



Neutral Citation Number: [2020] EWHC 1593 (Ch)

Case No: HC-2000-000004

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

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

Date: 19/06/2020

Before :

MR JUSTICE MANN

Between :

Various Claimants
- and -
News Group Newspapers Ltd

Claimants

Defendant

David Sherborne, Sara Mansoori and Julian Santos (instructed by Hamlins LLP) for the
Claimants

Clare Montgomery QC, Antony Hudson QC and Ben Silverstone (instructed by Clifford
Chance LLP) for the Defendant

Hearing date: 22nd May 2020

APPROVED JUDGMENT
STRIKE-OUT APPLICATIONS JUDGMENT

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

.....
MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This judgment deals with two applications by the defendant which are capable of having a significant effect on this managed litigation, and not only in terms of the forthcoming trial of Tranche 4 cases in October of this year. In them the defendant seeks to strike out all Replies that have recently been served in cases in this Tranche on the basis that they are an inadequate invocation of the provisions of section 32 of the Limitation Act 1980 (“the Act”), and to strike out certain cross-references in those Replies which rely on section 32(2). In fact, the latter application is an attempt to revisit a matter which is said to have been dealt with (by being available but not being properly raised) in a previous amendment application, as I shall explain.

2. I shall not set out the nature and background to this litigation, which has been set out in countless previous judgments. It suffices to say that in it a large number of claimants claim that the defendant has infringed their privacy rights by engaging in unlawful information gathering against them (in the form of, inter alia, voicemail interception and blagging information), some of which activities resulted in stories being printed about them which again infringed their privacy rights. The events in question are said to have taken place between 1996 and 2011, but it is probably fair to say that a large part of the events are likely to have taken place in the years in the middle of that period. The large number of claimants over the years have been batched into Tranches. All cases in Tranches 1 to 3 have been settled without a trial taking place.

3. Tranche 4 is the current batch. There are well over 100 cases in this Tranche if one counts cases which have just been started (there was a cut-off date at the end of May). There is to be a trial of cases in this Tranche in October of this year. Nothing like all the Tranche 4 cases will be tried, or even ready for trial, at that point. Those to be moved towards trial (if not settled before trial) will be chosen later this term.

4. In this Tranche the defendant has started to plead a limitation defence to all cases. This has led to the claimants pleading a concealment riposte pursuant to section 32 of the Act. The acts of concealment are extensive, ranging from the concealment which comes naturally from a covert act through to the deliberate destruction of emails in 2011 which is said to have been done in order to cover the defendant’s tracks once it became apparent that claims were being brought and criminal investigations started. The concealment case is an extensive one, and, as will appear in relation to the section 32(2) point, is said to extend into the conduct of these proceedings and how disclosure has been given.

5. Because the claimants all rely on the same sort of facts in order to run the section 32 riposte, and because the concealment acts (or some of them) are also relied on in relation to the claims themselves as part of a generic case, the claimants are entitled to rely on a common pleading called the Generic Particulars of Concealment and Destruction (“GPOC”). This provides a long document to which individual claimants can, if they wish (and they all do), subscribe. It prevents them all having to set out the same facts in their own individual pleadings. I have recently ruled on an application to amend the GPOC and allowed the amendments - see [2020] EWHC 1436 (Ch). This judgment should be read with that one to provide some context for some of the issues that now arise.

6. It would seem that originally the claimants may have been content to rely on the GPOC as setting out the section 32 ripostes that they wished to make to the limitation defence, without serving a Reply, and the defendant had indicated through their leader, Ms Montgomery QC, that they were content for that to be done, without accepting that what was pleaded there was enough in any individual case. However, they seem recently to have changed their minds (possibly as a result of a better understanding of remarks made by Ms Montgomery in court) and 17 of the claimants served Replies over the period 7th to 9th April 2020. It is those replies (and any served subsequently) that Ms Montgomery seeks to strike out. She did so in an application dated 7th May 2020, which was issued shortly prior to the hearing of the claimants’ application to amend the GPOC. Mr Sherborne, for the defendants, said he could not be expected to be ready to meeting the striking out application at the same time as his amendment application, so it was not dealt with even though it can now be seen (as would probably have been apparent at the time if there had been time to consider it) that it raised related issues to those which had to be dealt with on the amendment application. In my judgment on the amendment point I referred to this application, and offered what I had hoped were some helpful remarks which might obviate the need for this one, but it has turned out that I have not helped the parties to a settled resolution of the point.

7. Those replies also plead a reliance on two particular paragraphs in the GPOC and there is a separate application to strike those out. That is the point that arises under section 32(2) of the Act.

8. I shall deal first with the general strike-out application, and then the section 32(2) point.

PART 1 - STRIKING OUT THE REPLIES

Striking out the Replies - outline

9. The basis on which the defendant seeks to strike out the Reply is, in essence, that it does not properly plead matters which need to be pleaded under section 32(1) if the claimants are to be allowed to run the point that material facts relevant to their cause of action have been concealed from them. The same complaint was made in relation to amendments sought to be made to the GPOC, but in the judgment referred to above I allowed the amendment on the footing that a generic pleading did not have to plead claimant-specific matters as to the date of knowledge or putative knowledge required by section 32(1) of the Act. Ms Montgomery now takes the same sort of point in relation to the Replies, which is where Ms Montgomery says that detail should now appear. Since it does not appear, the Replies should be struck out.

Structure and content of the Replies

10. That attack requires consideration of the structure and content of the Replies. The Replies were served in anticipation of the amendments (actually re-amendments) to the GPOC being allowed because they cross-refer extensively to that document as amended.
11. Ms Montgomery took, as an example, the reply of Gary Lucy on the footing that it was typical, and her submissions could be taken to apply to all Replies. Mr Sherborne did not suggest that Mr Lucy's case was untypical though he did point to some other Replies which contained more specific pleadings in answer to more specific Defences.
12. Paragraph 3 pleads that Mr Lucy relies on section 32 and pleads "as follows". Because of the dispute as to whether what follows is sufficient, it is unfortunately necessary to set it out in full:

“a. The Claimant repeats and relies upon paragraphs 20 to 40 of the Re-Amended Generic Particulars of Concealment and Destruction (“Re-Amended C&DPOC”). He did not discover, nor could he have with reasonable diligence discovered, the facts pleaded therein which facts are relevant to the Claimant's rights/causes of action and have been deliberately concealed from him by the Defendant, until a date which is within 6 years of his claim having been brought.

b. The effect of NGN's concealment as set out in the Re-Amended C&DPoC upon the Claimant was that relevant facts which were required in order for him to plead his case against NGN were concealed, including (but not limited to) the following:

(i) In support of the entirety of his claim, the Claimant will rely on a number of crucial relevant facts set out in the generic statements of case and obtained from generic disclosure received in this litigation as demonstrating the scale and unlawful nature of the activities of the Defendant's journalists, the activities of private investigators instructed by them, the time period during which the unlawful information-gathering took place and the general circumstances in which the information was obtained by the Defendant's journalists. These facts, which are summarised in paragraphs 30 to 41 of the Re-Amended C&DPoC, are essential to his rights/causes of action. For the reasons set out in paragraphs 30 to 41 of the Re-Amended C&DPoC, this generic disclosure had been deliberately concealed by NGN until it was obtained by the Claimants through a series of specific disclosure applications, most of which were resisted strenuously by NGN. The Claimant was not aware of these facts, and could not with reasonable diligence have discovered them, until a date within 6 years prior to the issue of these proceedings.

(ii) In support of his causes of action at paragraph 6(b) of his Particulars of Claim, the Claimant relies on the targeting of him and his associates by NGN on various dates by various journalists and private investigators as revealed in a number of private investigator invoices; a number of Electoral Roll searches; and ZC Payments for The Sun and The News of the World. For the reasons set out in paragraph 39 of the Re-Amended C&DPOC, the private investigator invoices and related requests and payments had been deliberately concealed by NGN until they were obtained by the Claimants, within 6 years of the date of the issue of these proceedings, as generic disclosure in the MTVIL following Orders obtained against NGN. The Claimant was not aware of them until a date within 6 years prior to the issue of these proceedings.

(iii) In support of the causes of action at paragraph 12 of his Particulars of Claim the Claimant relies upon NGN's unlawful activities under the TDI Arrangement and/or the Features Information Arrangement, including calls by Dan Evans and

other journalists in the Features Department to intercept voicemail messages left on his mobile telephone and those of his associates. For the reasons set out at paragraph 33 the Re-Amended C&DPOC, the separate arrangement for unlawful information gathering by the Features Department at The News of the World and the unlawful activities of Dan Evans and other journalists within the Features Department had been deliberately concealed by NGN until it was gradually revealed as a result of Operation Pinetree which was announced in 2013. The Claimant was not aware of these facts until a date within 6 years prior to the issue of these proceedings.

