Neutral Citation Number: [2022] EWHC 1222 (Ch)

Case No: HC-2000-000003

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

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

27/05/2022

Before :

THE HON. MR. JUSTICE FANCOURT

- -

Between :

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

- -
- -

David Sherborne, Julian Santos (instructed by **Thomson Heath** as lead solicitors, and **Charles Russell Speechlys LLP, Hamlins LLP and Taylor Hampton** for the individual claimants) for the **Claimants**
Richard Spearman QC, Richard Munden, Ben Gallop (instructed by **RPC**) for the **Defendant**

Hearing dates: 11, 12, 27 April 2022

- -

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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THE HON. MR JUSTICE FANCOURT

Mr Justice Fancourt :

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Introduction

1. The Mirror Newspapers Hacking Litigation ("MNHL"), which has been running since 2011, is in its fourth phase and more than 80 individual claims are currently progressing towards a third trial within this phase, scheduled to start in about May 2023. A case management conference (CMC 22) was listed to be heard on 3 and 4 February 2022. On 28 January 2022, without prior notice, the Defendant ("MGN") issued and served applications for summary judgment in 23 individual claims, or alternatively to strike out part of each claim, on the ground that the entire claim or part of each claim was statute-barred when issued.

2. The particular issue raised by the applications is whether s.32(1)(b) of the Limitation Act 1980 (deliberate concealment by defendant of fact relevant to claimant's right of action) arguably applies and defers the running of the 6-year limitation period for the claims in tort to a time less than 6 years before each claim form was issued. MGN contends that each claimant knew, or alternatively could by using reasonable diligence have discovered, more than 6 years before the date of issue of the claim form, all the relevant facts needed to plead the claims that they have now brought.

3. MGN's primary case is that each claimant knew all the relevant facts that needed to be pleaded, at or shortly after the publication dates of the articles of which they complain (which range between 2000 and 2009), and so the limitation period started to run at the time of publication. Its alternative case is that each claimant either came to know all the relevant facts between 2011 and 2015 at the latest, or in the further alternative that each claimant could by using reasonable diligence have discovered the relevant facts before 2015, or at the very latest in May 2015.

4. MGN accepts that it deliberately concealed from the claimants facts relating to unlawful information gathering ("UIG") activities carried on by its journalists or staff, or by private investigators ("PIs") on their behalf. For reasons that will have to be explained in a little detail later, there is no agreement between the parties on the relevant facts that were concealed by MGN and are necessary for the causes of action advanced by each claimant, nor the degree of generality or specificity with which the relevant facts could be pleaded for the purposes of the s.32 test.

5. The claimants' lawyers protested at the time of service of the 23 applications – and still protest – that they are an attempt by MGN to derail the timetable towards trial in May/June 2023. They point out that, in many instances, defences were served many months previously and that accordingly MGN has not made its applications as soon as it could have done. In directions that I made at CMC 22, all defences in the existing claims where no defence has yet been served are to be served by no later than 30 June 2022. Whether the applications were so motivated or not, the answer is to deal with the issues that they raise in the most convenient way, as early as possible in view of the relative shortage of time and the court's and the parties' lawyers' other commitments, which in some instances are heavy.

6. Accordingly, I directed that up to 6 of the applications in the individual claims would be heard on 11, 12 and 27 April 2022. The parties were able to agree on 6 suitable claims that provide a range of facts relevant to the limitation issues, including dates of issue of the claim forms. It is hoped that my decision on these 6 cases may well enable the parties to agree the fate of the applications in the other individual claims, or at least many of them. Further court time has been made available in June 2022 in case the court needs to decide the outcome of the applications in other cases.

7. The 6 claimants whose claims have been selected as the initial sample are:

    i) Nikki Sanderson (claim issued 7 December 2020),

    ii) Zoe Grace (claim issued 3 March 2021),

    iii) Ingrid Dupre (claim issued 6 July 2021),

    iv) Fiona Wightman (claim issued 30 July 2021),

    v) Paul Sculfor (claim issued 15 June 2021), and

    vi) Eric Tomlinson (claim issued 5 August 2021).

It will be necessary later to consider some of the evidence in those claims in response to the applications.

8. Although MGN's applications are for summary judgment and in the alternative to strike out part of the claimants' claims, the argument on paper and in court focused almost exclusively on summary judgment. That is, no doubt, because summary judgment would dispose of the entire claim whereas the strike out application would leave the major part of each claim to proceed to trial.

9. In the context of a summary judgment application on a s.32 issue, the onus lies on MGN to satisfy the court that at trial there is no real prospect that the claimants will prove the s.32 issues (the onus there being on them). MGN must therefore persuade me that, at trial, a claimant has no real prospect of proving that they did not know, and could not by the exercise of reasonable diligence have discovered, more than 6 years before issue of the claim form, the relevant facts that were concealed, and that there is no other compelling reason why the claim should be disposed of at a trial (CPR rule 24.2).

Factual background

10. As is well known, MGN was the publisher of the Daily Mirror, the Sunday Mirror and the Sunday People during the period 1995 to 2011. During that period, a very large number of articles were published containing personal and often sensitive information about well-known figures – principally in the worlds of sport, fashion, film and television – and some less well-known people associated with them. Private actions for breach of confidence and (latterly, following the decision of the House of Lords in Campbell v MGN Ltd [2004] 2 AC 457) for misuse of private information were brought by some well-known personalities. MGN tried and failed to strike out four of the early claims that were brought, on the basis that they disclosed no arguable case of misuse of private information.

11. There was considerable publicity given to phone hacking claims and allegations, in particular between 2011 (in the tragic Milly Dowler case and with the start of the Leveson Inquiry) and 2015.

12. In 2014, following the Leveson Report, the conclusion of the Old Bailey trial of Andy Coulson, Rebekah Brooks and others, and many more claims brought by victims of phone-hacking, MGN made public admissions about phone hacking and in February 2015 issued an apology to claimants in the first phase of MNHL, whose claims were moving towards a trial, and to all phone hacking victims. The apology contained limited admissions of wrongdoing by MGN journalists in the search for stories to publish. MGN admitted that on occasions it had acted unlawfully.

13. The admissions and apology did not prevent several of the first wave claimants from taking their cases to trial and recovering substantial damages. In his judgment in Gulati and others v MGN Ltd [2015] EWHC 1482 (Ch) ("Gulati"), which was published on 21 May 2015, Mann J found that wrongdoing at MGN's newspapers had been very much more widespread and much more serious in

nature than the admissions that MGN had previously made. The judgment received extensive coverage in the media. Mann J's order was upheld by the Court of Appeal, by order dated 17 December 2015.

14. Both the judgment of Mann J and the judgment of Arden LJ on appeal noted that MGN had gone to considerable lengths to try to conceal from readers and victims the fact that UIG had taken place and was the source of the private and sensitive information in the articles. This was done by falsely attributing the information in the articles to an anonymous "friend" or "pal", or "persons close to" the subject of the article, or even sometimes by identifying a credible and unsuspicious source of information. This was a deliberate deception by MGN, which understandably caused havoc and lasting damage to the personal relationships of many claimants.

15. The Dupre, Wightman, Sculfor and Tomlinson claims were issued more than 6 years after the date of publication of the Gulati judgment; the Sanderson and Grace claims less than 6 years after publication.

16. The allegations of misuse of private information that were made and found proved at trial in Gulati were, broadly speaking, of three types: phone hacking (that is, the interception of mobile telephone voicemail messages); the publication of articles containing private information; and the instruction of PIs to find out information about a claimant by various unlawful means, including the "blagging" of personal information about a claimant from a third party source, by deception. Much of the private and sensitive information obtained was used by MGN journalists to publish articles about the claimants, though in other cases no publication resulted from a particular occasion of UIG.

17. The published articles relied on in the 6 sample cases were in the periods 2003-09 (Sanderson), 2000-09 (Grace), 1998-2008 (Dupre), 2000-2002 (Wightman), 2007-2009 (Sculfor) and 1999-2009 (Tomlinson). The UIG pleaded relates to these periods of time. In the Grace case, the articles were not about Ms Grace but about her closest friends and flatmates. Ms Wightman relies too on an attempt by someone to blag medical information about her from her doctor. The primary limitation period of 6 years stipulated by s.2 of the 1980 Act had therefore expired in each case well before the actions that have been brought. The defence of limitation raised by MGN will therefore succeed at trial except to the extent that any claimant can prove a case under s.32(1)(b).

18. Each of the 6 claimants says, in various terms, that they were caused considerable distress at the time by the publication by MGN of information that was, by its nature, private and very personal in character (and Ms Grace shared the distress of her close friends and flatmates, not least because she and her friends were on occasions accused of being the source). They believed that their closest friends, partners or relatives (who I shall refer to for convenience in this judgment as "friends and family") must have been responsible for the leak of this information to MGN. The belief that friends and family were culpable was fed mainly by the deception practised by MGN, and was supported by the inability of the claimants to understand how else such private information could have been published and by repeated denials by MGN until 2014 that any UIG was carried on at its newspapers.

19. Each of the 6 claimants says, in various terms, that they only realised that they might have a claim when a friend happened to mention that they had brought a phone hacking claim, or been a victim, and they asked the claimant whether they had made a claim, or said that they should check to see whether they had been hacked.

Routemap

20. In this judgment, I shall consider first the nature of the causes of action on which the claimants rely in their claims. It is to those claims, as brought, that the law of limitation of actions (and in particular the test specified by s.32(1)(b) of the Limitation Act) must be applied. Although each of the claimants (and indeed each of the 23 respondents to the summary judgment applications) has issued a separate claim against MGN, the pleaded cases in claims in the fourth wave of MNHL are relatively formulaic. For the purposes of this judgment, I can refer to one of the claims as being generally representative of the others, identifying any differences in the other 5 claims that may be material.

21. Having identified the causes of action relied upon, I will summarise the relevant law of limitation of actions and its application to such claims. The law under s.32 has been the subject of authoritative guidance during the last few years and the underlying principles are now well-established. However, the principles established by those cases have not yet been considered in the context of claims brought by individuals for misuse of private information, where the wrongdoing of the defendant more broadly has been the subject of publicity in news media.

22. I will then address a particular issue on which the parties vehemently disagree, which is of central importance to the determination of these and the other summary judgment applications. That is the degree of specificity with which – in the light of the authorities – a claimant could plead a claim of this kind, for the purpose of deciding under s.32 whether they knew or could reasonably have known the relevant facts. This is a question of law which it is appropriate to decide at this stage.

23. I will then summarise the facts (in the cases of each of the six claimants) relating to their circumstances, what they knew or suspected in relation to wrongdoing associated with the publication of articles, other suspicious activity and the publicity surrounding MGN's wrongdoing.

