The claimants, somewhat surprisingly, say that they should have the costs of the amendments, on the footing that they have been caused by the defendant giving

inadequate and late disclosure from which the position of the new associates as being relevant associates has become apparent.

32. I have been invited to deal with this matter generically rather than on a case by case basis. There is a danger in this course in that I have to assume facts which are applicable to every amendment in every case, and I am not sure that that necessarily reflects reality. There may be some refinements which might affect the reasoning below. However, since I have been asked to deal with it generically (with Mr Munden giving some examples which he said supported his case), I shall do so, at least to the extent of indicating that I do not think that the reasoning of either side gets them to where they want to be on this topic at the level of generality on which they are operating.
33. The normal or usual rule as to costs of amendments appears in *Taylor v Burton* [2014] EWCA Civ 21, as applied by Mr Roger Ter Haar QC in *Beynatov v Credit Suisse Securities (Europe)* [2020] EWHC 3328 (QB). In the former case Rimer LJ said:
- “30. Mr Butler reminded us that the general rule is that those who obtain permission to amend are ordered to pay the other parties' costs of and occasioned by the amendment. He referred us to paragraph 17.3.10 in the notes to Volume 1 of Civil Procedure, which records that such orders are 'often' made; and to paragraph 8.5 of The Costs Practice Direction, which records that such orders are 'commonly' made. Both references reflect judicial practice with which anyone with experience of contentious litigation will be familiar.”
34. Mr Ter Haar's judgment repeats the extent to which that is a common order.
35. It is not, however, an inevitable order. Practically all costs are ultimately within the discretion of the judge - CPR 44.2. If it is the case (and it is) that the normal order is that the amended against party should have the costs of and occasioned by the amendment then there must be some reason for it. I have been unable to find that reason articulated in authority, but in my view it must be that in the normal case a party's change of tack in the course of litigation is of that party's own volition, and it is right that the other party should have the costs of that voluntary change, particularly where the amending party might have included the amendments in the initial pleading. Where the amended claim might have been made at the outset then the amended against party would have had to plead only once. That seems to have been the case on the facts of both *Taylor v Burton* and *Benyatov*. As a result of the

amendment extra costs are incurred in having to revisit the pleading which would have been avoided had the pleading been in the amended form in the first place, and it is right that the amending party should bear those costs.

36. However, in my view that reasoning would not necessarily apply if the reason that the amending party seeks to amend is because the new information is important and comes to light only as a result of disclosure by the amended against party and the amending party cannot be expected to have pleaded it at the outset, particularly where it is said that there has been a cover-up of the activity in question. In those circumstances what seems to me to be the underlying rationale of the common rule does not necessarily apply. Some other order might well be appropriate.
37. That seems to me to be case in the present matter, at least on the facts as averred by the claimants in question. They were all in a position to identify the persons who are appropriately treated as associates, and associates who had been hacked, as at the date of the preparation of the Particulars of Claim, and they pleaded them. What they say they did not know was that there were other people they knew who had not been identified as persons who would be probed for information concerning them until they got disclosure and saw those people identified in PI invoices (or perhaps other documents). Since the operations conducted against them were conducted covertly their failure to appreciate that those individuals might be in the same position as associates already pleaded is entirely understandable. Unless they pleaded all their friends and family at the outset, just in case, which would not be desirable, they would have to amend if disclosure threw up potential unlawful activity directed at someone who did not occur to them as being a relevant associate at the time.
38. Where those are the circumstances of the amendment it seems to me that the normal rule should not necessarily apply just because it is the normal rule. The arguable underlying rationale of the normal rule does not apply. Some other order for costs should or could be made. However, it does not follow that the claimants (in this case) should have their costs, as sought by Mr Sherborne. I can see no reason why the claimants should have the costs of the amendment at this stage. Mr Sherborne said that the defendant is to blame, because if the generic disclosure, from which the new associates emerged, had been given earlier then the pleading would have been done at the outset, which means that the late pleading is the defendant's fault and they should pay for it. I am not satisfied that that simple analysis is universally true on the facts, but in any event I do not think that his order is the appropriate one.
39. In order to reflect the position in this particular litigation, with all its oddities (and in particular its high dependency on disclosure by the defendant and the covert nature of the activities alleged, which I have already found to exist to the extent referred to in my judgment in *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch)) I consider that the right order to make in relation to the costs of and occasioned by the amendment is that the

costs should be costs reserved. That would enable a trial judge to make an appropriate order against the claimants should it turn out, for example, that in fact the new associate should have been pleaded from the outset, or that the new associate was in fact inappropriately pleaded; or to make an order against the defendant if it transpires that there was a very good reason for the new associate not having been pleaded at the outset; or to make some other order. This would mean that at the end of a trial the costs orders might get a bit fiddly, but it is an order which works better justice than either of the orders proposed by the parties. Costs in the case would not really work the same degree of justice.