(iv) In support of the causes of action at paragraphs 13 to 16 of his Particulars of Claim the Claimant relies upon NGN's unlawful information gathering at The Sun. For the reasons set out at paragraphs 35 to 37 the Re-Amended C&DPOC, the unlawful information gathering at The Sun was deliberately concealed by NGN. The Claimant was not aware of these facts until a date within 6 years prior to the issue of these proceedings.

4. As a result, NGN deliberately concealed facts relevant to the Claimant's cause of action against it. The Claimant repeats and relies upon paragraph 41 of the Re-Amended C&DPOC. Paragraphs 28.2.1 and 29 are therefore denied, and the Claimant contends that the period of limitation did not begin to run before a date less than 6 years before he issued proceedings, in accordance with Section 32 of the Limitation Act 1980."

13. By way of explanation:

(a) The Re-Amended C&DPOC is what I have called the GPOC.

(b) Paragraphs 20 to 40 of the GPOC (referred to in paragraph 6(a)) are paragraphs in which there is extended pleading of the main facts which were concealed, in general terms so far as individuals are concerned but particularised so far as the acts themselves are concerned, and particularised allegations of acts of concealment including acts occurring during the course of these proceedings when dealing with previous Tranches.

(c) Paragraph 6(b) of his claimant-specific Particulars of Claim (referred to in (b)(ii) above) are a pleading of reliance on generic disclosure in support of his claim generally and targeting him in particular, with three sets of examples given.

14. It is unnecessary to set out extensively the provisions of the GPOC. However, it is worth setting out paragraphs 41 and 42 which summarise and rely on what has gone before. They say:

“41. As a result of NGN’s deliberate concealment of wrongdoing at the time, and NGN’s deliberate continuing concealment after the event, as set out above, NGN concealed relevant facts which were required by the Claimants to appreciate that they had a particular cause of action against NGN and to plead it. Without prejudice to any additional facts and matters which may be relied upon by an individual claimant, the following relevant facts which were concealed by NGN are common to many individuals with actual or potential claims against NGN in the MTVIL: ”

- (1) The identities of the potential claimants;
- (2) The identities of the journalists involved in voicemail interception and other unlawful information gathering;
- (3) The identities of the private detectives instructed to carry out unlawful information gathering on behalf of NGN;
- (4) The nature of the wrong-doing and relevant facts relating to it (i.e. voicemail interception, blagging or unlawful surveillance and particulars relating to the same);
- (5) The information from the SAP system relating to when individuals were targeted; by whom and/or in relation to which published articles;
- (6) The information from the call data relating to when an individuals’ or one of their associates’ mobile telephones was called;
- (7) The existence of articles, some of which have been removed from publicly accessible databases (such as LexisNexis) by NGN;
- (8) The interpretation of incriminating evidence – such as codes on documents, or euphemisms used by journalists in emails and payment documents – which can only be understood by reference to other evidence not disclosed by NGN; and

(9) The time period during which the unlawful information gathering at *The News of the World* and at *The Sun* took place.

42. The Claimants will rely on the aforesaid facts and matters to the extent that they are relevant to any individual claim, or any part of it, in support of their case that they did not discover and could not with reasonable diligence have discovered facts relevant to their rights of action until a date which is within six years before the claim was brought. Accordingly, by reason of Section 32(1)(b) and/or (c) of the Limitation Act 1980, any defence of limitation relied upon by NGN affords no defence to their claim.”

The relevant law

15. This has been set out in my previous judgment, but I will repeat it here.

Section 32 of the Act, so far as relevant, provides:

“32 Postponement of limitation period in case of fraud, concealment or mistake

(1) Subject to [subsections (3) and (4A) [, (4A) and (4B)]] below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.”

16. The claimants rely (for the purposes of this part of this judgment) on section 32(1)(b) - deliberate concealment of facts “relevant to the plaintiff’s right of action”. It is established on the case law, as I held in my previous judgment, that for the purposes of the sub-section the “facts relevant” are facts which it would be necessary to plead in order to establish the cause of action - “statement of claim” facts, in the words of the authorities. Facts relevant to the proof or establishment of those facts are not “relevant” facts for the purposes of the sub-section, and a claimant is not allowed to rely on the late discovery of that sort of material to postpone the running of the limitation clock. See paragraph 32 of my judgment on the GPOC amendment (referred to above).

17. It is also established that the burden of proof is on the claimant to establish the facts necessary to succeed in running the riposte, at least so far as the concealment and intention to conceal are concerned. In *Cave v Robinson Jarvis & Rolf* [2003] 1 AC 384 at para 60 Lord Scott said:

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

It will be noted that he did not expressly refer to where the burden of establishing discovery of the facts, or when reasonable diligence would have led to their discovery, lies. However, in *Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400 Millett LJ seems to have accepted that the claimant bore the burden of proof in relation to that issue, or those issues, as well:

“The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take.” (At p418b-c)

Strike-out - the principles to be applied

18. CPR 3.4(2) provides the circumstances in which a statement of case can be struck out:

“(2) The court may strike out a statement of case if it appears to the court—

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.”

19. Practice Direction 3A provides some additional guidance as to when it might be appropriate to strike out:

“1.4

The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):

(1) those which set out no facts indicating what the claim is about, for example “Money owed £5,000”,

(2) those which are incoherent and make no sense,

(3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.

1.5

A claim may fall within rule 3.4(2)(b) where it is vexatious, scurrilous or obviously ill-founded.

1.6

A defence may fall within rule 3.4(2)(a) where:

(1) it consists of a bare denial or otherwise sets out no coherent statement of facts, or

(2) the facts it sets out, while coherent, would not even if true amount in law to a defence to the claim.”

20. Some of the principles which have emerged from the case law are summarised in paragraph 3.4.2 of the White Book, to which Mr Sherborne drew my attention:

“Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (*Harris v Bolt Burdon* [2000] C.P. Rep. 70; [2000] C.P.L.R. 9). A claim or defence may be struck out as not being a valid claim or defence as a matter of law (*Price Meats Ltd v Barclays Bank Plc* [2000] 2 All E.R. (Comm) 346, Ch D). However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (*Farah v British Airways, The Times*, 26 January 2000, CA referring to *Barrett v Enfield BC* [1989] 3 W.L.R. 83, HL; [1999] 3 All E.R. 193). A statement of case is not suitable for striking out if

it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown*, 19 January 2000, unrep., CA). An application to strike out should not be granted unless the court is certain that the claim is bound to fail (*Hughes v Colin Richards & Co* [2004] EWCA Civ 266; [2004] P.N.L.R. 35, CA (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts)).

Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In *Soo Kim v Youg* [2011] EWHC 1781 (QB)). ”

The main strike-out attack - argument

21. The basis of the application to strike out as set out in the application notice of the defendant is said to be:

“The Defendant seeks this this order on the grounds that the Replies disclose no reasonable grounds for bringing the Claimants’ cases under s 32(1); and/or are an abuse of the court's process or are otherwise likely to obstruct the just disposal of the proceedings, for the reasons set out in in box 10 below.”

Box 10 goes on:

“The Replies make broad and vague allegations relating to that contention, containing no or no adequate particulars of relevant facts relating to a Claimant's individual claim.

In taking that approach, the Replies fail to plead proper cases under s 32(1) of the 1980 Act. A claimant relying on that provision is required to specify and particularise facts which are relevant to his/her right of action and which were deliberately concealed from him/her by the defendant (as stated by counsel for

the Defendant at the CMC on 4 March 2020). Further (and as the Defendant set out in previous correspondence and in the 17th witness statement of Maxine Mossman dated 27 March 2020), only facts which are essential to a claimant's cause of action may properly be relied on for that purpose and not other facts, such as those which may improve prospects of success, are not relevant.

Contrary to those requirements, the Replies do not set out and particularise facts which are relevant to Claimant's case under s 32(1) of the 1980 Act. Moreover they improperly rely on a draft statement of case in respect of which consent or permission to amend has not been given.

The Defendant therefore applies to strike out the Replies on the grounds that they disclose no reasonable grounds for bringing the Claimants' cases under s 32(1); and/or are an abuse of the court's process or are otherwise likely to obstruct the just disposal of the proceedings.”