24. I will then turn to MGN's case on these applications, based first on the actual knowledge of the claimants and second on the knowledge of the relevant facts that they could have obtained by using reasonable diligence. Ultimately, bearing firmly in mind that this is an application for summary judgment, not a preliminary issue with full factual findings, I must decide in relation to each claimant whether at trial in 2023 they have a real (that is, better than fanciful or theoretical) prospect of proving that, six years before the issue of their claim form, they neither knew nor could by exercising reasonable diligence have known the relevant facts needed to plead allegations of:

i) wrongdoing of MGN by publishing each article complained of, whether the wrong alleged is a breach of confidence or a misuse of private information by publication; or

ii) wrongdoing of MGN by carrying on or commissioning individual acts of UIG that amounts to misuse of private information regardless of whether the fruits of the UIG were then published in an article.

25. As I shall explain, these are the two distinct types of claim for misuse of private information that each claimant has brought, which I shall refer to as the "publication claims" and the "underlying UIG claims" respectively. The "relevant facts" are, in each case, the facts that a claimant has to prove (and needs to be able to plead) to establish a *prima facie* case – the so-called 'statement of claim test'. The test is not whether the claimant has evidence that will establish the pleaded case at trial, nor indeed whether the claim will be likely to succeed. The only requirement is that a valid *prima facie* case can be pleaded.

26. I bear in mind the guidance given by Lewison J in EasyAir Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), subsequently approved at a higher level, on the right approach for a judge hearing a summary judgment application to take in relation to issues of law, issues of fact and issues of mixed fact and law, and whether it is appropriate for such issues to be determined on a summary application rather than at a trial. The guidance is now so well known that it is unnecessary to lengthen this judgment by rehearsing it verbatim. As will appear, MGN did not argue that any of the factual evidence of the claimants should be rejected. I should therefore accept that evidence as arguably true and decide any issues on that basis. I have in mind throughout the question whether a fuller investigation of the facts at trial might alter any of the conclusions that I reach.

The causes of action pleaded

27. For convenience, I summarise in some detail here the claims pleaded by Ms Sanderson.

28. By the claim form, Ms Sanderson claims injunctive relief in relation to future unlawful conduct of MGN and damages, including aggravated damages, for:

> "…misuse of the Claimant's private information, including but not limited to the publication of articles about the Claimant or her private life in the Defendant's newspaper titles which derived from, or were based upon or corroborated by, the unlawful accessing of the Claimant's voicemail messages and/or unlawful obtaining of the Claimant's personal information through the use of private investigators or blagging"

and further or other relief, and costs. There is therefore no claim for breach of confidence, but different types of misuse of private information are described.

29. The Particulars of Claim allege that Ms Sanderson is a well-known actress who is associated with a number of other well-known individuals of interest to MGN's journalists. The Particulars of Common Facts and Issues ("PoCFI") are relied upon. The PoCFI set out the Phase 4 Claimants' generic case about UIG and concealment and destruction of evidence, and they include many detailed allegations concerning the scope of UIG and the extent of knowledge of it by MGN's senior editors, board members and in-house legal team.

30. Paras 4 and 5 of the Particulars plead that between 1999 and 2009 (the Relevant Period) Ms Sanderson was of considerable interest to MGN and that she and her associates were targeted by MGN and its journalists. Para 7 identifies a number of close associates with whom Ms Sanderson frequently exchanged voicemail messages during that period. Para 9 pleads that the messages contained information about Ms Sanderson's personal, private or family life and the private lives and business affairs of others. Some of the information was highly personal, intimate or sensitive.

31. Para 10 is as follows:

> "During the Relevant Period the Claimant experienced suspicious telephone and media-related activity, on dates which she cannot now recall specifically given the length of time which has elapsed since these covert and unlawful activities took place. This is consistent in hindsight with the unauthorised accessing of her voicemails, and included on occasion private information about the Claimant and her associates appearing in the Defendant's newspapers for which there was no legitimate explanation, or the fact that photographers were appearing at places or on occasions which was highly unlikely that they could not have known about other than by intercepting the Claimant's or her Associates' communications. In light of the Defendant's clear interest in the Claimant and her associates during this period, the Claimant will infer that this activity was attributable to the Defendant's journalists who were attempting to unlawfully access their voicemails."

Thus far, a case of UIG by phone hacking is pleaded as a matter of inference from facts known to Ms Sanderson.

32. Para 11 pleads that the communications and voicemails were private and confidential, within the scope of rights protected under Article 8 of the Convention, and that Ms Sanderson had a reasonable expectation of privacy. Para 12 then specifies the information as regards which she had a reasonable expectation of privacy.

33. Para 13 pleads that MGN owed Ms Sanderson a duty of privacy in relation to all this information and/or a duty not to misuse the same, and that for the avoidance of doubt this included acts of accessing, obtaining, receiving, storing or recording the information, which amounted to misuse of her private information.

34. There then follows a section of the Particulars of Claim in which Ms Sanderson makes allegations of widespread and habitual unlawful newsgathering activities,

based on MGN's (by then identifiable) relationship with a number of identified PIs, the large number of victims of voicemail interception over a substantial number of years and the findings of Mann J in the Gulati case. This section, like reliance on the PoCFI, is pleaded as the basis of inference not just that UIG was directed at Ms Sanderson but also that MGN was deliberately conducting it on a large scale, for gain.

35. The unlawful acts alleged against MGN are then pleaded as follows (so far as directly material):

> "19. From at least as early as 1999 to 2009, MGN unlawfully accessed or intercepted the claimant's voicemail messages and obtained private information (including through the use of private investigators) relating to her for the purposes of investigating, obtaining or verifying information or stories for publication in its newspapers on occasions which the claimant is presently unable to identify precisely.
>
> 20. Prior to full disclosure and/or the provision of further information by MGN, the claimant will rely in support of this contention upon the following facts and matters (which are the best particulars she can presently provide of the nature and scale unlawful activities), together with the inferences which can be drawn from these activities based on the facts and matters referred to in the PoCFI and particularly the Generic Facts [found by Mann J]…"

and the Particulars of Claim then set out: the records of phone calls made to her and her associates' mobile phones by MGN; an inference that many more phone calls were made to Ms Sanderson's phone during the Relevant Period resulting in accessing of voicemail data; private investigator invoices relating to investigations into her or her associates; and an inference that blagging occurred to obtain details about her and her associates.

36. Significantly, these records of phone calls and PI invoices were only available to Ms Sanderson as a result of disclosure in the claim that she brought. 13 invoices are itemised relating to various enquiries made by PIs for reward and they are pleaded as particulars of the nature and scale of the offending activities. Otherwise, the claim pleaded is largely based on inference, and Ms Sanderson expressly pleads that she is unable to give fuller particulars at this stage.

37. Para 21 pleads that it is to be inferred, as a result of these matters and the findings of Mann J and the PoCFI, that MGN obtained a substantial number of Ms Sanderson's voicemail messages and/or information relating to her and her associates which was private, confidential and/or sensitive which may not have been published.

38. The next section of the Particulars of Claim pleads a number of articles published by MGN containing private information that Ms Sanderson had not put into the public domain herself or though others, as examples of MGN's misuse of private information through the unlawful obtaining of personal information about her. 37 separate articles are identified in a schedule.

39. Para 23 pleads that the articles were based on information derived from UIG "and would not have been published but for the voicemail interception or unlawful obtaining of personal information" and mark occasions on which MGN was carrying out UIG in relation to Ms Sanderson.

40. For the proposition that the information published was private and Ms Sanderson had a reasonable expectation of privacy, the Particulars of Claim rely on the nature of the information, the medium in which it was conveyed, the unlawful circumstances in which and the purpose for which it was obtained, and the fact that it was obtained and published without her consent.

    Publication of the 37 articles is relied on at para 26 separately from the underlying UIG as being a product of the misuse of private information and as giving rise to "a freestanding cause of action for misuse of private information" which was deliberately concealed from Ms Sanderson at the time and subsequently.

41. Para 27 pleads that Ms Sanderson suffered considerable distress, loss of dignity, standing and personal autonomy caused by the matters complained of, and loss and damage.

42. Materially, Ms Sanderson pleads in relation to the damages claimed that the information that MGN was seeking was "obviously personal and sensitive"; that she was upset at the time of publication of the articles and "distressed by the publication of confidential information that only the Claimant knew"; and that the fact that the source of the personal information was a mystery caused her to become paranoid about who might be the source of the disclosure and distrust those around her. Ms Sanderson relies on the great lengths to which MGN went to conceal its activities and the public denials of UIG made following the revelation of hacking at the News of the World and at the Leveson Inquiry.

43. The claim advanced by Ms Sanderson is therefore for misuse of private information in respect of: (1) UIG in its various hidden forms that led to private information being extracted from her, her associates or third parties, and (2) the publication of the identified articles containing private information about her. In form, the articles are pleaded as if they were one cause of action, and the itemised invoices are pleaded as the factual basis for an inference of UIG rather than as individual causes of action. The cause of action for misuse of private information is pleaded compendiously, as embracing a course of conduct over a lengthy period, full particulars of which Ms Sanderson was unable to provide, and as covering two different types of claim for misuse of private information, as identified above.

44. The Claim Forms in the other 5 cases are either identical in the brief details that are given of the claim, or substantially to the same effect as in the Sanderson claim form, with the only material difference being that Ms Wightman does not claim injunctive relief.

45. The Amended Particulars of Claim in Grace and the Particulars of Claim in Dupre, Wightman, Sculfor and Tomlinson are essentially in the same form and to substantially the same effect as the Sanderson Particulars of Claim, save for the following points.

a) In Grace, Sculfor and Tomlinson, the section of the Particulars of Claim alleging widespread and habitual unlawful activities (see para 31 above) is not included, though reliance on the PoCFI is;

b) The particulars of articles and PI activity specifically pleaded in Grace almost entirely relate to her famous associates rather than her personally, and in part in Sculfor and Tomlinson);

c) In Dupre and Wightman, the section alleging widespread and habitual unlawful activities is considerably expanded, to give more detailed particulars of the widespread and habitual activities; and

d) The Wightman Particulars of Claim contain an expanded section dealing with the call data and invoices relating to associates as well as the claimant herself, and plead inferences that far more than the claimant is able to identify must have been occurring.

Nevertheless, the essential content of the Particulars of Claim in the other 5 cases is the same as in Sanderson.