40. Mr Munden's written submissions indicate that his client could have raised specific objections to some of the new associates on the grounds of relevance, merits and proportionality. However, it chose not to do so bearing in mind the number of other issues arising at the hearing. That is a sensible attitude in the context of this litigation. Such arguments as he might have wished to raise under this head are still available to him in due course under my proposed order. It would certainly be unfair to the defendant to make the order proposed by Mr Sherborne.
41. I therefore determine that these costs shall be reserved. I have dealt with this matter generally (or generically), as indicated above. I trust that there are no special cases which need to be considered in the light of my reasoning. Debate on such special cases would, quite frankly, not be welcome.

#### **The costs of pleading additional PI payment records, palm pilot entries and contact lists**

42. This is a generic costs point similar to the previous point. Having had disclosure of various matters of the type referred to in the heading, the claimants seek to amend to plead those matters as supporting their respective cases of being the victims of unlawful information gathering. What they seek to plead is material gleaned from the payment records, and material in some palm pilot databases (such as phone numbers and dates of birth) which they say are indicia of that activity. The palm pilots were PDAs owned or possessed by a limited number of journalists, and only relatively recently disclosed in terms of their full contents. The contact lists are what they sound like, being lists maintained by one or two journalists in which entries appear which are said to be suggestive of phone hacking or other activities.
43. The respective positions of the parties are rather unusual. The defendant has offered to allow the claimants to make use of that material without the necessity of pleading it. It claims to regard the material as evidence which does not need to be pleaded, and that it is offering a proportionate response to the amendment. If the claimants

nonetheless wish to plead the items then the defendant says the normal order as to costs should follow.

44. The claimants have not accepted that position. They insist on pleading the matter and have expressed the view that it is not for the defendant to dictate how they plead their cases. They have put forward the case that each act by a PI which relates to the claimants it itself a separate tort, and therefore requires (or at least justifies) pleading (though that cannot apply to the palm pilot entries or the contact list entries). Other than that they do not seem to have given a reason for insisting on pleading something that the defendant does not require to have pleaded. In particular, the claimants have not suggested that they should plead the material so that they can understand what the defendant's case is in relation to each allegation (probably on the footing that they do not expect the defendant's Defence to be particularly illuminating on the topic). In addition to wishing to amend, the claimants also say that the defendant should pay the costs of the amendment on the footing of what are said to be defaults by the defendant in giving generic disclosure. It is said that the defendant was too slow and too resistant in giving it, with the result that the information that they now wish to plead was not available to plead earlier.
45. I think on the whole it would be beneficial to have the reliance on disclosed material spelled out in the Particulars of Claim, especially where the matter pleaded is actually said to be a cause of action and not just a matter relied on. I do not quite understand why the defendant is so relaxed about having the matters pleaded, but pleaded they should be.
46. It is therefore necessary to turn to costs, which is what this is ultimately all about. I do not consider it appropriate to order the defendant to pay the costs of the claimants of pleading the new matters, in order to reflect alleged defaults on disclosure. I could not do that without having a considerable and unrewarding debate as to the history of the matter, and even if I found the relevant degree of fault I would then have to go on to find that the newly pleaded material was obviously material which would have been pleaded earlier if it had been available, which would be a difficult judgment to make. All that would not be a proportionate use of court time. I think it would be fair to describe the defendant's conduct as less than impressive in some respects, but I do not need to go into that. I shall not make an order which would require me to find that the defendant has been seriously at fault in a manner which would attract a highly unusual order.
47. I am also reluctant to make the usual order on an amendment for the same reasons as set out above. On this occasion I propose to make the order offered by the defendant in correspondence, which is costs in the case. I am not sure that I would have ordered

that in the absence of such an offer, but it seems to me to be a sensible manner of resolving this question in all the circumstances.