22. I can ignore the complaint about relying on a draft statement of case for which permission had not been given because it now has. The central complaint is that the pleading does not set out the “relevant facts” clearly enough, nor does it particularise the case on knowledge of the “relevant facts” in the sense of stating when they became known, and when it is said that the claimants could, with due diligence, have found out about them. (It is necessary to bear in mind the concession made by the defendant and recorded in my previous judgment to the effect that if any claimant relied on s 32 then the defendant would not say the defendant had or ought to have knowledge of relevant facts until 2011.)
23. Ms Montgomery made her point by going to Mr Lucy's Particulars of Claim and pointing to how it is pleaded, with what she said were separate types of claim. There were claims based on published articles, pleaded at paragraph 19 as being free-standing causes of action, and there were claims based on misuse of private information (phone hacking, blagging and the like) which were separately sued on, whether or not they resulted in the publication of an article. When one turns to the Reply it does not identify the “statement of claim” facts or say when they first became known, much less when with due diligence they could have been known. The incorporated GPOC does not fill in those gaps for this individual claimant because they are general (generic) and do not deal with the point. She took some examples:
 - (a) Paragraph 31 of the GPOC pleads that NGN deliberately concealed the true nature, scale and extent of voicemail interception carried out by Mr Glenn Mulcaire for various individual journalist other than Mr Clive Goodman. Particulars of this

include false public statements that the activity was confined to “one rogue reporter”. Ms Montgomery says that the “one rogue reporter” line was not pursued after 2011. What Mr Lucy ought to be pleading is when he knew that line not to be true.

(b) Paragraph 32 of the GPOC alleges that NGN deliberately concealed the unlawful activities of journalists themselves at the News Desk, including Mr Ian Edmondson, and the modes of concealment included, inter alia, peddling the “one rogue journalist” falsehood. In 2011 Mr Edmondson’s activities became known; Mr Lucy ought to plead when he knew about that and the falsity of the “one rogue journalist” stance.

(c) Paragraph 33 of the GPOC pleads deliberate concealment that Mr Dan Evans and other journalists on the Features Desk of the News of the World carried out unlawful information gathering. Ms Montgomery says that these facts were discussed at the Leveson Inquiry in 2011 and 2012 (though she said that without evidence) so Mr Lucy should say when he became aware of these things.

24. In short, Mr Lucy (and the other claimants) should plead what they did and did not know, in relation to all their “statement of claim” facts, and when they discovered them. Because the Replies do not do that, and indeed do not even identify the “statement of claim facts” themselves, they should be struck out. She urged on me that these were not matters which could be left until trial, because then the trial would be a mess. They should be dealt with (and should have been dealt with) in the pleadings.
25. Mr Sherborne first complained that the application to strike out had come late. Then he said that the current suggestion that there had to be a claim by claim pleading of date of knowledge or “due diligence” was a recent construction, which was not reflected in Requests for Further Information about the Replies which had already been served and which did not seek to pursue that point (or not in that way). Then he turned to the substance of the application and sought to demonstrate how appropriate cross-referencing between the Replies and the GPOC enabled one to see what causes of action were being referred to and when it was that the claimant became aware of them, and had averments that he/she could not with proper diligence have become aware of them earlier. He accepted that the Replies did not contain a precise date when knowledge or reasonable diligence knowledge were acquired, but that was not necessary because there was a pleading that it was within 6 years from the commencement of proceedings. There was enough pleaded and it was a fact-sensitive matter for trial when a claimant was aware of what information and when. If one broke down the claims (which Ms Montgomery did in pointing to the claims on the publication of the articles and suggesting that those particular wrongs would be likely to have come to the knowledge of the claimants, starting the limitation period running then), then one had to treat each instruction of a private investigator (to take an example) as a separate wrong, and the claimants cannot have known about that until disclosure at some stage revealed it. This demonstrated how it was that a detailed fact-finding inquiry had to be conducted in order to investigate the limitation position, and not an inquiry on a strike-out application. He pointed to one instance in the case of Lily Cooper in which generic disclosure had revealed an invoice that she could otherwise not have pleaded, which is said to evidence the placing of an instruction by

Mr Nick Parker to obtain evidence unlawfully. That disclosure took place within 6 years of the commencement of Miss Cooper's claim.

26. Mr Sherborne also pointed to the case of Mr Bradley Adams as being a case where there was a more detailed pleading, apparently triggered in this case by the defendant anticipating a section 32 riposte in its Defence. In that Defence the defendant actually pleaded (without prejudice to its case that Mr Adams had to plead and prove each element of section 32 that he relied on) that Mr Adams had close relationships with some of the early claimants in this litigation, and that from those relationships and from publicity given to their claims in newspapers he was aware of those claims "from October 2010 onwards". Mr Adams pleaded to those allegations in his Reply, stating that he did not know of those claims, rarely read newspapers which contained reference to them, that the first he knew of a police inquiry into one of those claims (that of Siena Miller) was in May 2015 when he was interviewed, and that the police never told him he could be a victim of phone hacking or other unlawful information gathering. This form of pleading is said to show what an intensely fact-sensitive exercise the exercise is.

Decision on the application to strike out the Replies

27. I shall not decide this point on the basis of the lateness of the application (which I do not accept anyway), or on the basis that the necessary inquiry is fact-sensitive. There is undoubtedly a fact-sensitive inquiry to be had if the claimants' points are run, but the prior question is whether it is properly pleaded, and if it is not whether I should strike out the pleadings.
28. For the following reasons I shall not accede to the defendant's application.
29. I agree, as appears in my earlier judgment, that it is the facts which make up the claim and give rise to the cause of action which are the relevant facts for the purposes of section 32(1)(b). I also agree that since the claimant bears the burden of proof on those matters, they will need to be adequately pleaded so that the defendant will know what case has to be met. I do not accept that a precise date for knowledge will need to be pleaded in most cases, and that it will not be possible in many. One can imagine that in many cases a claimant will have acquired knowledge by dint of events of disclosure which may make specifying a precise date impossible, but unless the events span the date which is 6 years prior to the issue of claim that may not matter. If they all took place before that 6 year date, they will not assist the claimant. If they all took place after that 6 year date they will assist the claimant and it does not matter what the precise date was.

30. I also accept that there are likely to be limits to the facts that a claimant will be able to plead (in practice) in relation to his/her “reasonable diligence” knowledge. One would normally expect him/her to plead a date of knowledge, and probably the means of knowledge, and to state that there was no way in which he/she could have been expected to have known before then. It will be a rare case in which a claimant will plead: “ I knew on X date, and I accept that if I had done more I could have known on the earlier Y date, but that is still within 6 years.” One would expect the pleading and establishing of the earlier “reasonable diligence” knowledge date to come from the defendant, despite the burden of proof.
31. With those points in mind, and bearing in mind that there has to be an adequate, not necessarily an exhaustive, pleading of a knowledge date in relation to “statement of claim” facts, it is necessary to look at the statements of case in this litigation.
32. Paragraph 3(a) of Mr Lucy’s reply is a straight reliance on paragraphs 20 to 40 of the GPOC with an averment that he did not discover, nor could with reasonable diligence have discovered, “the facts pleaded therein” which are relevant to his causes of action, until a date which is within 6 years of his claim form. No specific facts relevant to Mr Lucy’s claims are directly referred to there –the GPOC is a generic pleading and one would not expect to find them there. However, paragraph 29 pleads:
- “29. The Claimants have set out at paragraph 41 below relevant facts to rights of action that are common to many Claimants which have been (and, in some cases, continue to be) concealed as a result of NGN’s concealment at the time of the wrongdoing.”
33. Paragraph 41 pleads as set out above, but I repeat it here:
- “41. As a result of NGN’s deliberate concealment of wrongdoing at the time, and NGN’s deliberate continuing concealment after the event, as set out above, NGN concealed relevant facts which were required by the Claimants to appreciate that they had a particular cause of action against NGN and to plead it. Without prejudice to any additional facts and matters which may be relied upon by an individual claimant, the following relevant facts which were concealed by NGN are common to many individuals with actual or potential claims against NGN in the MTVIL:
- (1) The identities of the potential claimants;

- (2) The identities of the journalists involved in voicemail interception and other unlawful information gathering;
- (3) The identities of the private detectives instructed to carry out unlawful information gathering on behalf of NGN;
- (4) The nature of the wrong-doing and relevant facts relating to it (i.e. voicemail interception, blagging or unlawful surveillance and particulars relating to the same);
- (5) The information from the SAP system relating to when individuals were targeted; by whom and/or in relation to which published articles;
- (6) The information from the call data relating to when an individuals' or one of their associates' mobile telephones was called;
- (7) The existence of articles, some of which have been removed from publicly accessible databases (such as LexisNexis) by NGN;
- (8) The interpretation of incriminating evidence – such as codes on documents, or euphemisms used by journalists in emails and payment documents – which can only be understood by reference to other evidence not disclosed by NGN; and
- (9) The time period during which the unlawful information gathering at *The News of the World* and at *The Sun* took place.”