The tort of misuse of private information

46. It is common ground that the tort of misuse of private information involves a two-stage test: whether there is a reasonable expectation of privacy in relation to information, and then a balancing of competing Article 8 and Article 10 rights. This was recently confirmed by the Supreme Court in ZXC v Bloomberg LP [2022] 2 WLR 424 at [47], [49] and [50] in the joint judgment of Lord Hamblen and Lord Stephens JJSC:

> "In *Murray* the Court of Appeal endorsed the two stage test for whether there has been misuse of private information, as explained in the Court of Appeal decision in *McKennett v Ash* [2008] QB 73. As stated by Simon LJ at para 42 of his judgment in the present case, at stage one, the question is whether the claimant has a reasonable expectation of privacy in the relevant information; if so, at stage 2, the question is whether that expectation is outweighed by the countervailing interest of the publishers' right to freedom of expression. This two-stage test is now well established.
> …..
> Whether there is a reasonable expectation of privacy is an objective question. The expectation is that of a reasonable person of ordinary sensibilities placed in the same position as the claimant and faced with the same publicity – see *Campbell* [2004] 2 AC 457, para 99 per Lord Hope of Craighead; *Murray* [2009] Ch 481, para 35.
> As stated in *Murray* at para 36, "the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case". Such circumstances are likely to include, but are not limited to, the circumstances identified at para 36 in *Murray* – the so-called "*Murray* factors". These are: (1) the

> attributes of the claimant; (2) the nature of the activity in which the claimant was engaged; (3) the place at which it was happening; (4) the nature and purpose of the intrusion; (5) the absence of consent and whether it was known or could be inferred; (6) the effect on the claimant; and (7) the circumstances in which and the purposes for which the information came into the hands of the publisher. "

47. Mr Sherborne submitted that, in the light of these principles, each case is "quintessentially fact-sensitive and requires consideration of all factors together". That is doubtless right, when making the final adjudication on the twin issues of privacy and balancing interests; but, conversely, the essential ingredients of the tort that have to be pleaded to establish a *prima facie* case are quite limited. These are: (1) that the claimant is a private individual; (2) the information that is said to be private; (3) that the claimant had an Article 8 expectation of privacy in relation to the information; (4) the unauthorised publication or other acts of misuse complained of, so far as known; (5) that in the circumstances the publication or acts were a breach of duty not to misuse private information, and (6) that loss and damage was caused by the breach.

48. It is not necessary, in pleading this cause of action, to identify the evidence that will be relied on for each of the *Murray* factors, or to anticipate any defence on the privacy or balancing rights stages (such as the purpose of the act or publication, the public importance of the information, or the way in which the information came into the defendant's hands) that the defendant may raise. Obviously, a claimant may not know what the defendant did to obtain the information, but that does not preclude them from bringing a claim. If it did, the early claimants in MNHL and the parallel News Group Newspapers litigation could not have issued valid claims going beyond the mere publication of the articles.

49. There is clearly no difficulty with a claimant pleading (1), (2) and (3) above. Whether the case on expectation of privacy succeeds at trial is a separate question from whether the claimant could properly plead the case. The problematic area is (4) if the underlying UIG rather than the publication itself is to be relied upon. As a result of concealment, a claimant may not know, or be able to discover, what acts were done that amount to UIG. That is particularly pertinent in Ms Grace's case, since no article was published about her.

50. MGN's case is that each claimant knew, or alternatively could with reasonable diligence have discovered, enough to plead an inferential case about UIG, either at the time of publication of the articles or at least by the period 2011-2014, when there was substantial media coverage of phone hacking. As a final fall-back position, they contend that a claimant could with reasonable diligence have pleaded a claim alleging UIG after publication of the Gulati judgment. Where a claimant does not know of the acts of UIG, Mr Spearman QC for MGN submitted that all that was needed for any of these claimants to issue a claim for misuse of private information based on inferences of UIG was to plead:

    i) that they or their associates were of interest to MGN's newspapers;

ii) the treatment (publication of articles, doorstepping, telephone interference or blagging) that the claimant had personally experienced;

iii) generic factual material that tends to show that MGN engages in widespread UIG;

iv) as a matter of inference, the claimant was a victim of UIG.

51. That is the approach to pleading that was taken in the first four MHNL claims, in 2011, even before there was more extensive publicity of phone hacking activities at MGN's newspapers. MGN submits that the material for an inferential claim is much stronger by 2014, and stronger still after the Gulati judgment.

Section 32 Limitation Act 1980

The statutory provision

52. Section 32 provides, so far as material:

> "(1) Subject to subsections (3), (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.
>
> (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….."

Subsections (3), (4A) and (4B) are irrelevant to the issues in this case.

The authorities on s.32

53. In Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Her Majesty's Revenue and Customs [2020] UKSC 47 ("FII"), the Supreme Court was concerned with the application of s.32(1)(c) to the case of a mistake of law as to the tax liability of UK-resident companies for dividends paid by non-resident subsidiaries. The appeal in FII gave rise to complex and important issues that are irrelevant to this case. However, in the course of their joint judgment, Lord Reed PSC and Lord Hodge DPSC reviewed in some detail the historical origins and the purpose of the Limitation Act in general, and section 32 in particular.

54. They noted, at [155], that it had long been recognised that "the purpose of the statutes [of limitation] goes further than the prevention of dilatoriness; they aim at putting a certain end to litigation and at preventing the resurrection of old claims, whether there has been a delay or not", and recognised that the effect of section 32 might be to extend the running of the limitation period for an indefinite period of time. Nevertheless, "it is the duty of the court, in accordance with ordinary principles of statutory construction, to favour an interpretation of legislation which gives effect to its purpose rather than defeating it."

55. Having reviewed all relevant authorities on section 32 and its predecessor, and those on sections 11 and 14 of the 1980 Act, Lords Reed and Hodge said at [193]:

> "The purpose of the postponement effected by section 32(1) is to ensure that a claimant is not disadvantaged, so far as limitation is concerned, by reason of being unaware of the circumstances giving rise to his cause of action as a result of fraud, concealment or mistake. That purpose is achieved, where the ingredients of the cause of action include his having made a mistake of law, if time runs from the point in time when he knows, or could with reasonable diligence know, that he made such a mistake 'with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence'; or, as Lord Brown put it in *Deutsche Morgan Grenfell* [2007] 1 AC 558, he discovers or could with reasonable diligence have discovered his mistake in the sense of recognising that a worthwhile claim arises. We do not believe that there is any difference of substance between these formulations, each of which is helpful and casts light on the other."

Although this paragraph has reference to mistake of law, it is clear from the judgment as a whole that (subject only to a possible difference as to the precise time at which the 6-year limitation period starts to run) the general principles explained apply equally to cases of fraud, deliberate concealment and mistake.

56. This and other passages in FII were considered by the Court of Appeal in Potter v Canada Square Operations Limited [2021] EWCA Civ 339; [2022] QB 1, where it was explicitly stated that, in view of s.32 and other sections of the 1980 Act that have a similar effect, the Act does not pursue an unqualified goal of barring stale claims but its objective in that regard is tempered by the acceptance that it would be unfair for time to run against a claimant before they *could reasonably be aware* of the facts giving rise to a right of action. Males LJ in that case rejected the argument (advanced on the basis of dicta of Simon J) that s.32 itself should be narrowly construed:

> "It should be given its natural meaning without a predisposition to interpret it either narrowly or broadly." [167]

As emphasised in FII, the section must be construed in such a way as to give effect to its purpose rather than defeating it. The purpose of s.32 is to avoid the unfairness of a claim being barred before the claimant *could reasonably be aware* of the relevant facts giving rise to the claim.

57. Their Lordships in FII then turned to (and rejected) the argument that time could not start running until it was known that a cause of action was well-founded:

> "… At the stage of an enquiry into limitation the existence of the cause of action, and therefore the truth of the facts relied on by the claimant to establish it, is not the relevant issue. Put in general terms, the question is not whether the claimant could have established his cause of action more than 6 years… before he issued his claim, but whether he could have commenced proceedings more than 6 years before he issued his claim. The existence of the constituents of the cause of action - such as fraud or mistake - as verified facts is not the issue" [201].

The fact that the defendant disputes an element of the cause of action does not mean that commencement of the limitation period is further postponed.

58. Their Lordships then considered the statutory meaning in s.32(1) of "could with reasonable diligence have discovered it" and noted that authoritative guidance had previously been given by Millett LJ in Paragon Finance plc v DB Thakerar & Co [1999] 1 All ER 400 at 428 as follows:

> "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. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

and by Neuberger LJ in Law Society v Sephton & Co [2004] EWCA Civ 1627; [2005] QB 1013 at para 116, who said that it was inherent in s.32(1) that there must be an assumption that the claimant desires to discover whether or not there has been a fraud:

> "Not making any such assumption would rob the effect of the word 'could', as emphasised by Millett LJ, of much of its significance. Further, the concept of 'reasonable diligence' carries with it the notion of a desire to know, and, indeed, to investigate."

59. Reviewing the practicability of the suggested approach in relation to a mistake of law, Lord Reed and Lord Hodge observed at [210] that its application would depend on the circumstances of the case, noting that in case of mistaken payment resulting from ignorance of the law the mistake would normally be discoverable immediately, by seeking legal advice – reasonable diligence would usually

include the seeking of legal advice in that context. However, if the payment was made in accordance with the current understanding of the law, which was later overturned, the question would be whether it was discoverable by the exercise of reasonable diligence that the basis of the payment was legally questionable.

60. Although this comparison relates to mistake of law, it is instructive. It establishes that a person cannot rely on legal ignorance of the right to bring a claim if they know the facts that, according to a proper understanding of the law, give rise to that claim. Where mistake of law is not in issue but the question is whether there exists a factual basis for a right to bring a claim, the prior question is likely to be when, by the exercise of reasonable diligence, a person could discover the relevant facts. In this regard, as noted by Millett and Neuberger LJJ, it is to be assumed that the claimant is reasonably motivated to find out whether they have a claim.

61. The Supreme Court in FII did not deal with the question of what was meant by "any fact relevant to the … cause of action" or what it was that put a claimant on inquiry in the first place, in a case of deliberate concealment.