### **The costs of pleading additional articles**

48. The claimants seek to add articles as a result of two factors. The first is the extension of the Relevant Period to a period between 1991 and 1998 and to add the year 2011. As a result of these extensions disclosure is given to cover those periods. That has led the claimants to consider additional articles as being candidates for their claims, and to add some. Second, what the claimants describe as late generic disclosure has also caused some claimants to review articles and in some instances to add articles to their claims.
49. The costs of this are in dispute. The claimants say that the defendant should bear the claimants' costs of the exercise of reviewing the position and of adding articles. The defendant says that the normal rule as to the costs of amendment should apply.
50. It would be inappropriate to require the defendant to pay these costs on the blanket basis proposed. That would require a finding at this stage that it is all the defendant's fault that the claimant has had to carry out a review and to plead previously unpleaded articles. The logic of that approach would require an article by article check to ensure that each newly pleaded article was the result of the fault of the defendant, and that is neither sensible nor appropriate in this litigation. Apart from anything else, the claimants were always at liberty to plead cases in the extended Relevant Period; the Relevant Period related to disclosure, not pleadable articles. Whether or not articles in the Relevant Period were sensibly triggered by some particular item of disclosure is a fact-sensitive exercise which would take some time and (at this stage, anyway) might not lead to a clear conclusion as to culpability.
51. In this instance I consider that the normal costs order should follow. It is not perfect, but it is better than the alternatives. I agree with Mr Munden that in this instance that the review is the sort of thing that happens in litigation and if it is decided to plead further articles then that too is the sort of thing that happens in litigation and which should attract the normal costs order, that is to say the claimant should pay the defendant's costs of and occasioned by the amendment. In this particular case it might also introduce some discipline in relation to the choice of articles to be pleaded. Although I have no doubt been shown the most striking examples (see below), if such an order produces a brake on some of the lesser articles then that would be no bad thing in keeping this litigation manageable and proportionate. I accept that it might be thought that there is a degree of inconsistency between this order and my order in



relation to newly introduced associates, but slightly different factors are in play and the normal order is the more appropriate one.

### **The costs of the "asterisk exercise"**

52. The "asterisk exercise" describes the process of considering whether any given pleaded article is relied on as amounting to infringement of privacy rights in itself, or whether it is relied on merely as an indicator of an underlying infringement (such as listening to a voicemail, which is an infringement per se). I required that that distinction be drawn in relation to future articles (as from the date of the 17<sup>th</sup> CMC on which it was ordered - the actual terms of the order are set out above) but it was not required that the claimants should go back and carry out the exercise in relation to cases already pleaded.
53. Despite the fact that the exercise did not have to be done retrospectively, the claimants have nonetheless done it retrospectively, covering 1926 articles. They say that given it was not required they should have their costs of the exercise. The defendant treats the result as the equivalent of an amendment, so that it should have the costs of and occasioned by the exercise.
54. The claimants' application is, to say the least, ambitious. They conducted a voluntary exercise, which one would have thought would be an indication that they should not have the costs, at least at this stage. Nor should the exercise be viewed as an amendment. I consider the exercise to be one akin to the provision of voluntary particulars. That would not attract an order for costs in favour of the provider, and would generally not be viewed as an amendment either. There is no case for making either proposed order as to costs, or indeed any particular order, at this stage. The costs will be part of the claimants' respective costs in respect of which they may or may not get an order at the end of the day.
55. In my view raising this point in an already over-burdened application was something which should obviously not have happened, and this sort of thing (where the answer is obvious to any party which is not posturing) should not be allowed to happen again. It is fortunate that no time was spent on it at the hearing.

### **Individual articles**

56. Under this head the defendant challenges the introduction by amendment of a number of articles on the footing that it is plain that they do not contain or reveal any information which could realistically be viewed as private and/or that the claim on the articles is manifestly doomed to fail for that or other reasons. Mr Munden drew to my attention various authorities indicating the legal nature of the privacy claim relied on and providing that even if a theoretical degree of privacy is established it must attain a certain level of seriousness; see *C v Bloomberg LP* [2021] QB 28; *R (Wood) v Comr of Police of the Metropolis* [2010] 1 WLR 123 at para [22], *Ambrosiadou v Coward* [2011] EMLR 21, *Campbell v MGN* [2003] 2 AC 457 at para 157, and *Iman v Express Newspapers* [2012] EWHC 355 at para 69 on adjusted levels of privacy for sportsmen. On the basis of that material Mr Munden says it is apparent at this stage that a number of articles cannot succeed for a variety of reasons. They include the non-existence or triviality of private material in the publication, the absence of any privacy belonging to the claimant (as opposed, possibly, to others), the lack of likelihood of the story coming from unlawfully gained material and (in the case of one claimant) the implausibility of the articles being appropriately “asterisked” as the claimant maintains. His case is that the claimants have to make a sufficiently evidenced case for the disputed amendments and they have not done so. Most of these points were not developed in oral argument, but they have been set out in the skeleton arguments.
57. Mr Sherborne puts forward an answer on the facts to each of the disputed items, and takes a quasi-procedural point. As referred to above, in November 2018 the defendant launched applications to strike out 50 articles from the claims of 13 claimants. I considered 12 articles by chosen way of a sampling exercise and indicated that the strike out of the claims based on the articles succeeded in relation to 4 only - see my judgment of 2<sup>nd</sup> August 2019 ([2019] EWHC 2122 (Ch)). What is said to be of significance to this application is that I indicated that I would not allow this litigation to be conducted on the basis of a whole series of striking out applications seeking to strike out only some (often not a large proportion) of the articles pleaded, and I refused to allow the exercise to be repeated across the rest of the disputed articles because it would not be a sensible way of conducting the litigation (see para 113). Mr Sherborne says that the resistance of the defendant is effectively the same as their application of 2018, and it should meet with the same fate, namely that I should refuse to deal with that resistance.
58. I will deal with Mr Sherborne’s quasi-procedural point first. It might at first sight seem that as a matter of strict logic I ought to apply the same case management reluctance to consider all articles on a case by case basis in this instance as in the strike-out application. The point might be said to look the same; it is merely arising on an amendment application and not a strike-out or summary judgment application, and the case management considerations are the same.