34. That paragraph identifies generically the type of relevant facts which are said to have been concealed and some of them at least are, or refer to, “statement of claim” facts - principally item (4), but also (7), and (5) which by implication refers to the act of wrongdoing evidenced by the SAP payment system (a system for recording payments to third parties and which is relied on by the claimant as a source of evidence of the engagement of private investigators to carry out unlawful activities). So far as this claimant is concerned, one then goes to the Particulars of Claim to see the details of his claim that were concealed in the ways alleged. Some of the other pleaded items in paragraph 41 may be more in the nature of detail or evidence, but taken as a whole the pleading is of the wrongdoing as a whole - the claimant says he knew none of it, and could not have discovered it until a period within 6 years of his claim.
35. This way of pleading, relying on cross-reference and incorporation, may not be the usual way in which a claimant invokes section 32, but this is not litigation which adopts the usual shape. In the majority of more traditionally run cases there will be one, or at most a small number, of related causes of action, and some limited acts of concealment, which lend themselves to a more conventional pleading approach in

which a Reply will refer easily to the cause of action and the acts of concealment. Because of the complexities of this litigation, and the common nature of allegations as between large numbers of claimants, the technique of generic pleading has been adopted to avoid every claimant setting out the same material extensively in their Replies. That means that incorporation by reference is inevitable. Furthermore, the causes of action are numerous - sometimes dozens of articles (39 in the case of Mr Lucy, which is modest compared with some), coupled with underlying and separate invasions of privacy when unlawful information gathering took place. All this is a much more complex situation, which justifies a different pleading technique. In my view, and in that context, just taking those paragraphs which I have just mentioned, there is a sufficient identification of the “statement of claim facts” for the purposes of section 32.

36. The cross-referencing technique is then carried into paragraph 3(b)(i) of the Reply in which, by that technique, the “statement of claim facts” are again sufficiently identified as they are in the remaining sub-paragraphs. I repeat - in this litigation that identification technique is acceptable, and I do not believe for a moment that the defendant has any difficulty in working out what the claimants’ case is in any individual case which adopts this technique.

37. However, that is just the “statement of claim facts”. One then has to consider whether the dates of knowledge are adequately pleaded in relation to those facts. Paragraph 3(a) of the Reply is a rather general plea, but paragraph 3(b) with its sub-paragraphs puts some flesh on the bones. Sub-paragraph (i) refers to the fact that the “crucial relevant facts” emerged as a result of generic disclosure, which disclosure itself was said to be deliberately concealed. In other words, the claimant is alleging that he did not know the relevant facts until they emerged in generic disclosure, and his awareness through that route occurred only in the 6 year period preceding his claim form. I believe it is the case that some limited generic disclosure took place outside that period, but the vast bulk has taken place within it. So he is saying that he did not know of his case until that disclosure, which took place within that period. That is an acceptable pleading in the context of this litigation. Again, I do not believe that the defendant has difficulty understanding that case or will have difficulty in meeting it. The precise date of knowledge in these circumstances is unlikely to matter, unless there is an important element of disclosure which occurred (and which was drawn to the attention of Mr Lucy, which is unlikely) at about the 6 year mark.

38. Sub-paragraph (ii) again relies on generic disclosure as being the source of knowledge. The same applies as applies in relation to paragraph (i). Sub-paragraph (iii) pleads that no-one knew those facts until Operation Pinetree (a Metropolitan Police investigation into the activities of the Features Desk) started to reveal the facts, which occurred since 2013 (Mr Lucy started his case in 2019). If that was Mr Lucy’s source of knowledge (which is his allegation) he cannot have acquired it more than 6 years before his claim form. So far as sub-paragraph (iv) is concerned, this time there is no assertion of what the source of knowledge of the facts is. That might be

regarded as a shortcoming, but not one which requires striking out. Mr Lucy could amend (and if that were appropriate I would give him an opportunity to do so), or the question could be probed by a request for further information (a technique which the defendant has already adopted in relation to the Replies, and to which I refer below).

39. Thus the pleading of the claimant in this case (and, I assume in the other cases) is heavily dependent on the detail of the GPOC, which is a long and detailed document. Ms Montgomery complains that it contains a lot of material which is supporting evidential material and not “statement of claim facts” and it does not assist in the “winnowing out” (as she put it) of the relevant facts. I agree that it contains a lot of detail of material which does not amount to “statement of claim facts”, and of course it cannot do so for individual cases anyway, but what it does is to refer in general terms to the nature of the claims, and then in some detail gives particulars as to how those facts were concealed in every case, and in that context it sometimes refers to the emerging evidence in order to particularise the concealment alleged. But, long and detailed though the document is, by and large it manages to separate out those functions so as to present an intelligible case on what was concealed, how it was concealed and, to an extent, how that concealment was unravelled. It is by no means abusive of the process even though it is repetitive (as noted in my previous judgment on the amendment of the GPOC), There are one or two paragraphs which are probably over-enthusiastic (for example, paragraph 25, which is probably irrelevant to the matters properly raised in the pleading) but that does not taint the rest of the case advanced.
40. I therefore find that a section 32(1)(b) point is adequately pleaded in the Reply of Mr Lucy. Insofar as there may be deficiencies then I do not consider that they prejudice the defendant, and they can (insofar as thought appropriate) be probed by a request for further information. Indeed, the defendant has already served one in respect of each of the Replies, and they go to what the defendant says are the current omissions in the pleading. I can take the request in relation to Mr Lucy as an example. In relation to the second sentence of paragraph 3(a), and the last sentences of the 4 sub-paragraphs of paragraph 3(b) the defendant asks:
- “1. Please set out the dates on which, the means by which, and the circumstances in which, the Claimant discovered each fact relevant to his rights/causes of action which he claims was deliberately concealed by the Defendant.
 2. Please set out and particularise all the facts and matters relied on by the Claimant in support of his case he could not with reasonable diligence have discovered, more than 6 years before issuing proceedings, facts which would have enabled him to plead any or all of the causes of action set out in the Claimant Specific Allegations.

3. Please set out the dates on which, and the circumstances in which, the Claimant was contacted by the Metropolitan Police in connection with Operation Weeting.

4. Please set out the dates on which, the means by which, and the circumstances in which, the Claimant obtained details and copies of Mr Mulcaire's notes referred to in paragraph 23.1 of his Claimant Specific Particulars of Claim dated 24 July 2019.”

41. That seems an entirely appropriate way of dealing with any holes in the pleading (if there are any). Striking out would be a completely disproportionate way of dealing with those defects. I bear in mind the last sentence of the notes to the White Book quoted above. I am not sure the amendment route is necessary at the moment. A request for further information may be appropriate. A striking out is not.

PART 2 - THE SECTION 32(2) POINT

How the section 32(2) point arises

42. In my last judgment I observed that the GPOC invoked section 32(2) in a manner which I queried. In paragraphs 38 and 39 it invoked deliberate breaches of duty which were not those sued on and were not related to the causes of action sued on, which struck me as at least questionable. However, I did not rule on that specific point at the time because it was not taken (or not taken in that way) by the defendant, and the claimant had not had a proper opportunity to meet it. (See paragraphs 52 to 57.) Permission was therefore given to amend to include the relevant paragraphs.
43. Ms Montgomery now revives the point that I made, under the guise of an attack on those paragraphs of the GPOC being incorporated into the Replies, saying that her application to strike out the Replies involves an application to strike out paragraphs 38 and 39 of GPOC, and she was thus entitled to take the point even though the amendment point had gone against her. Thus she seeks to make it arise (again, or for the first time, depending on one's point of view) and runs the argument which I mentioned in my previous judgment as being the point that troubled me.