62. The former question is now long established as meaning an essential fact needed to enable a statement of claim to be pleaded (the 'statement of claim test'). This question was addressed comprehensively by Simon J in Arcadia Group Brands Ltd v Visa Inc [2014] EWHC 3561 (Comm); [2015] Bus LR 1362 at [24] by reference to several authoritative decisions. It is of value because it addresses the matter in the context of an allegation of deliberate concealment, though the suggestion of narrow interpretation in principle (1) has been disapproved by the Court of Appeal (in the Potter case, see above):

> "These cases establish a number of principles which are relevant to the present applications.
>
> (1) Section 32(1)(b) is a provision whose terms are to be construed narrowly rather than broadly, see Rose LJ in *Johnson* [Johnson v Chief Constable of Surrey (CA, unrep, 23.11.92)]. In this context, Neill LJ referred to 'the public interest in finality and the importance of certainty in the law of limitation,' in *C v MGN* at p.239A [C v Mirror Group Newspapers Ltd [1997] 1 WLR 131]
>
> (2) There is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of succeeding in the claim or are broadly relevant to a claimant's case. Section 32(1)(b) is concerned with the former, see Rose LJ in *Johnson*.
>
> (3) The section is to be interpreted as referring to 'any fact which the [claimant] has to prove to establish a prima facie case', see Neill LJ in *Johnson* and in *C v MGN* at p.138H, and Rix LJ in *The Kriti Palm* [[2006] EWCA Civ 1601] at [323].
>
> (4) The claimant must satisfy 'a statement of claim test': in other words, the facts which have been concealed must be those which are essential for a claimant to prove in order to establish a prima facie

case, see Rose and Russell LJJ in *Johnson* and Neill LJ in *C v MGN* at 137B-C. As Buxton LJ expressed it in *'Kriti Palm'* at [453]:

> … what must be concealed is something essential to complete the cause of action. It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it.

(5) Thus section 32(1)(b) does not apply to new facts which might make a claimant's case stronger, see Russell LJ in *Johnson*:

> Accordingly, whilst I acknowledge that new facts might make the plaintiff's case stronger or his right to damages more readily capable of proof they do not in my view bite upon the 'right of action' itself. They do not affect 'the right of action,' which was already complete, and consequently in my judgement are not relevant to it.

Nor does the sub-section apply to newly discovered evidence, even where it may significantly add support to the claimant's case, see Rix LJ in the '*Kriti Palm*' at [325], nor to facts relevant to the claimant's ability to defeat a possible defence, see Neill LJ in *C v MGN* at 139A.

(6) as expressed by Rix LJ in *The 'Kriti Palm'* at [307], the purpose of s.32(1)(b) is intended to cover the case,

> where, because of deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action (the so-called 'statement of claim' test). It is therefore important to consider the facts relating to an allegation of deliberate concealment vis-à-vis a claimant's pleaded case.

(7) What a claimant has to know before time starts running against him under s.32(1)(b) are those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation, see for example Neuberger J in *Gold v Mincoff* [Gold v Mincoff, Science & Gold [2001] Lloyd's Rep PN 423] at [75] in the different context of s.14A of the 1980 Act, but referring to *Johnson* and *C v MGN*."

63. It follows that to start time running the facts that must be known by the claimant, actually or constructively, are only those that comprise the essential elements needed to constitute a validly pleaded cause of action – importantly, being the cause or causes of action that the claimant has pleaded – not those facts that enhance, support, add detail to or evidence the facts that need to be pleaded at the outset (before disclosure).

64. The question of what is needed to put a claimant on inquiry, for the purpose of determining what measures (to use the language of Millett LJ) the claimant could reasonably have been expected to take to inquire into the matter, has very recently

been considered in a case whose hearings at first instance and in the Court of Appeal fell either side of the decision of the Supreme Court in FII. That case too was one concerned with deliberate concealment of wrongdoing: Granville Technology Group Ltd (in liquidation) v Infineon Technologies AG [2020] EWHC 415 (Comm) (Foxton J), *sub nom*. OT Computers Ltd (in liquidation) v Infineon Technologies AG [201] EWCA Civ 501; [2021] QB 1183 (Court of Appeal) ("OTC").

65. The particular issue in OTC was whether a company in administration or liquidation could reasonably be expected or should be taken to have conducted the same degree of inquiry into circumstances of potential wrongdoing as a trading company would reasonably have done; and more broadly, what if any characteristics or character traits of the claimant are relevant when considering the objective test of what the claimant could with reasonable diligence have discovered of concealed facts.

66. At first instance, Foxton J rejected the argument that the test of constructive knowledge ("could with reasonable diligence have discovered it") required it to be assumed (possibly contrary to the facts) that there was something to put the claimant on notice of the need to investigate the fraud, concealment or a mistake, as the case may be. He held, following dicta of Aikens LJ in Allison v Horner [2014] EWCA Civ 117 at [35] and Henderson LJ in Gresport Finance Ltd v Battaglia [2018] EWCA Civ 540 at [46] that the assumption of reasonable diligence would only make sense, in context, if there was something that actually put a claimant on notice of the need to investigate. However, he emphasised that the question of whether there was something to put the claimant on notice must be determined on an objective basis.

67. Foxton J then addressed the question of how far the test of reasonable diligence falls to be qualified by particular circumstances of the claimant. Having reviewed further authorities, including a judgment of Lord Hoffmann sitting in the Court of Final Appeal in Hong Kong, he held that the particular circumstances of the claimant companies being in liquidation or administration at the relevant times could well affect the answer to the question whether there was something to put the claimant on inquiry, and that it was not right that such a claimant should be assumed to be a solvent trading company (as a literal application of the test propounded by Millett LJ might suggest). He considered that the insolvency of the relevant claimant might not so far affect a consideration of what reasonable diligence was to be assumed if the claimant was on inquiry about wrongdoing. The judge found that a reasonably diligent insolvency practitioner could not have discovered the facts relating to the wrongdoing by the cartel more than 6 years before the claim form was issued.

68. The Court of Appeal agreed with Foxton J that a claimant in administration or liquidation could not for the purpose of the test in s.32(1)(b) be assumed to be a trading company, or to have been on notice to the same extent as a trading company would have been, and this was sufficient to dispose of the only permitted ground of appeal. However, Males LJ, giving the only reasoned judgment, considered that the test in s.32(1) did require a consideration, first, of whether there was anything to put a claimant on notice of a need to investigate, and then, secondly, what a reasonably diligent claimant would have discovered

by its investigation. The criterion of reasonable diligence does not only apply at the second stage: a claimant must be reasonably attentive, so as to become aware of what a reasonably attentive person would learn.

69. Males LJ expressly stated at [30] that application of the criterion depends on the context in which the issue arises, and that what reasonable diligence requires in any situation must depend on the circumstances. The application of the test is therefore necessarily fact-sensitive. See also per Henderson LJ in the Gresport Finance case, at [50].

70. The following paragraphs or parts of paragraphs of Males LJ's judgment are relevant:

> "In summary, when there has been deliberate concealment of a relevant factor, "reasonable diligence" will not require a claimant to take steps to discover that fact unless there is something (referred to in the cases as a "trigger") to put it on notice of the need to investigate. Whether there is such a trigger must be determined objectively as a question of fact." (para 35)
>
> "I would agree that personal traits or characteristics bearing on the likelihood of the particular claimant discovering facts which a person in his position could reasonably be expected to discover, such as whether the claimant is slothful, naïve, shy, nervous, and curious or ill-informed, are not relevant. But it does not necessarily follow, as Lord Hoffmann NPJ said in *Peconic*, that the claimant must be assumed to be someone or something which he is not."
>
> "… Although the question what reasonable diligence requires may have to be asked at 2 distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section.
>
> Third, while the use of the words "could with reasonable diligence" make clear that the question is objective, in the sense that the section is concerned with what the claimant could have learned and not merely with what he did in fact learn, the question remains what the claimant (or in the terminology of the section, "the plaintiff")

> could have learned if he had exercised such reasonable diligence. That must refer to the actual claimant, in this case OTC, and not to some hypothetical claimant.
>
> Fourth, the section applies to all kinds of claim where there is fraud, concealment or mistake. There is no warrant in the language of the section for a different test to be applied in certain kinds of case, such as cases where the claimant is carrying on business. The application of the test will differ according to the circumstances, but there is a single test." [47]-[49]

> "In my judgement a similar approach [to that which applies under s.14 of the 1980 Act] applies to section 32. The section requires an objective standard (what the claimant could have discovered with the exercise of reasonable diligence) but what assumptions are appropriate in the case of a claimant from whom wrongdoing has been deliberately concealed and the degree to which they reflect the actual situation of that claimant will depend upon why the law imports an objective standard. Here, the purpose of the section is to ensure that the claimant – the actual claimant and not a hypothetical claimant – is not disadvantaged by the concealment. In achieving that purpose it is appropriate to set an objective standard because it is not the purpose of the law to put a claimant which does not exercise reasonable diligence in a more favourable position than other claimants in a similar position who can reasonably be expected to look out for their own interests. Rather, claimants in a similar position should be treated consistently." [59]

Analysis

71. I derive from this line of authority, as a matter of principle, that the objective test in s.32(1) requires both a standard of reasonable general awareness and self-interest to be attributed to a claimant, when considering the question of whether a claimant was on notice of the need to investigate, and an objective assessment of the inquiries that a reasonable person in the position of the claimant would carry out, exercising reasonable but not exceptional diligence. Further, the objective standard must be applied to the claimant themselves – in other words, a person circumstanced as the claimant actually was at the relevant time(s), but that individual character traits that may have affected the nature of the claimant's response, or desire to investigate, should be disregarded, to ensure that like cases are treated alike, rather than careless or inattentive claimants being favoured by the law. This in my judgment is consistent with the equitable origins of the statutory provision now found in s.32 of the 1980 Act, where equity relieved against the consequences of mistake and applied the early statutory provisions by analogy, but did not do so in favour of those who failed to act promptly once the claim could with reasonable diligence have been discovered: see paras [103] to [128] of FII.

72. What the line of authority does not distinctly address is how Millett LJ's standard of reasonable diligence ("how a person carrying on a business of the relevant kind

would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency") applies in the case of a private individual who does not carry on a business; and where the line is properly to be drawn between the circumstances of an individual claimant and their character traits. If the test propounded by Millett LJ were to apply to individual claimants, one would be required to make assumptions (if not the case) about the solvency and resources of the claimant, but it is unclear whether, consistently with the principles expressed in OTC, one should make such assumptions. For example, if an individual claimant were impecunious and living alone, would it be right to assume that they had the funds with which to instruct lawyers or other contacts from whom to obtain advice? It is unwise to try to answer such subtle questions in the abstract, divorced from the particular facts of each case, if those facts are capable of bearing on the answer.

73. What is central to the "statement of claim test" for relevant facts is the nature of the claims that these 6 claimants have brought, and the recognition that has already been given to the difficulty that claimants generally have in MNHL in accessing the documents or other evidence needed to establish the facts that prove their cases. It is of course a pleading test, not an evidence test, but nevertheless some basic facts need to be believed to be true in order to plead a viable claim for misuse of private information.