59. That is a tempting view, but at the risk of appearing inconsistent I do not think I should adhere to it. The fact is that the point does arise on an amendment application, and there is some sort of burden on the claimant to make some sort of case, or at least not to plead material which can be easily seen to be unsustainable. Were it otherwise one would be giving carte blanche to the claimants to plead whatever they like by way of articles, with no incentive at all to make sure they are sensible or sustainable claims. Were this application been being made in relation to one case only then there would not be the same practical case management obstacle to considering the merit of the challenged items, and the defendant might fairly say that the position should not be different because the court and the defendant are swamped with many claimants making applications to amend (it would seem from the fate of the cases before me that not all of those claimants had disputed amendments in the end, but I am going to assume that most of the rest currently do). If the defendant says it opposes the amendments then it is entitled not to have its resistance dismissed merely because there is too much to consider. If there is a risk that articles are pleaded which ought not to be pleaded then some sort of review ought to be carried out.
60. However, the volume and size of the exercise cannot be ignored. Amendment purity has to interface properly with case management expediency. I do not think that the situation calls for an agonised consideration of each disputed article, or indeed a consideration at the depth of the consideration in my strike-out judgment. A proportionate approach would be a sort of “quick and dirty” view of the articles to see if any can be seen plainly to be inappropriate on a short consideration of each one, with the benefit of any doubt going to the claimant.
61. Before finally ordering that, however, I need to consider whether it would be likely to bear fruit. I can do that by considering quickly the still contested articles in the sample cases before me. (I say “still contested” because the defendant has removed its challenge in some instances on seeing a particular claimant’s response to the challenge, which is yet another reason for not adopting a blanket approach to the problem at this stage). In the interests of brevity I shall not necessarily set out the text or content of each article. I shall try to come to a quick conclusion on each article as the matter has been presented to me and to come up with shortly expressed conclusions. The parties are aware of the material which has been placed before me and on which I therefore base my judgment. In what follows I deal only with articles which are still in dispute after the concessions made in Mr Munden’s skeleton argument. In what follows I have ruled out articles only where it is really obvious, even at this stage, that they should be ruled out. It is possible to make that judgment in some cases.
- (a) Abigail Crouch - a one sentence article (no 58), presumably captioning a photograph - “Peter Crouch and his girlfriend Abbey Clancy looking petrified on the rollercoaster ride at Alton Towers”. Of itself this probably does not cross the privacy threshold, and in any event is too trivial. I would disallow this amendment as an

article said to infringe privacy. I make no ruling on whether it is capable of marking an underlying invasion of privacy.

(b) Glenn Hoddle

Article 47 - this article is theoretically capable of containing private information - that Mr Hoddle wishes to stay managing Chelsea. It seems to me highly likely, but perhaps not quite inevitable, that this is attributable to normal football tittle tattle. However, it is not quite immediately obvious enough that this is hopeless enough to justify refusal of permission to amend and I will allow it. It does, however, justify some sort of scrutiny of the other articles pleaded by the same professional source because it raises a strong suspicion that a "kitchen sink" judgment has been brought to bear on articles.

Articles 48, 50-53. I agree with the defendant that these articles obviously do not contain or disclose Mr Hoddle's private information, as opposed to the information of the club. I would disallow these articles.

Article 60 - details of plans relating to Michael Owen and team selection. There is an argument that his thought processes are private for these purposes, though damages might not be thought to be particularly significant. I would not disallow this.

Article 64 - said to be details of an altercation between Mr Hoddle and Sir Alex Ferguson. I agree with Mr Munden that it does not say that. It implies some sort of disagreement. The article does not match the privacy matter alleged. I would disallow this.