Whether the point should be argued

44. Mr Sherborne took the point that this point should not be argued. I had given permission to amend, the amendments for which I gave permission included paragraphs 38 and 39, and that was an end of it. Seeking to re-inject the arguments (which Ms Montgomery did not even seek to run first time round) under the cloak of her application to strike out the Replies should not be allowed. It was, in effect, a ruse (though he did not use that word).
45. Mr Sherborne does have a point, but it does not carry him home. In a more normal piece of litigation I would be more likely to have taken the view that the defendant had had an opportunity to object to the introduction of the point by amendment, it had failed to do so, and it could not seek to revive it in the context of a striking out application of another pleading which was really about something else. It had had its opportunity and should not have another one.
46. However, this is not normal litigation. It is managed litigation in which an enormous amount of detail is being raised in pursuit of the claim and in meeting a limitation defence. That is not said in a spirit of criticism. It is just a fact of this litigation. It occurred to me, and it still occurs to me, that there is or may be something wrong with this part of the claimant's pleaded case. It is a part of the pleaded case that raises a large amount of further detail which (unlike most of the other amendments to the GPOC which I have allowed) has not been pleaded before, and therefore extends the scope of the factual case. Much of it concerns the actual conduct of the litigation itself, which may not be easy to deal with. If there may be something fundamentally wrong with it then there is merit, in the interests of the shape and manageability of the litigation, in deciding whether there is and in dealing with it. In this instance, if in fact the duty claims have no legal merit in the context of section 32(2), then it would be right to deal with that now in order to avoid argument at trial (which will be long enough already) and in order to cut down a swathe of facts which are pleaded to support the breach allegations.
47. In those circumstances, and as managing judge of this litigation, I face reality. I allowed the point to be taken even though it essentially goes back to a point which could have been raised at the amendment point. I did not allow it under the artificiality of an attack via the Reply; I allowed it for what it was, which was an attack on the relevant paragraphs of the GPOC. In the interests of the proper conduct of the litigation I considered that the point ought to be dealt with, despite the (understandable) opposition of Mr Sherborne. Mr Sherborne was told that I wished to deal with it, and had an opportunity to make full submissions on it.

The relevant paragraphs and the point arising

48. The key paragraphs are the paragraphs in the GPOC which set out what are said to be deliberate breaches of duty in circumstances in which they were unlikely to be discovered for some time. Although the paragraphs do not expressly plead reliance on section 32(2), that is obviously what the duties in paragraph 38, and the breaches pleaded in section 39, are aimed at - see the opening words of paragraph 39. The two paragraphs are too long to set out conveniently in the body of this judgment so I have set them out in the Annex to this judgment.

49. On the amendment application Ms Montgomery suggested that the (or a) problem with that pleading is that it relies on duties which do not exist (eg the duty to assist the police) or are duties to other people (ibid). However, that is not the point which I have considered for the purposes of this judgment. The question of the existence of the duties, and to whom they are owed if they exist, is capable of being a complex one which it is not appropriate to consider on this strike-out application. I shall assume that they exist as pleaded. The issue which I consider is whether they can be relied on for the purposes of section 32(2) when they are not duties actually sued on or aspects of the pleaded causes of action (“correlates”, to use a word used in one of the authorities). It is plain that they are not in any sense sued on. The claims in the action are for misuse of private information. The duties and breaches pleaded do not go to that point; they are relied on to strengthen the riposte to the limitation defence pursuant to section 32. They have no other relevance as pleaded.

50. Mr Sherborne, after complaining about the point being allowed to be taken, went on to submit that the point fails to qualify as a point which should be taken on a strike-out application. This was a point in an area of developing jurisprudence where the facts are in dispute, and that makes it inappropriate to be decided on an application such as this - see the passage from the White Book quoted above. He pointed to various recent cases where section 32(2) had been considered in support of his proposition that this was a developing area of the law. It was at least arguable, if not right, that the duties pleaded existed and were owed to the claimants (particularly the legal process duty). The duty and breach were an alternative way of proving the concealment which he relied on for the purposes of section 32. Section 32(2) provides an alternative and easier form of proof where a deliberate breach of duty exists, and the case law (to which I will come) showed that the sort of duty which is relevant for the purposes of section 32(2) is wide.

51. Ms Montgomery adopted the point which concerned me in my previous judgment. She submitted that the duty and breach referred to in paragraph 32(2) had to be the duty sued on or at least the “correlate” of the cause of action. It could not be one which somehow arises in the context of the action and is not the one sued on. The

cases which Mr Sherborne relied on as justifying his pleading, or which he said at least indicated that this was a developing area of the law in which the point could arise, in fact indicated no such thing when properly read.

Decision

52. I start, as one has to, with the wording of the actual section. It is common ground that a 6 year limitation period applies to the present claims (1980 Act section 2 - actions in tort). Section 32 sets out the conditions in which a limitation period is postponed in the case of fraud, concealment or mistake. Subsection (1) sets out the main provision

—

“ (1) where

...

“(b) any fact relevant to the plaintiff’s right of action has been concealed from him by the defendant ...

the period of limitation shall not begin to run until the plaintiff has discovered the ... concealment ... or could with due diligence have discovered it.”

53. That is plainly focused on the actual cause of action sued on and its facts - “any fact relevant to the plaintiff’s right of action”. Under that subsection it is those facts that have to be “deliberately concealed”. Subsection (2) is expressed to be “For the purposes of subsection (1) above ...”. That means its provisions are clearly related to the cause of action sued on, and it is an elaboration of that subsection. It elaborates in relation to “the facts involved in that breach of duty”. That has a clear linguistic and logical link to the facts referred to in subsection (1) - “any fact relevant to the plaintiff’s right of action”. So the duty which is referred to is the duty which is sued on in relation to which the inquiry is as to whether there is concealment; the “breach of duty” is the “right of action”. (That is a linguistic analysis. I acknowledge that case law has developed the concept of what is a breach of duty for these purposes, but that does not affect the central thrust of that analysis.)
54. I consider that that makes coherent sense of the legislation. The legislature was concerned to cater for someone who deliberately breaches a duty in a covert manner and who is liable to be sued for it. Such a person does not necessarily deliberately conceal; he does not have to because of the nature of the breach of duty. So

Parliament decreed that he will be treated as having done so - he will be treated as if he had deliberately concealed facts relevant to the cause of action.

55. Mr Sherborne's position does not make the same amount of sense. He relies on duties which have nothing to do directly with the cause of action. They can be compendiously (albeit slightly inaccurately) described as duties to disclose. If one can find one of those, and find it is deliberately broken in a covert way, then there is taken to be deliberate concealment of - what? - "the facts involved in that breach of duty". What are those facts? They are actually the act of concealment itself, and its techniques. They are not the underlying facts which it is attempted to conceal. That would not assist a claimant because the duty to disclose is not the cause of action sued on.
56. I therefore consider the position to be clear on the wording of the statute.
57. Authority provides no assistance for Mr Sherborne. There is no authority directly on the point. To that extent Mr Sherborne can say that it remains open because it has not been decided against him. But that is true of many bad points. Nonetheless Mr Sherborne relied on recent authority which he said gave the point some life.
58. Mr Sherborne started with *Cave v Robinson Jarvis & Rolf* [2003] AC 384. The cause of action in that case was negligently drafting a document so as to fail to give the claimant the proprietary (as opposed to contractual) rights that he needed. The decision of the House of Lords was to the effect that unwitting negligence did fall within the extension provisions of section 32. That is not the same point as arises in the present case. However, Lord Millett did consider the origins and purpose of section 32(2), and in essence held that it was linked to the cause of action in section 32(1)(b). He said:

"23 As I have explained, in enacting the 1980 Act Parliament substituted "deliberate concealment" for "concealed fraud". This is a different and more appropriate concept. It cannot be assumed that the law remained the same. But reference to the old law explains why Parliament enacted section 32(2) and did not rely on section 32(1)(b) alone to cover the whole ground. With all reference to fraud or conscious impropriety omitted, there was an obvious risk that "deliberate concealment" might be construed in its natural sense as meaning "active concealment" and not as embracing mere non-disclosure. Section 32(2) was therefore enacted to cover cases where active concealment should not be required. But such cases were

limited in two respects: first, the defendant must have been guilty of a deliberate commission of a breach of duty; and secondly, the circumstances must make it unlikely that the breach of duty will be discovered for some time.

24 Given that section 32(2) is (or at least may be) required to cover cases of non-disclosure rather than active concealment, the reason for limiting it to the deliberate commission of a breach of duty becomes clear. It is only where the defendant is aware of his own deliberate wrongdoing that it is appropriate to penalise him for failing to disclose it.”

59. While those words do not quite address the point, they lend strong support to the view that the breach of duty has to be the cause of action sued on. There is no suggestion that some sort of collateral duty can be relied on.
60. Mr Sherborne relied on what Lord Scott said at paragraph 60:

“60. I hope I have done justice to the argument but, in my opinion, it cannot be accepted. I find it easy to accept that Mr Doctor’s submissions as to the meaning of section 32(1)(b) are correct. I agree that deliberate concealment for section 32(1)(b) purposes may be brought about by an act or an omission and that, in either case, the result of the act or omission, i e, the concealment, must be an intended result. But I do not agree that that renders subsection (2) otiose. A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question. In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, none the less, proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult. Subsection (2), however, provides an alternative route. The claimant need not concentrate on the allegedly concealed facts but can instead concentrate on the commission of the breach of duty. If the claimant can show that the defendant knew he was committing

a breach of duty, or intended to commit the breach of duty - I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach - then, if the circumstances are such that the claimant is unlikely to discover for some time that the breach of duty has been committed, the facts involved in the breach are taken to have been deliberately concealed for subsection (1)(b) purposes. I do not agree with Mr Doctor that the subsection, thus construed, adds nothing. It provides an alternative, and in some cases what may well be an easier, means of establishing the facts necessary to bring the case within section 32(1)(b).”