74. In this regard, the decision of Mann J in Gulati v MGN Limited [2013] EWHC 3392 (Ch) is of importance. That judgment was on MGN's application for summary judgment against Mr Flitcroft and Ms Gibson and to strike out the generic allegations in two paragraphs of all four claims (the other claims being those of Ms Gulati and Mr Eriksson). The summary judgment aspect raised the question of whether, on the facts of those cases, there was any credible evidence that the articles published about each claimant were the result of phone hacking.

75. In para 5 of his judgment, Mann J addressed the argument of MGN that a claimant is not entitled to bring a claim with no real prospect of success in the hope that something would turn up on disclosure:

> "It is a familiar state of affairs that a claimant is ultimately reliant on disclosure from the other side in order to bring his case home, particularly in cases where the nature of the wrong is such that the defendant's activities were covert so that, if the case is good, the defendant is likely to have a substantial amount of material in its hands with no equivalent in the hands of the claimant. Unless the prospects of getting disclosure are "fanciful", the claimant is generally entitled to maintain its case in those circumstances. That is not to say that claimants are entitled to embark on speculative cases in the hope that disclosure will throw up something useful. The claimant must have more than that to start with, but the inability to make a full case without disclosure is not, in my view, a bar to starting the litigation in the first place."

After referring to dicta in Doncaster Pharmaceuticals Ltd v The Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661, Mann J continued at para 9:

> "The present cases are capable of falling into the category of cases which require full investigation. Provided that there is enough to prevent them falling into the category of the purely speculative, the nature of the wrong or alleged [wrongs] is such that the claimants will or may have little knowledge and evidence of their own at this stage and will need the benefits of pre-trial procedures in order to add to the case. There is nothing wrong with this. It is what disclosure (among other steps) is for. The alleged activities in this case were covert and, of their very nature, would be activities of which the victims would know little or nothing. Better evidence of what happened would lie with the defendant. There is nothing wrong with pleading a starting point, on an appropriate basis, and then expecting the case to become clearer after pleading and disclosure (not the extraction of further information pursuant to a request)".

76. Mr Flitcroft had pleaded that The People obtained information about his relationship with a Miss James through phone hacking, not normal investigative journalism. MGN had some contrary evidence. Mr Flitcroft also relied on the generic material that MGN failed to strike out. The judge held that the generic material was relevant and capable of supporting the inference that particular information about Mr Flitcroft had been obtained by phone hacking. A similar conclusion was reached in Miss Gibson's case. The judge concluded that Mr Flitcroft had a real prospect of establishing that phone hacking played its part in MGN's information gathering.

77. The approach taken by Mann J to the adequacy of generalised pleadings is well-established in cases where the relevant facts are likely to be in the defendant's control because the defendant is seeking to conceal them from the claimant, as in the case of secret cartels. In Nokia Corporation v AU Optronics Corporation [2012] EWHC 731 (Ch), Sales J referred at [67] to "a measure of generosity in favour of a claimant" in such cases when assessing whether a claim has been pleaded with sufficient particularity to enable a defendant to know exactly what case it has to meet. In Bord Na Mona Horticulture Ltd v British Polythene Industries plc [2012] EWHC 3346 (Comm), Flaux J similarly referred at [31] to "a more generous ambit for pleadings, where what is being alleged is necessarily a matter which is largely within the exclusive knowledge of the defendants". Conversely, if a valid claim could be pleaded on this "starting point" basis, the running of the limitation period is not deferred until the claimant knows (or could reasonably have known) further facts that were not essential for a valid claim to be pleaded.

The argument based on "*The Kriti Palm"*

78. Mr Sherborne on behalf of the claimants submitted that what each claimant needed to know, for the purposes of the test in s.32(1)(b), was each act of UIG that gave rise to a freestanding cause of action. This was necessary because each occurrence of UIG (*e.g.*, each instruction to a PI to obtain information covertly, each occasion on which a PI 'blags' confidential information from a third party, and each occasion on which a voicemail is intercepted and captured) was a separate cause of action. A relevant fact for each distinct cause of action is the particular act that amounts to the unlawful invasion of privacy. He said that it was

not sufficient for the purpose of s.32 to be able to plead UIG more generally, without providing the specific detail of the occasion of UIG.

79. Mr Sherborne placed heavy reliance in this regard on the decision of the Court of Appeal in The Kriti Palm [2006] EWCA Civ 1601. He submitted that it demonstrates that it is insufficient to be able to plead breach of duty or breach of contract generally, without regard to the specific cause of action; and that for s.32 purposes a claimant needs to be able to plead the facts relevant to each individual breach of duty or breach of contract.

80. In that case, the trial judge held that the cargo certifier (ITS) had deceived a purchaser of the cargo about its specification, and in the alternative that claims for breach of duty succeeded and were not statute-barred because the fact and results of a re-test of a sample carried out by ITS had been deliberately concealed from the purchaser (AIC). The Court of Appeal held that the judge's conclusion on the deceit claim was wrong, and that he had applied the wrong test under s.32. By a majority, they held that the conclusion on s.32 was nevertheless right because, properly applying the test to the pleaded breach of duty causes of action, the re-test and the results of the re-test were relevant facts for some of the causes of action pleaded, which AIC did not know and could not by using reasonable diligence have known until disclosure.

81. Rix LJ, who dissented on the s.32 issue, considered that the real gravamen of the claim was that ITS had provided an invalid certificate and negligently performed the wrong test, and that the claims alleging non-disclosure of the re-test were merely parasitic claims attempting to avoid having to rely on statute-barred claims. He held that ITS did not have a duty of disclosure of the re-test but that, even if they did, the re-test results were merely further evidence of the principal breaches and were not facts relevant to the right of action.

82. At [307], Rix LJ said, in relation to the error of the judge's approach:

> "A further difficulty is that in his conclusion on deliberate concealment the judge nowhere identifies in respect of which pleaded causes of action he finds that deliberate concealment prevents the running of the limitation period. On the contrary, he appears to have regarded the Cooper retest and results as critical to all AIC's various pleaded causes of action (see generally at paras 316/331 of his judgement). This is important because the purpose of section 32(1)(b) appears to be designed to cater for the case where, because of deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action (the so-called "statement of claim" test). It is therefore important to consider the facts relating to an allegation of deliberate concealment vis-à-vis a claimant's pleaded case. However the judge appears to have regarded the deliberate concealment of the Cooper retest and results as relevant to any claim at all."

It is therefore clear that the s.32 test must be applied to the particular causes of action that are pleaded.

83. Rix LJ then referred to the decisions of the Court of Appeal establishing the "statement of claim" approach and cited Neill LJ in C v Mirror Group Newspapers [1997] 1 WLR 131 at 138H, who said "the relevant facts are those which the plaintiff has to prove to establish a prima facie case", as contrasted with the evidence that related "to the proving of the case rather than the existence of the right of action".

84. At [355], Rix LJ said:

> "I therefore turn to the pleaded causes of action which were particularly relied on, namely those which depend on alleged duties of disclosure about the Cooper retest (including the failure to obtain permission to make the test). I have said above that those duties did not arise. But even if they had, it seems to me that Mr Gaisman is correct to submit that section 32(1)(b) is not fulfilled by the pleading of causes of action which are artificially designed to attempt to turn a parasitic question of knowledge of further evidence into an essential basis of the claimant's right of action. The Cooper retest was simply further evidence that the goods were out of specification and that something had gone wrong in the original test and result certificate."

85. Buxton LJ and Sir Martin Nourse disagreed with Rix LJ's analysis of the facts but not the law. Buxton LJ said at [453]:

> "…as Rix LJ emphasises, *Johnson* stands as authority for the proposition that what must be concealed is something essential to complete the cause of action. It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it. *The court therefore has to look for the gist of the cause of action that is asserted, to see if that was available to the claimant without knowledge of the concealed material*.". (*emphasis added*)

86. Buxton LJ concluded that arguments that the Cooper re-tests were either irrelevant or only further evidence, as ITS had argued:

> "… do not sufficiently respect the nature of a cause of action in negligence, or breach of contract, when applied to the facts of this case. A party may fail to perform his duty, whether in contract or in negligence, in a variety of different ways. In the present instance, the certifier may breach his duty by negligently reaching a wrong result; or by misinforming his client about some material fact; or by failing to reveal some matter that is relevant to the client's reliance on the certificate. Although each of those complaints relates to a failure of the certifier to perform his duties, the breaches relate to different aspects or heads of those duties, and generate different causes of action: even though all of them are causes of action in negligence, and all of them complain of the certifier's performance of his duties."

87. Buxton LJ then explained the significance of the Cooper re-tests to the causes of action in negligent misstatement:

> "Once the Cooper retests were available to AIC, it was able to plead for the first time that ITS was negligent by failing to give proper weight to the results of the Cooper retests. A cause of action in negligent representation is completed by asserting first the representation; second that it was false; and third the negligent fault on the part of the representor that caused the falsity. Where there are different respects in which the representor was negligent, those different respects generate different causes of action, even though the first and second items listed above are common to all of them. This is such a case. The cause of action that complains that the representation was false because of failure on ITS's part to act on the Cooper retests is different from the cause of action in negligent representation that was pleaded before the Cooper retests were known about."

88. This passage illustrates that, for s.32(1)(b) purposes, causes of action are to be reduced to their essentials – in that case, the representation relied upon, the fact that it was false, and the respect in which the representor was negligent in making it. A cause of action that depends on a particular negligent act is not the same as a cause of action that depends on a different negligent act.

What are the essential facts of the claimants' claims?

89. Applying The Kriti Palm, in this case – where the cause of action is misuse of private information – each occasion of misuse is, strictly, a separate cause of action (see Mann J and the Court of Appeal in Gulati v MGN Ltd [2015] EWHC 1482 (Ch) and [2017] QB 149). What the 6 claimants have done is nevertheless to plead the allegations of UIG more generally and rely on the known PI invoices and articles as evidence of particular instances of a pattern of unlawful conduct. The question therefore arises whether, for the purpose of the s.32 test, the particular occasions of UIG evidenced by the individual PI invoices are essential facts. If they are, it is clearly arguable that these claimants did not know and could not reasonably have known of each particular instance before they issued their claims.

90. In reality, the PI invoices that the claimants obtained on disclosure are evidence that occasions of UIG probably took place at about the date of each invoice. The invoices are not essential facts; they are evidence. Similarly, as regards the causes of action based on UIG, the published articles are evidence that UIG may have happened shortly before the date of each article. The essential facts are that on numerous occasions, which the claimant is unable to identify exactly but which they can describe as being around a particular time or times, MGN carried out UIG of particular types, by hacking the claimants' and/or their associates' phones and using PIs to blag or otherwise obtain information unlawfully. Although each occasion of UIG that is proved will strictly be a separate cause of action, the claimants have not pleaded their case in that way, but compendiously. It is clearly not correct that, for s.32 purposes, the claimants must have been able to plead their claims 6 years earlier in a more specific way than they have in fact done later. What they must have been able to plead is the essential facts, or "gist", of

the right of action, which may be something less than the claimants have now pleaded.