(c) Ryan Giggs

Articles - various. The articles complained of are "asterisked" articles, that is to say they are treated as marking the occasion of unlawful information gathering rather than as disclosing private information. The defendant seeks to say that the argument is not plausible. I do not regard the challenge as obviously right and the better place to deal with these more elaborate points is the trial rather than an amendment application.

(d) Stanley Collymore

Article 65 - details of an altercation. Although not the most serious of infringements, this disclosure is capable of being more than trivial (just). I would allow the amendment.

Articles 72 and 74 - these are sustainable. I do not accept that the defendant does not know the case it has to meet in relation to Article 74.

Article 76 - the fact and nature of discussions is capable of being private and being non-trivial. I allow this amendment.

Article 77. The disclosed transfer fee is said to be private. I do not accept that so far as Mr Collymore is concerned; if it was private, the privacy was the clubs' as opposed to Mr Collymore's. There is no other information which one could realistically call private in this article. I disallow this amendment.

Article 81 - the information about Mr Collymore's dispute is capable of being private. If the agent says what it is reported he says then that undercuts most of the claim, but that will be a matter for trial. The information about the mother's health (which is very limited) and Mr Collymore's compassionate leave is doubtful as Mr Collymore's private material, but it can stay, just. I doubt if it will attract any significant damages. This is an instance of a context in which claimants really ought to think very carefully about before pleading the article itself.

Article 83 - this is allowed, but only just. My remarks about the need to plead carefully apply.

Article 84 - this is not quite trivial enough to be disallowed, particularly since it might be said to form part of an overall pattern of intrusion, which could be significant.

(e) Kerry Katona

The first complaint in the skeleton argument is that the privacy claim is inadequately particularised in relation to the new articles. The appropriate course here is to raise a request for further information. I do not consider the pleading to be so inadequate as to justify refusal of permission to amend.

The second complaint relates to publications in the Irish edition of the defendant's newspaper. Mr Sherborne indicated that he would not be pursuing those amendments, at least for the time being.

Mr Sherborne's skeleton argument anticipated other complaints, but they were not advanced in Mr Munden's skeleton argument so I do not deal with them.

62. I believe that that deals with the challenges to the articles which were placed before me. It demonstrates that only a small number should actually be disallowed, but others came close. I consider that that return justifies the carrying out of the sort of exercise which I have outlined above. I also consider that it justifies each party reconsidering their respective positions on the amendments. Mr Munden said that the parties would find it useful if I expressed views on the articles that I had after considering each article briefly so that I could see how obviously bad it was (or was not). That is what I have done. I will do the same in the exercise that I have outlined above in relation to other disputed articles. The claimants need to consider very carefully whether they are going to pursue obviously weak articles, and the defendant should consider carefully which articles it now wishes to challenge of those which remain (it is right to record an apparent willingness of the defendant to abandon its opposition when faced with appropriate evidence from claimants). If that is done then the exercise which involves me should, I hope, involve fewer articles than might otherwise be in play.
63. As to mechanics, what I envisage is that the following steps should take place, in fairly short order. The claimants should indicate which articles they still intend to pursue by way of amendment, and the defendant should indicate which of those it wishes to challenge. I hope that my judgment above will enable the parties to reduce the number of disputed articles, and that in the course of that exercise there will be an exchange of information which will enable the defendant to concede in the manner in which it has conceded on some of the articles in the 8/10 cases, where appropriate. That will enable a residue of disputed articles to be generated. They should then be submitted to me in the form of the text of each article accompanied by a short document with each party's brief points about it - I envisage no more than 3 or 4 sentences each. That will facilitate the sort of review which I have in mind. The object will be to identify the obviously poor cases, if possible (and if there are any). Anything less than obvious will be allowed in and, as I have said, the benefit of the doubt will have to go to the claimants. If the parties have better ideas about how to

conduct the exercise then I will, of course, consider them. The mechanism can be finalised at the consequential hearing after this judgment, but once it has been finalised the parties will be expected to move very swiftly, so they would be well advised not to wait until then to start on the activities necessary to carry it out. They can each embark on their own culls of articles once they have received this judgment, which will save time later in the process.

### **Other points**

64. The skeleton arguments of the parties indicate points that arise in individual cases which I have not expressly addressed above. I believe that this judgment will enable the parties to sort those matters out, because the outstanding points, I think, can be solved by the application of the generic answers given above to the specific cases in question. If there are other matters on which I still have to rule then the parties may raise them on a consequential hearing. I appreciate that this may take a little sorting out, so I propose to allow enough time to elapse between the hand-down of this judgment and the consequential hearing to allow that to be done.