61. Mr Sherborne relied on the references to the alternative method of proof. I do not consider that that helps him. In fact the passage, if anything, hinders him. When Lord Scott refers to “the facts involved in the breach [which] are taken to have been deliberately concealed for subsection (1)(b) purposes” he must be taken to be referring to the facts relevant to the cause of action. It is only those facts which fall within subsection (1)(b). That only makes sense if the breach of duty is the breach of duty sued on.

62. The next case is *Giles v Rhind (No 2)* [2009] Ch 191. This case turned on the question of what was a “breach of duty” for the purposes of section 32(2), and it was held that a breach of section 423 of the Insolvency Act 1986 was capable of qualifying for those purposes. The decision has nothing to do with the point which now concerns me. Nonetheless, it is fair to say that Arden LJ seems to have assumed that the breach of duty which was relied on in relation to subsection (2) was in essence the wrong which was sued on. That appears from paragraph 38 of her judgment:

“38. With one qualification, I agree with the judge's conclusion. The qualification I would make is this. I do not consider that the expression "breach of duty" includes *any* legal wrongdoing whatsoever. In my judgment there must be a legal wrongdoing of a kind that can properly be raised in action to which s 32 applies. I will call this the "wider meaning" of "breach of duty". Thus, the expression "breach of duty" would not cover legal wrongs which are not justiciable, for example target duties. It may also not cover a breach of duty owed by a public authority which can be the subject of judicial review proceedings at the instance of a person who is not directly affected thereby but who has a sufficient interest for the purposes of standing in public law. I would not wish to be taken as approving the view that any such actions fall within s 32, at least without further argument.” (my emphasis)

This analysis is also consistent with paragraph 42 of her judgment:

“42. There is a further point about s 32(2), which may be noted here, though it has not been argued and so I express only a provisional view here. For s 32(2) to apply, (1) there must be the deliberate commission of an act; (2) that act must amount to a "breach of duty"; and (3) that breach of duty must occur in circumstances in which it is unlikely to be discovered for some time. If those ingredients are satisfied, then the next step (where the claimant relies on s 32(1)(b)) is to go back to s 32(1)(b) and to identify the facts that are involved in the relevant breach of duty. After that, those facts can be tested against the right of action relied on in the proceedings. There is no need, as I see it, on an ordinary reading of s 32(1) (b) to show that the right of action was for a breach of duty. All that it is necessary to show is that the relevant facts involved a breach of duty. Accordingly, in this case, all that matters is whether the execution of the deed *involved* the deliberate commission of a breach of duty of some kind.”

63. Although Arden LJ was not making a decision on the point, it seems clear to me that she was envisaging that the “relevant facts” had to involve the breach of duty in question under section 32(2). She is indicating that one does not actually have to sue on a breach of duty; but the facts giving rise to the wrongdoing have to involve a breach of duty, and that must be the same breach of duty as is referred to in section 32(2). A separate breach of duty, which is not involved in the original claim, cannot qualify.
64. That can be demonstrated by following through Arden LJ’s chain of reasoning in relation to the duties said to be owed in the present case, taking the alleged breaches of duty to disclose documents as an example. Assume there is a deliberate act in withholding documents; that is stage one. Then assume that is a breach of duty - stage 2. Assume that breach occurred in circumstances in which it would not be discovered for some time - stage 3. You then go back to section 32(1)(b) and “identify the facts involved in the relevant breach of duty”. They are the facts just set out - a failure to disclose documents which ought to be disclosed. Then test that against the right of action relied on in the proceedings. They are not the same. What was not disclosed was some documents. The right of action relied on in the proceedings is (putting it shortly) wrongful invasions of privacy. The chain breaks down.

65. The third case is *Canada Square Operations Ltd v Potter* [2020] EWHC 672 (QB). In that case Jay J had to rule on the application of section 32(2) in the context of a Consumer Credit Act 2006 claim. In it he agreed with the provisional view of Arden LJ in paragraph 42 of *Giles v Rhind*. The claim in his case was for an order under sections 140A and 140B of the Consumer Credit Act based on a failure to disclose commissions under a PPI arrangement. Since the events occurred rather more than 6 years before the claim was made limitation arose. The customer relied on section 32(2). Jay J held there was no duty of disclosure under the general law and the statute did not, as such, impose one, so section 32(1)(b) itself could not be directly applied. However, he followed *Giles v Rhind* in saying that a “breach of duty” was the obverse of “right of action” in sub-section (2) (see para 43). Thus section 32(2) could apply if the breach was deliberate. In relation to Arden LJ’s paragraph 42 he said:

“47 ... Although expressed as a preliminary view, I would respectfully agree with it. The act or omission in question must be deliberate; it must amount to a "breach of duty" in the sense that it constitutes some form of legal wrongdoing as stigmatised by statute; and it follows that the act or omission in question *involves* a "breach of duty" even if the "right of action" is not *for* a breach duty and, outside of the statutory scheme, there is no independent duty.”

Although he allowed the application of section 32(2) in relation to a duty which was not technically the cause of action sued on, it is important to note that Jay J is referring to a duty which is still associated with the wrong in question. It is a “judicial correlate”, as he put it in paragraph 29 of his judgment:

“The language of section 32(2) does not precisely track section 32(1)(b), but all that I would wish to remark upon at this stage is that the latter does not mention "breach of duty" but rather "right of action". That is defined extremely broadly in section 38(9) and includes, albeit is not limited to, "cause of action". Approaching this without the benefit of authority at this point, it seems clear that the concepts of "breach of duty" and "right/cause of action" must be the two sides of the same coin: in Hohfeldian terms, "juridical correlates". Section 32(1)(b) considers the matter from the perspective of a claimant; section 32(2) from the perspective of a defendant.”

66. Jay J put forward an additional analysis in his paragraph 48:

“48. An additional consideration is to return to an examination of the paradigm case under section 32(1)(b), namely deliberate concealment of any fact relevant to the claimant's right of action. Although the present case is not concerned with active concealment, it is possible to envisage circumstances in which section 32(1)(b) could apply to the deliberate covering up of a claimant's right of action under sections 140A-D. In these hypothetical circumstances, what is being actively concealed is any fact relevant to the autonomous statutory right of action conferred by the 1974 Act. In my view, section 32(2) operates in a similar way, at least constructively. The effect of the subsection is to treat a deliberate commission of a breach of duty (i.e. doing or not doing something which amounts to a breach of obligation, whatever it happens to be) in circumstances where it is unlikely to be discovered for some time as a deliberate concealment of any fact involved in that breach of duty: in these circumstances, being a fact pertaining to the claimant's right of action under section 140A-D. In both situations, therefore, what is being concealed, either actively (section 32(1)(b)) or constructively (section 32(2)), is a fact relevant to the legal claim the claimant is advancing. In this way, section 32(2) works in a piece with section 32(1)(b). At the end of the day, there is simply no room for the Appellant's analysis that treats "breach of duty" as requiring proof in some manner of breach of an underlying legal obligation pre-existing or separate from any right of action, statutory or otherwise, that is being invoked.” (my emphasis)

67. When analysed, this paragraph shows that Jay J is talking about a breach of duty which is the breach sued on or is parallel to it as per *Giles v Rhind*. The emphasised words show that what is being concealed, or treated as being concealed, is a breach of fact involved in the breach of duty sued on. That makes it concealment of a relevant fact; and that relevant fact is one of the facts relevant to the cause of action. That distinguishes the situation from the duties relied on by the claimants in paragraphs 38 and 39 where the duty relied on is not a legal correlative of, or related to, or an aspect of, the cause of action sued on.
68. It is true that none of the authorities cited actually decides the point which I have to decide, but their exposition of the law is consistent with the position that one arrives at when considering the wording of the statute by itself. I consider that the point is clear enough to enable me to address it in a striking out application, and I do so in favour of the defendant. Consideration of the point will not be assisted by putting it in the context of found facts. It can be decided by assuming the basic facts in favour of the claimants and considering it in that context, which is what I have done.