91. The consequences, if Mr Sherborne's argument is right, are rather startling. The individual invoices recording instructions to a PI and call data identifying specific phone calls from MGN's headquarters or journalists' 'burner' telephones to claimants' mobile phone numbers are invariably only available to a claimant as a result of disclosure in the claim that they have started. There are exceptional cases where a potential claimant first sees this kind of evidence of UIG as a result of being proofed as a potential witness in an existing claim brought by someone else. Also, MGN generally volunteers some pre-action disclosure once a claim is notified in a pre-action letter. Subject to that voluntary practice, it is therefore only by starting the proceedings that a claimant obtains documentary evidence of individual occasions of UIG that would enable them to plead each occasion specifically; before knowing of and issuing the claim, the claimant could not plead the individual causes of action (or, as the claimants have done, the evidence of the fact that numerous individual occasions of UIG took place). That would mean that, for the purpose of s.32(1), time does not start running for limitation purposes in relation to almost any such claims of UIG until after the claim is started. It would also mean that the only way in which claims for UIG will in future become time-barred is where a claimant is proofed as a witness for someone else's claim and does not issue their own claim for more than 6 years thereafter.

92. The conclusion urged by Mr Sherborne would also run contrary to the reality of what has happened since 2011 in phone hacking claims in the MNHL and the parallel litigation against News Group Newspapers Ltd. Claims for misuse of private information have been issued but without identifying individual occasions of UIG. The particulars of claim were based on such facts as were known to the claimant, starting with the published articles and then drawing inferences from what was known at the time about phone hacking generally. MGN failed to strike out such claims as disclosing no reasonable cause of action, these claims by their nature being ones in which all the relevant evidence is likely to be held by MGN and not by the claimants. On disclosure, claimants were able to add details of specific instances of alleged UIG.

93. In my judgment, the claimants' argument based on The Kriti Palm fails to give sufficient weight to the particular circumstances of the MNHL, where, because of the nature of the concealment of wrongdoing, a claimant will be unable to specify before disclosure the precise occasions on which MGN conducted UIG, each of which as a matter of law is a separate cause of action. The argument also departs from the way that the claimants have in fact pleaded their cases. What The Kriti Palm establishes is that it is inappropriate to consider as relevant facts only facts for "the umbrella complaint of breach of contract and negligence", as Sir Martin Nourse put it, agreeing with the reasoning of Buxton LJ. That does not mean that multiple occasions of the same wrongdoing giving rise to the same cause of action need to be individually identified in order to plead a claim for damages for each occasion on which it took place. The gist of the causes of action would be sufficiently pleaded by alleging, in the context of facts that were known, numerous occasions (that the claimants cannot yet separately identify) in a

defined period in which MGN deliberately caused the claimants' and their associates' voicemail messages to be intercepted and instructed PIs to 'blag' private information about them by deception or otherwise obtain it unlawfully and without consent.

94. I therefore reject the primary argument of Mr Sherborne that time did not start to run in relation to any cause of action until each claimant know or could with reasonable diligence have known the separate occasion of UIG to plead that separate cause of action. I must consider, in the light of the principles that I have identified, whether the claimants either knew or could with reasonable diligence have discovered more than 6 years previously the essential facts required to plead their claims in the compendious way that the claimants have done.

MGN's case on actual knowledge

The publication claims

95. The starting point is that each claimant accepts that they were aware, at about the date of publication, of the articles of which they complain. The latest of any of these articles was published in 2009, which is more than 6 years before each of the claims was issued.

96. That means that, in so far as the act of misuse of private information alleged is the act of publication itself (as each claimant expressly alleges, as part of their claim), each claimant (other than Ms Grace, about whom no articles were published) knew the facts necessary to plead the claim at about that time. The information published is in each case alleged to be private and the claimant had an expectation of privacy in relation to it, so publishing that information without consent was itself an act of misuse of private information. What each claimant did not know at the time was how MGN had obtained the information.

97. Given that articles attribute the information to a "pal" or "friend" or "close contact" of the claimant, the obvious conclusion for a claimant to reach was that friends or family had leaked the information. But that fact does not mean that the assumed provision of the information and the subsequent publication of it were not acts of misuse of private information.

98. Each claimant asserts in their evidence a strong feeling of having been wronged, or of being aggrieved by the publication. The fact that they may not have known that they had a legal remedy is irrelevant. It is the essential facts of a cause of action that must be known (actually or constructively), not the legal consequences of them. In any event, as part of a reasonably diligent investigation, each putative claimant can be assumed to seek expert advice (including legal advice) where it is reasonable to do so, unless their circumstances preclude it.

99. Mr Sherborne nevertheless argued that the case that claims for publication of the articles were all statute-barred was hopeless in law and in fact. He submitted that it was hopeless in law because the articles are the product of (and therefore inextricably linked to) the underlying activities that gave rise to them, and the

damages awarded for the underlying infringements are aggravated by the publication that could not have occurred but for the underlying tort. He also submitted that the articles in any event would have to continue in the case because they are relied on as being the fruit of the unlawful activity. Mr Sherborne submitted that the case was hopeless in fact because the articles themselves misled the individual claimants away from the wrongdoing of MGN, and so they cannot be triggers for inquiry on the part of the claimants because they are part of the concealment.

100. In my judgment, Mr Sherborne's argument is somewhat removed from the basis on which his clients' claims are pleaded. Each of the Particulars of Claim (oddly, including Ms Grace's) makes it clear that publication of articles listed is being relied on as a freestanding cause of action, distinct from the unlawful accessing or obtaining of the private information (see, e.g., Sanderson, para 26(d)). That gives rise to a straightforward question of whether each claimant knew the essential facts required to plead a cause of action based on publication of information in respect of which they had a legitimate expectation of privacy.

101. The answer is that they clearly did. There was no concealment of what was published. However the private information reached MGN (unless provided by or with consent of the claimant), the fact of publication without consent was all that needed to be pleaded for that cause of action. Whether the publication could have happened without the underlying UIG – the "but for" case that Mr Sherborne frequently alluded to – and the claimants' belief that friends or family leaked the private information are irrelevant to the publication claims, which is what the claimants have pleaded. The terms of the publication concealed the true source of the information, i.e. UIG, which is very material to the question of whether the underlying UIG claims are time-barred. Further, the fact of UIG might well be relevant to the quantum of damages, and be supportive evidence relating to the privacy issue. But the concealment did not conceal any of the essential facts required for a statement of claim alleging misuse of private information by wrongly publishing the information. Time is not stopped from running by s.32 because a claimant does not have all the evidence to support an argument for higher or aggravated damages.

102. The facts relating to publication and knowledge are not in dispute – no claimant suggests that they were unaware of the publication of intrusive and private information – and the law is clear.

103. Mr Sherborne had various arguments why, even if there was no realistic prospect of those claims succeeding, they should be allowed to proceed to trial. These reasons were that: disclosure was unsatisfactory and incomplete; the summary judgment applications are tactical, late and not fairly prefigured in the pleaded defences; the directions previously given contemplated that any matters expected to be pleaded in a reply (as s.32 would ordinarily be) would be dealt with at trial; and public interest and fairness dictate that these matters should be allowed to proceed to trial.

104. As Mr Sherborne submitted, the articles will not disappear from the evidential picture just because the separate causes of action based on them are struck out. However, that is not a reason to refuse to strike out a separate cause of action

based on publication if it is bound to fail. The court should focus its resources on those claims that have a real prospect of success and clarifying at this stage which claims are bound to fail may assist the parties in settling the claims. The fact that a strike out or summary judgment application is brought later than it might have been is not a reason to refuse to make the right order, having heard and decided the application. The expectation that s.32 issues would be dealt with at trial did not preclude an application of the kind that has been issued for earlier determination, if appropriate. The complaint about the pleading of limitation is a point of no substance. There is no doubt about reliance on limitation, and the normal sequence of pleading has been altered by the Managing Judge's direction that there is no need for a Reply. As a result, s.32 issues are now pleaded in the particulars of claim. The complaint about inadequate disclosure has no relevance to the publication claims.

105. For all these reasons, it is appropriate to strike out or grant summary judgment to MGN on the separate claims of misuse of private information pleaded by the claimants where the misuse relied on is only the publication of the identified articles. I will hear the parties on which remedy is more appropriate and how in practice that should be dealt with in the statements of case.

The underlying UIG claims

106. MGN's case on actual knowledge goes further than the relevant facts of the publication claims, however. MGN submits that each of the claimants had actual knowledge of the facts necessary to plead misuse of private information by unlawful acts of acquiring and processing the private information, which would encompass the underlying UIG claims that the claimants have brought.

107. The relevant facts that a claimant would need to plead include the type and examples of private information that was accessed (whether voicemail messages or other private data) and the fact that journalists of MGN obtained it by unlawful means, whether phone hacking, blagging or other PI techniques, and then processed it. MGN submits that each claimant knew of the private information that had been obtained – from the content of the articles that were published – and therefore knew that MGN had obtained it unlawfully by some means (since they knew that it was private and they had not authorised MGN to have access to it). The claimants therefore knew at the time, it submits, that it had some antecedent dealing with the private information before publishing it, on multiple occasions (save in the case of Ms Wightman, who only had one article published about her), which was also a violation of their rights.

108. MGN submits that, from the claimants' knowledge, their publication claims therefore could also have encompassed the prior acquisition and processing of information used for the articles, and an inferential case that this must have happened on more occasions than the number of published articles. There was no need, MGN submits, for the claimants to be precise in their pleaded case about how MGN obtained the information: the means of acquisition was not a "fact relevant to the plaintiff's right of action" within the meaning of s.32(1).

109. In their evidence in response, the claimants explain, variously, that they were distressed and bemused by the fact that their (or in Ms Grace's case, her friends')

private information was being published and were concerned to understand how it had happened. In different words, each of them says, essentially, that they concluded that it must have been as a result of leaks to the newspaper from friends and family, and that this realisation caused them to be paranoid about talking to anyone and to be mistrustful of those close to them. They say that this conclusion was reached in part because a significant number of the articles attributed the private information to a "pal", "friend" or "source close to" the claimant. They also say that their belief in this regard was reinforced by MGN's public denials of unlawful phone hacking activity. They did not know that MGN had conducted UIG activities. On this summary judgment application, all that evidence must be assumed to be true.