69. The evidential baggage which the point brings with it makes it particularly appropriate to deal with the point now if it can be dealt with. As I have remarked, paragraph 39 pleads a lot of detail which is not pleaded elsewhere and will take a significant amount of time at a trial. Striking out those two paragraphs, and reliance on them in the Replies, might bring a considerable benefit in keeping the trial manageable. I am aware of the possibility that some of those facts might be pleadable as concealment under section 32(1)(b), and it would be naive to assume that the claimants might not seek to bring them in in by further amendment in that way (a course which I in no way encourage). However, it is not clear that they would be able to do that, or would seek to do that, and any such application would have to be considered on its merits. One of the things that would have to be borne in mind now we are getting to close to trial is whether those points are really likely to add anything material to such concealment case as the claimants have. If they have a substantial concealment case already, some if not all of these breach of duty points may well add little; if they do not have such a case then at first sight they might be thought to be insufficient to get them home. The claimants will doubtless wish to reflect on that, but of course at this point I decide nothing on that particular point.
70. I do not consider that what I have decided to do is to trespass into an area of “developing jurisprudence” which is best developed in trials and not in interlocutory strike-out applications. If there is an area of developing jurisprudence it is the extent to which a given cause of action can give rise to a breach of duty claim for the purposes of section 32(2). There is no indication that it is developing or might develop into an area outside those considerations and into duties which have nothing to do with the rights sued on. In any event, there is no point in having an elaborate trial on the facts of duty, breach and intentionality if it can be seen clearly enough that the duty is not relevant in the first place, which in my view it can.

PART 3 - CONCLUSIONS

71. For the reasons given above I therefore:
- (a) Refuse to strike out the Replies and dismiss that application.
 - (b) Strike out paragraphs 38 and 39 of the GPOC. I am not clear as to whether it will be appropriate to make any consequential orders in relation to express cross-references to those paragraphs in the rest of the GPOC or the replies, but I will consider submissions on that should it be necessary.

Annex - GPOC paragraphs 38 and 39

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

arose as a result of notification to NGN of legal claims/the legal process and/or requests for documents by the MPS and/or individual professional duties (as set out below).

38.1 From at least December 2006 onwards, NGN was under (and was well aware that it was under) a duty to preserve all documents or evidence relevant to allegations of voicemail interception or related unlawful information gathering activities because of civil claims or proceedings arising out of the wrongdoing of Glenn Mulcaire and/or NGN journalists; the Claimants refer to and rely upon paragraphs 15.1-15.12 above. (This is referred to, together with paragraph 38.2, as the “the legal process duty”).

38.2 Further, NGN was under a duty to comply with the obligations imposed in the civil legal process both in the individuals claims brought against it in (or connection with) this litigation, including not to make false statements, either in documents verified by a statement of truth or in statements to the Court, and to provide full and proper disclosure in accordance with the civil procedure rules and/or Orders of the Court (together with paragraph 38.1, “the legal process duty”).

38.3 In Autumn 2006 the MPS requested NGN to produce available evidence relevant to their investigation, including emails between journalists and editors, receipts, invoices and telephone records of calls with the Glenn Mulcaire. NGN was under a duty to comply with this request to the best of its ability (together with paragraphs 38.4 and 38.5 below, “the duty to the MPS”).

38.4 In October 2010 the MPS wrote to numerous members of staff on the News and Features desks of *The News of the World* via Tom Crone to establish if they could assist in any way with any material which could be potential evidence relating to the phone hacking allegations. NGN was under a duty to comply with this request to the best of its ability (together with paragraph 38.3 above and paragraph 38.5 below, “the duty to the MPS”).

38.5 On 7 January 2011 Detective Inspector Dean Haydon wrote to the Editor of *The News of the World*, Colin Myler, referring to the internal investigation by *The News of the World* into the allegation that Ian Edmondson was involved in phone hacking and requesting that “as part of the internal investigation, if you have or obtain any material which could be potential evidence of phone hacking relating to Ian Edmondson or any other member of staff”, this be forwarded to DS Haydon “at the earliest opportunity” for his consideration. NGN was under a duty to comply with this request to the best of its ability (together with paragraphs 38.3 and 38.4 above, “the duty to the MPS”).

38.6 Tom Crone, Legal Manager for NGN and News International, was a barrister and was required to act in accordance with the Code of Conduct which set out the core duties imposed on all barristers. This included a duty to act with honesty and integrity; a duty to maintain independence; and a duty to not behave in a way which is likely to diminish the trust and confidence which the public placed in him or in the profession (together with paragraph 38.7 below, “the professional obligations duty”).

38.7 Jon Chapman, Director of Legal Affairs for News International, was a solicitor and was under a professional duty to uphold the rule of law and the proper administration of

justice; to act with integrity; and to behave in a way that maintained the trust the public places in him and in the provision of legal services (together with paragraph 38.6 above, “the professional obligations duty”).

39. NGN, by means of those acting on its behalf, deliberately breached the duties set out in paragraph 38 above. Further, due to the false public statements made by NGN about the scale, nature and extent of wrong doing; the confidentiality provisions imposed on early claims against NGN which settled (such as Gordon Taylor’s claim); the confidentiality obligations imposed on agents or employees such as Glenn Mulcaire, Clive Goodman and Andy Coulson; and the destruction of NGN emails, the circumstances of these breaches of duties were such that they were each unlikely to be discovered for some time.

39.1 In breach of its ‘legal process duty’:

(a) NGN falsely stated in Defences served in the civil litigation in 2011 and verified with statements of truth, that Mr Mulcaire’s contracts with *The News of the World* were for legitimate services. The Claimants will refer for example to NGN’s Defences in the claims brought by Gordon Taylor (as well as NGN’s Response to the Claimant’s Part 18 Request dated 31 July 2007 in the same claim), Sienna Miller, Ben Jackson, Steve Coogan, Joan Hammell, Kelly Hoppen, and Jude Law.

(b) Since 2011, NGN has refused to provide the Claimants with highly relevant disclosure and then objected to the Claimants’ attempts to obtain disclosure orders, based on a number of objections, including the fact that it was making admissions and proportionality. This has resulted in a highly misleading impression as to the fact, nature and scale of unlawful information gathering activities taking place at NGN’s titles. Even in January 2012, Mr Justice Vos (as he then was) stated as follows in his judgment of 19 January 2012 in a disclosure application brought by the Claimants (at [10]): “As I said in the course of argument, if I had acceded to suggestions back in the early part of 2011 that disclosure was not necessary because admissions had been made, the entire course of the phone hacking history might be very different from what it has been.” Despite this, NGN’s attempts to avoid providing the Claimants with proper disclosure of evidence which is highly relevant to their generic and specific claims has continued.

(c) On 18 January 2016 NGN’s Leading Counsel (Antony White QC) stated (on instructions) that NGN had obtained “a full set of the mobile data as we can get”. This was false and NGN must have known it was false. In fact, as NGN admitted on 24 March 2016 its SAP system did contain scanned copies of mobile-phone bills, dating as far back as 1999.

(d) Even after the Claimants were granted permission to amend their Generic Pinetree Particulars of Claim to plead allegations of unlawful information gathering activities at *The Sun*, NGN resisted providing the Claimants with any generic disclosure of emails demonstrating such activities. It was only pursuant to the Managing Judge’s Order of 16 December 2016, made following an

application by the Claimants which was vigorously opposed by NGN, that NGN was required to provide disclosure in relation to 43 nominated custodians at *The Sun*. The disclosure provided demonstrated a widespread culture of unlawful information gathering across the entire paper over the whole period for which documents had been disclosed. These emails implicate a very large number of journalists at *The Sun* in unlawful information gathering, and are therefore of crucial importance to the Claimants' generic case and to all or most individual claims in relation to articles published by *The Sun*. NGN had sought to prevent the Claimants from obtaining disclosure of these highly relevant emails, despite some of the individuals incriminated by those emails, such as Nick Parker and John Sturgis, holding senior positions at *The Sun* at the time.

(e) On 29 July 2016 NGN's Leading Counsel stated (on instructions) at the CMC that the reason that the Claimants had not received any Private Investigator invoices by way of disclosure was because NGN had looked for such invoices and found that there were none (beyond those which had already been disclosed). In fact, as NGN must have known, there were very many private investigator invoices, as the Claimants later discovered. Upon the Managing Judge ordering NGN to disclose any remaining invoices and vouch for the disclosure with an affidavit, NGN served the affidavit of Sinead McLaughlin dated 26 August 2016, which in fact disclosed a small number of invoices, relating to the limited number of Advanced Claimants at the time and relating only to a limited number of private investigators. This prompted the Claimants to seek an order at the 9-10 March 2017 CMC that all PI invoices be disclosed. NGN resisted such an order, insisting that it should review all of the invoices that had been scanned onto the SAP IXOS system and decide whether they were relevant. NGN was permitted to carry out this exercise, but with two sample six-month periods where it was required to disclose all invoices, so that they could be compared with those invoices which NGN considered to be relevant.

(f) This sample exercise resulted in 816 pages of invoices being disclosed for the period 1998-2010, and 1236 pages of invoices for the two six-month sample periods. The disclosure showed that the use of private investigators by NGN's journalists was massive and habitual over both the News and Features/Showbiz departments of the *The News of the World*, as well as across *The Sun*. Furthermore, the commissioning and payment of private investigators was approved by senior executives at both titles (most commonly the Managing Editors, Stuart Kuttner and Graham Dudman). However, NGN frustrated the purpose of the exercise ordered by the Managing Judge by refusing to reveal the invoices within the two six-month sample periods that it considered to be relevant and disclosable, and therefore preventing the Claimants and the Court from assessing its relevance checks. Further, it was evident that NGN had adopted a seriously and unduly restrictive approach to relevance. The Managing Judge held as follows in his Ruling dated 13 June 2017: "...the defendant has frustrated the purpose of providing the sample. Although the order does not provide in terms for standard disclosure to be done in relation to each of the six-month periods notwithstanding the bulk disclosure of invoices, it is quite clear from the judgment that I delivered on the last occasion that the reason that I gave for requiring the two six-month periods was effectively some form of test, so some form of assessment could be made as to whether the defendant's view of

relevance was actually the correct one for these purposes. Since the defendant has not carried out a standard disclosure exercise in relation to those six-month periods, we do not have the relevant comparators, so the purpose of the exercise was frustrated. I find it surprising and disappointing that the defendants have gone about the matter in this way when the purpose of the exercise was so clear.” Given NGN’s complete lack of cooperation, the Court ordered it to disclose all PI invoices held for the nominated PIs during the relevant period.

(g) This Order resulted in NGN disclosing a total of 6,360 invoices: 3,570 in relation to *The News of the World* and 2,790 in relation to *The Sun* (and even then being deliberately provided in an unsearchable format, despite NGN holding them in searchable form). NGN had been prepared to allow the Court to determine the Claimants’ claims, and the agreed generic issue as to the extent and nature of the use of PIs at its titles, without the benefit of this directly relevant and vast cache of evidence. These PI invoices have proved extremely significant in a large number of individual claims.

(h) Even the very substantial PI invoice disclosure provided by NGN in 2017 only related to a limited pool of around 30 PIs (despite the Managing Judge having ruled that disclosure should take place in relation to a much larger list of PIs). It was not until September 2018, after a further application by the Claimants in which they pointed this deficiency out, that disclosure of invoices in relation to the full list of approximately 100 PIs was again ordered and finally provided by NGN. These additional invoices have proved extremely significant in a large number of individual claims.

(i) As with the many thousands of PI invoices, NGN was also prepared to allow the Court to determine the Claimants’ claims and the generic case without the benefit of records of thousands of payments to PIs through an alternative payment system, that were readily obtainable from the Defendant’s SAP system – namely contributor payments (“ZC payments”). It was only in response to an application specifically seeking disclosure of ZC payments to PIs that NGN agreed to carry out searches for such payments, and on 1 November 2017 NGN disclosed 8,252 ZC payments to a limited number of PIs. Despite the apparent ease with which payments could be retrieved, NGN resisted disclosure of payments relating to other investigators identified by the Claimants at the PTR on 13 December 2017, even where these contributors could be identified in the disclosure as being suppliers of unlawfully obtained information. The Managing Judge granted the Claimants’ application and ordered disclosure of further ZC payments based on a limited number of search terms. On 5 January 2018, a further 2982 payments were disclosed. These payments have proved extremely significant in a large number of individual claims.

(j) On 5 December 2016 NGN’s Leading Counsel (Mr Green QC) stated that “the defendant’s case is that *The Sun*, as your Lordship knows this is our position, was different from *The News of the World* and the *Mirror* titles in that systemic unlawful activity, particularly VMI, wasn’t a feature of journalism at the Sun”. He further stated that after a manual review by Clifford Chance of the 51,000 documents that had been located as a result of the agreed search terms

there were only 40 relevant documents; and these did not show the existence of voicemail interception. In fact, these statements were false and misleading and NGN must have known they were false and misleading; the disclosure subsequently obtained by the Claimants has demonstrated unlawful information gathering, including voicemail interception, did take place at *The Sun*.

(k) At the same time as withholding crucial disclosure from the Claimants, NGN has regularly made assertions that the Claimants did not have sufficient evidence to maintain their claims in relation to unlawful information gathering at *The Sun*. For example, in paragraph 13 of its Skeleton Argument for the CMC on 9 March 2017 NGN made the following assertion (apparently on instructions) in relation to the limited generic disclosure in relation to the *Sun* that it had recently provided to the Claimants: “*In particular, in line with NGN’s consistent position in this litigation, no evidence has emerged from the extensive disclosure already conducted of any practice of voicemail interception at The Sun. It is not properly open to Cs to seek to salvage their case on this issue by ever more disproportionate requests for further disclosure.*”

(l) Similarly, at the hearing on 13 June 2017, NGN’s Leading Counsel Anthony Hudson QC stated as follows (apparently on instructions) (key parts in bold font): “As set out in Miss Morony’s 9th witness statement there would also be a fairly time consuming task to have to go through all of the invoices, and there are just over 6 000 which have not been disclosed on the basis that I have set out. But, my Lord, we would also remind my Lord of what frankly has been an enormous exercise of generic disclosure in this litigation. It is quite easy, it seems to us, to forget just the scale of the disclosure that NGN has given since 2011. **It seems to us that in the light of all the searches that have taken place over those six years we are well beyond the point of vastly diminishing returns. It seems to us that the claimants have to make a choice at some point. Do they want to continue chasing after documents which in reality, as I hope I have shown to my Lord, really do not help or certainly do not help my Lord to decide the issues that have to be decided, or do they want a trial of these cases? We are 16 weeks away from a trial and instead of focusing, we say, on getting those cases ready for trial and being ready for trial in 16 weeks and picking the cases that should be tried, the claimants are still focusing, we say inappropriately and massively disproportionately, on invoices which just go nowhere. That is why we said in the skeleton, as my learned friend pointed out, the reality is the documents they hoped for, they were searching for desperately in relation to *The Sun* to try and show systemic VMI just do not exist. They have not found them and they are not going to be able to prove that case.**” In fact, as NGN must have known at the time and as has been demonstrated by disclosure provided since then, NGN had not disclosed to the Claimants crucial evidence of unlawful information gathering activities, including voicemail interception, at *The Sun*.

(m) NGN did not disclose the email and attachments sent on 6 January 2011 at 14.19 from Chris Williams to Jon Chapman and Tom Crone until ordered to do so pursuant to the Order dated 16 November 2018 following the Claimant’s application; this is despite it being obviously key to the chronology and the

timing of the targeted deletions. This was a breach of NGN's disclosure obligations.

(n) Despite the Claimants being granted permission to amend their Generic Pinetree Particulars of Claim to include reliance on unlawful information gathering activities at *The Sun*, NGN failed to disclose crucial and highly incriminating documents of which senior NGN employees must have been aware, instead allowing trials to be listed and claims to settle without the benefit of important disclosure. The set of expense forms relating to Nick Parker is one clear example of this. These forms, which not only demonstrate Mr Parker's habitual use of unlawful information gathering but also their approval by The Sun's Head of News/Associate Editor and Managing Editors, were only disclosed in June 2019 as a result of the Claimants having to specifically identify and apply for them, despite NGN's clear disclosure obligations in this litigation. This evidence is of crucial importance to the Claimants' generic case and to individual claims in respect of articles published by *The Sun*.

(o) The Claimants repeat paragraph 19(47) (Mr Cheesbrough's deliberate failure to mention the batch and targeted deletions in his first and third witness statements in the MTVIL, in breach of Court Orders and his duty to provide true and full evidence to the Court).

39.2 Further or alternatively, NGN deliberately breached the duty to the MPS by failing to hand over relevant documents as requested in 2006 and 2010/2011 and instead engaging in the deliberate destruction of evidence (see above, paragraphs 13A – 17.8).

39.3 Further or alternatively, Tom Crone and/or Jon Chapman deliberately breached the professional obligations duty by being aware of unlawful activities taking place at *The News of the World* and/or *The Sun* and not only failing to report it, but by allowing and/or assisting in its concealment (see above paragraphs 19(39) – (42)).