110. I am unpersuaded that knowledge that something odd was happening with mobile telephones, or some knowledge of phone-hacking claims being made by a few well-known persons, means that a claimant who knew these matters must have known that there was unlawful phone hacking or other UIG being conducted against them. Ms Wightman's knowledge of the attempt to blag information about her medical condition is a clearer case but, as a one-off occasion two years before the article about her was published, it is in my judgment still arguable that this did not give her actual knowledge of MGN's UIG.

111. It follows that if any of the claimants had issued a claim form at the time of or shortly after publication of the various articles, as MGN submits they could have done, they would have been likely to plead that MGN had wrongly induced their friends and family to divulge private information or had wrongly accepted private information from friends and family, the circumstances of which they were unable precisely to identify, and then processed the private information internally with a view to publication or future use of it.

112. Apart from the fact that such a claim would indeed have been a claim for misuse of private information by MGN, it would have been wholly different in its essential facts from the claimants' pleaded underlying UIG claims based on institutionalised UIG by MGN, in particular voicemail interception and PI blagging and other data extraction. The notional claim would have been an inadequate pleading of the actual causes of action because it would have pleaded none of the facts relevant to the underlying UIG claims except that the information was private and that MGN wrongly processed the information or sought to obtain it.

113. MGN argues that a pleaded claim at a higher level of generality would suffice – a claim alleging only obtaining and processing of private information – in effect accepting that the claimants cannot specify how, when and from whom the private information was obtained until after disclosure, but stating that MGN must have misused the information by obtaining or receiving and processing it.

114. In my judgment, although for the purposes of s.32 only the relevant facts of a right of action need be capable of being pleaded, they must be the relevant facts of the same rights of action that have in fact been pleaded by the claimants. The essential facts of the claimants' pleaded underlying UIG claims are the extensive phone-hacking, blagging and other unlawful and subversive activities being carried on by MGN, both itself, through its journalists and staff, and through PIs;

that the claimants were victims of such conduct on repeated occasions; and that the private information that was published and other private information was unlawfully obtained by MGN.

115. A general claim brought against MGN for obtaining or receiving private information and processing it with a view to publication would not have been a viable pleaded case except as regards the bare inference that MGN must have handled and processed the information before publishing it. In response to an application for particulars or to strike out a broad general plea of misuse of private information, the claimants could only honestly (according to their evidence) have explained that they inferred that MGN journalists must have approached (or been approached by) their family and friends to receive the private information. Those particulars would not be the relevant facts of the underlying UIG claims that the claimants have brought.

116. Accordingly, the claimants' actual knowledge (as asserted in their evidence) at or shortly after the dates of publication of the articles did not enable them to plead the essential basis of the claims that they have now brought.

117. The 2013 judgment of Mann J in Gulati is not inconsistent with this conclusion. The pleaded cases of the first four MNHL claimants were general and inferential – a "starting point" only – but were held to be valid pleadings in the circumstances at that time. The pleaded cases of the 6 claimants in issue here are much more specific about the nature and extent of the UIG. It is the relevant facts for those pleaded cases (though not each individual occasion of UIG) that the claimants would have had to be able to plead by 2015.

118. Whether the claimants in fact knew or suspected more than they say that they did at that time is, self-evidently, a matter for a trial.

119. Moving on from 2009, when publication of articles about these claimants ceased, by 2014 there had been considerable media publicity about the scale and nature of phone hacking activity, both at News Group Newspapers and MGN. (I summarise some of this in paras 162ff below.) MGN made admissions and published apologies in late 2014 and early 2015. The Gulati judgment, in which detailed factual findings about the nature and extent of the phone hacking and PI activity were made, was handed down and reported in the media in May 2015.

120. If the claimants had been aware of these developments, they would have known facts that were inconsistent with MGN's deception and denials. This would have caused them at least to question, if not reject, their previous conclusions that the publication of their private information was attributable to leaks from friends and family. However, each of the claimants, in different terms, explains in their witness statement that they were not attentive to print or television or radio news media. Some say that they may have heard about phone hacking very generally, as affecting A-list celebrities and the like but not ordinary people, but they were not in fact aware of these developments. Others say that were not aware of the publicity at all.

121. Their evidence is not that they discovered in about 2019 or 2020 relevant facts that MGN had concealed previously, but that, as a result of conversations with

friends who had brought a successful claim, they decided to take legal advice. The trigger was therefore what they were told by a friend at that time, and the knowledge they had was what they learned from instructing a lawyer to advise them.

122. For the purposes of these summary judgment applications, the claimants' evidence – which I summarise in more detail in the next section of this judgment – has to be accepted. Mr Spearman realistically did not seek to challenge any of it at this stage as being unreliable or incredible.

123. That being so, I must conclude that the claimants have a real prospect of proving at trial that they did not in fact know, more than 6 years before they issued their claims, the essential facts of MGN's UIG activities, or facts from which such activities could be inferred and sufficiently pleaded in a valid claim.

124. MGN's case for summary judgment on the underlying UIG claims based on the claimants' actual knowledge therefore fails.

MGN's case on discovery by reasonable diligence – constructive knowledge

Introduction to issues on constructive knowledge

125. MGN then submitted that even if the claimants did not know the essential facts needed to plead their underlying UIG claims because of deliberate concealment by MGN (including the "ruse" that friends and family had leaked the private information), by using reasonable diligence more than 6 years before their claims were issued they could have discovered the concealment and so the relevant facts.

126. I have already rejected as wrong in law the claimants' argument that they needed to be able to discover each individual instance of UIG (whether it was an interception of a voicemail or an occasion of unlawful PI activity) that gives rise to a separate cause of action before they were able to plead the gist of their claim. Conversely, I have rejected MGN's argument that it was sufficient for the claimants to plead only that, by reason of the published articles and established generic facts, some UIG affecting the claimant could be inferred.

127. In this section of the judgment, I am concerned with two related questions:

    i) whether, at any stage between the publication of articles about each claimant and 6 years before their claim form was issued, a reasonable person, circumstanced as the claimant was at those times, would have been put on inquiry about possible UIG of their private information by MGN; and

    ii) if so, whether reasonably diligent investigation by the claimant would have discovered the relevant facts, enabling them to plead the essence of the claims that they have in fact brought.

128. MGN's case, in brief summary, is that the claimants were put on inquiry by the publication of the articles, and then by significant publicity about phone hacking

by MGN during the period 2011 to 2015; that, as reasonably alert and diligent people (which they are assumed under s.32 to be), they could easily have discovered the relevant facts, either by taking legal advice, or asking friends, or doing research themselves on the internet about those matters. As a fallback position, MGN contends that each claimant was put on inquiry by the Gulati judgment and the media coverage that it attracted and could have discovered all the concealed relevant facts by reading the judgment. In the judgment, the deception that MGN had practised was uncovered and the truth about MGN's UIG activities was exposed.

Constructive knowledge at the time of publication

129. MGN's first proposition is that each claimant whose private information was published and who suffered anguish or distress at the time of publication was "on notice" then that they had been wronged such that investigation into the matter was reasonably called for. The claimants were on inquiry from the very start. In addition to the articles, MGN points out that each claimant acknowledges in varying degrees an awareness of suspicious telephone activity, which some did investigate further; and some claimants admit being aware of being "doorstepped" by photographers or journalists in a way that was suspicious. MGN submits that the claimants' evidence demonstrates that they did try to work out what had happened, albeit they each came to an erroneous conclusion that family and friends must have been the source. But none of them approached MGN or a lawyer for assistance, as MGN submits they could have done.

130. Given MGN's deliberate concealment of its UIG, including the "ruse" that led the claimants to blame friends and family and which destroyed trust and relationships as a result, the argument that the claimants could have done more at the time to find out the source of the private information is unattractive. It is hardly surprising in the circumstances that the claimants concluded that friends and family were to blame. Moreover, the suggestion (which was not quite stated in terms by Mr Spearman) that had any claimant approached MGN for an explanation they would have found out the truth is clearly wrong. MGN was still publicly denying institutionalised phone hacking until 2014; its officers had told Sir Brian Leveson on oath that they had found no evidence of voicemail interception; and even after its admissions were made in 2015, MGN has refused to make further admissions in subsequent claims.

131. The claimants about whom articles were published were clearly put on inquiry generally by the publications themselves. They do not suggest that they were not. These claimants were aware of the wrongs that had been done to them and so were on inquiry as to how and why it happened. The contrary is not realistically arguable. The position is much less clear-cut in the case of Ms Grace, however, who was only on notice that others' private information had been obtained and published.

132. It is necessary to consider what, in the *circumstances* of each claimant, would have been a reasonably diligent investigation at that stage, and what such investigation would have revealed. As Mr Spearman and Mr Munden put it in their written argument, "the reasonable diligence standard requires them to be

treated as if they were interested in ascertaining what it was that had gone wrong, and in taking appropriate steps to investigate".

The Claimants' evidence

133. I set out here what is arguably relevant to the circumstances of each claimant when the articles were published and during the later period (2011-15) addressed in the next section of the judgment. It is also germane to the issue of whether any claimant was put on notice of possible UIG during that later period.

134. Ms Sanderson was a young actress at the time (only 16 when she started her role and about 20 when the first article was published in 2003), working then on *Coronation Street*. Numerous articles were published about her relationships with boyfriends and her family. She says in her witness statement that she assumed that the source was friends or people that she worked with, or friends of her boyfriend. She was not aware of the different newspaper groups; she knew that Sienna Miller had been hacked but thought that it happened to Hollywood celebrities, not to her; and she was not aware of MGN's admissions.

135. A press officer at *Hollyoaks* did once mention phone hacking, but she did not understand that to be an enquiry about her experience of it. She does not recall seeing any of the numerous press articles that Mr Mathieson exhibits to his 26th witness statement (covering the period 2011 to 2015), and does not recall hearing names of PIs or Police operations. She knew nothing about the Leveson Inquiry or the Gulati proceedings, even though Shobna Gulati was one of her former co-stars on *Coronation Street*. She was aware of some suspicious things happening to her mobile telephone during the relevant period but she assumed that it was something going wrong with the phone, or that she had accidentally deleted messages, as she was "rubbish with technology".

136. Ms Grace was a close friend of a number of high-profile individuals, some of whom have brought phone hacking claims. She says that she thought at the time that someone was leaking information to the press and she did not think for a moment that she was being hacked. Strange things would happen with her mobile phone and she thought that something was wrong at the time, but she did not know what it was or who was responsible. At one point she asked BT to check her landline and BT said there was no evidence of line tapping. None of her friends at the time thought they were being hacked and she discounted it. At one point, Ms Frost accused Ms Grace's flatmate of leaking the private information. A few times she was herself accused of leaking stories because only she knew the information that was published.

137. She had not seen any of the newspaper or online articles about phone hacking and had not been told anything about it by friends, such as Ms Frost, who were involved in claims, though she does accept that some of them told her that they had made claims, and Ms Frost phoned her to say that she had won her case. She considered them to be high-profile people and that she was not in the same category. When one of her friends who had settled a claim mentioned a PI invoice with her name on it, she did not understand the potential significance of that. She stopped reading newspapers because the stories in them were so horrific. She only

heard about events or articles if her friends told her about them. She knew nothing about the Leveson Inquiry or about Police operations.

138. Ms Grace clearly knew by 2015 that close friends had had their phones hacked. She says nevertheless that she believed at the time of the publications that others had leaked private information to the press. It is material that, in her case, there was no article published about her, so unlike the other 5 claimants she was not on notice for that reason that her private information had been accessed. But she was aware that some information published about her closest friends had been known only to them and her (hence the accusations that were made against her).

139. Ms Dupre was married to a television celebrity. She says that she was dimly aware of some coverage in the newspapers about phone hacking involving the News of the World, but that she did not pay attention to it, as she did not think it had anything to do with her. Her husband was the famous one, not she. She did not know that other newspapers were conducting phone hacking or how they did it, and she was not aware of MGN's admissions. In 2006 the Police asked her to identify some phone numbers, which were hers and her husband's, but they did not explain what it was about. She cannot recall previously seeing any of the newspaper articles exhibited by Mr Mathieson or the Information Commissioner reports, and had not heard of Gulati before starting her claim. At the time when the articles were published, Ms Dupre assumed that the information was obtained through close friends. She does remember a lot of suspicious activity with her telephones but did not think anything of this at the time.

140. Ms Wightman was also married to a more famous husband. She says in her witness statement that she did not read any of the exhibited articles about phone hacking. She recalls hearing about the Milly Dowler case and Sienna Miller's claim but did not make any connection between those cases and herself, as she did not regard herself as newsworthy. She had very difficult health and family circumstances to cope with at the time that the article was published and during the period of (about) 1997 to 2003, and she did not have time to read the news. She did not hear about the Gulati trial, the Information Commissioner's report or the Police investigations. She and her parents did get doorstepped. She received a call from her surgeon's secretary in 1998 telling her about a fake call attempting to obtain medical information about her, but she could not think at the time who would do such a thing. She was never told by anyone that she might be a victim of phone hacking until a chance conversation with a friend in 2019.

141. Mr Sculfor was a model who had brief relationships with some high-profile Hollywood actresses. He says in his witness statement that until 2020 he was not aware of any friend or associate of his having made a phone hacking claim. He did not read the papers and was told by friends about the published articles, but he did not know where the information was coming from. He did watch BBC News occasionally but did not follow the phone hacking scandal, although he did hear of Hugh Grant's claim and recalls the arrest of Rebekah Brooks. He had a vague awareness of the Leveson Inquiry but did not follow it and cannot recall now what it was about. He did not know about the Gulati trial or recall hearing about MGN's admissions. He did not know about the Police operations or the Information Commissioner's report, or the names of the convicted journalists. He

does recall problems with telephone calls and missing voicemails but assumed that something was wrong with the technology.

142. Mr Tomlinson is a comedian, actor and television personality. He says in his witness statement that he recalls problems with his landline and that he called BT to investigate and was told that it was an electrical fault on the line. He told his wife his concerns about line tapping and she told him he was paranoid. He was politically active at the time and did not give much thought to who might be behind it, and had no idea that MGN would be. He was only told about the phone hacking litigation by a friend in late 2019. He knew nothing of other associates issuing claims before then. He never read the newspapers but sometimes watched the news on television. He knew nothing about the legal proceedings concerning Mr Whittamore's obtaining data about his son, Clifton, about Police operations or the Leveson Inquiry. He had not heard about the Gulati trial. He did not see the newspaper articles that specifically referred to details about his son.

Analysis

143. A critical fact in all these cases is the nature of the concealment that the claimants had to overcome. It was not just that the UIG was covert but that there had been a successful attempt by MGN to deceive the claimants (and in Ms Grace's case, her close friends) about the source of the private information. As Mr Sherborne metaphorically submitted, the claimants were deliberately "put off the scent".

144. As a consequence, the claimants' initial investigations focused on which of their close associates might have leaked private information to MGN. This resulted in the breakdown of relationships. None of the claimants expressly says so in their evidence, but it is inherently likely that, in time after the publications stopped in 2009, the issue of which friend or family member was to blame would have receded and the claimants would have got on with their lives. That is consistent with the evidence that the claimants have given: none of them says that they continued to try to search for the truth and identify the person who was to blame. On a summary judgment application, I consider that it is right to make that assumption in the claimants' favour, which may well be confirmed in evidence at trial.

145. It is important in this context to remember that each of the claimants is (or is assumed to be) an ordinary private individual, albeit one who says that they suffered serious wrongs, in most cases repeatedly. The wrongs that were done to them related to intensely personal matters. These claimants are not companies whose profitable business has been impacted by financial wrongdoing but human beings. The directors of companies will readily be expected (because it is their duty as directors) to seek legal advice where they are on notice of facts that might give rise to a valuable claim or that continue to threaten their company. Most private individuals are different and will not react as a business would, unless perhaps they are professionals or businessmen who have been wronged in that capacity. None of these claimants is such a person.

146. In light of the OTC case in the Court of Appeal, a distinction falls to be drawn between the *circumstances* in which a claimant finds themselves, which are to be taken into account – i.e. it is inappropriate to posit some different factual

circumstances or a different hypothetical person as claimant – and the *character* or personality traits of the claimant (such as indolence, naivety, ignorance), which might have influenced the way that they did in fact respond to something that could or did put them on inquiry. Such characteristics are to be ignored in favour of an objective reasonable standard.

147. It is an unusual feature of this case that, although each claimant about whom articles were published was on inquiry, they were at the same time given an answer to their notional questions. It is understandable that they did not go to lawyers to attempt to find the source of the private information. A reasonable person in the position of each claimant might well not take the step of seeking legal advice *to identify the source of the information* because they did not want to threaten friends or family whom they believed were to blame. Whether they might reasonably have sought legal assistance to put a stop to further publication, at least after several articles had been published, is a different question. It is relevant to note that, in fact, very few did. Only a handful of claims were issued against MGN during the period of publication.

148. In my judgment the decision of the Court of Appeal in Gravgaard v Aldridge & Brownlee (a firm) [2005] PNLR 19 (knowledge under s.14A(10) of the Limitation Act that would be acquired from lawyers as a result of asking for advice on a different matter to be treated as actual knowledge of the claimant) does not compel the same conclusion under s.32(1). That is because s.14A(10) expressly states that "knowledge includes knowledge which [a person] might reasonably have been expected to acquire…from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek". As Arden LJ explained, the subsection does not limit its effect to knowledge about a matter that is the subject of the expert advice actually sought. Under s.32(1), the test is different: the question is whether a claimant could by reasonable diligence have discovered relevant facts. The reasonable diligence is to be assumed in relation to discovering the facts about which the claimant is on inquiry, namely UIG. In any event, seeking legal advice to stop publication would, at least arguably, not have uncovered the relevant facts relating to UIG since, as MGN has emphasised on this application, the cause of action for misuse of private information is complete merely by publication of the information.

149. I consider that each claimant therefore has a real prospect of succeeding in establishing at trial that, following publication of the articles about them, a reasonably diligent investigation at that stage would not have included instructing a lawyer to find out how and from whom the private information that was published came into MGN's hands. The particular reasons why that is so is the deception that MGN practised on the claimants. The impact of the deception is illustrated by the very small number of claims that were issued at that time. Ms Grace also has a real prospect of establishing that she was not put on inquiry at all at that time by the publication of articles about her friends. These articles did not show that her own private information was being misused.

Constructive knowledge as a result of media coverage between 2011 and 2015

150. The next question is whether the claimants were later put on inquiry as a result of media coverage of MGN's phone hacking activities. It cannot be right (and MGN did not seek to argue) that these claimants were on a permanent state of being on inquiry from the date of publication of the first article. They had (arguably, in Ms Grace's case) been put on inquiry by the publication of the articles, had investigated the matter in their own way, to some extent, and had concluded (induced by MGN's deception) that friends and family were to blame. The publications ended and the claimants tried to get on with their lives. The claimants were no longer on inquiry by that stage.

151. MGN submits that a reasonably attentive person in the position of each claimant would nevertheless have become aware of extensive media coverage of the phone hacking allegations against MGN, its admissions and apology, and the Gulati judgment itself, and so would have been put on inquiry about UIG from this later time – it submits from the start of the period 2011-2015.

152. If, at this later time, a claimant was, objectively, put on inquiry that they might have been a victim of UIG and that it might not have been friends and family that were to blame, it is difficult to see how reasonable diligence on their part would not have extended to seeking legal advice (which is exactly what these claimants did in fact do when they were told that they might also be victims of phone hacking), or at least conducting research themselves into what had been established. In view of the extensive material in the public domain by 2015, seeking legal advice or conducting research at that time would have brought the relevant facts about UIG and MGN's deception to their knowledge.

153. The critical question is therefore whether these claimants were put on inquiry by the media coverage, such that the limitation period started to run at some time during the period 2011 to 2015.

154. As explained previously, the test of reasonable diligence in both aspects identified by Males LJ in OTC (attentiveness to what is going on and taking appropriate steps to investigate) is objective but needs to be applied in relation to the individual circumstances of each claimant. Where exactly the line between circumstances and character traits falls to be drawn in an individual case is not always an easy matter and will be fact sensitive. The test propounded by Millett LJ in Paragon Finance relates to a business which is assumed to have adequate but not unlimited staff and resources. Despite the urging of Mr Munden, in reply, that this simply translates into an assumption that an individual has sufficient time and money, I am not sure that it is so simple. It is however true that no claimant suggested that they were inhibited by lack of money, or that they had no time to seek advice or to do research.

155. In applying the statutory test to individuals, there may be wider considerations that amount to circumstances (that can be taken into account) rather than character traits (that cannot). Work and family commitments and state of health of the individual claimants, being objective facts, might well be relevant, albeit *per* Males LJ their relative degrees of curiosity and being either well- or ill-informed will be irrelevant. What happened to each claimant following the publication of

the articles must be relevant to the question what it is reasonable for a person in their circumstances to appreciate or do, though any particular attitudes or character traits that resulted from that experience have to be excluded from consideration. What each claimant did in fact know about phone hacking claims is also to be taken into account. Beyond that, it is inappropriate to seek to draw a precise line.

156. I must therefore assume in favour of each claimant, as this is a summary judgment application, all facts on which they rely in their evidence that are arguably capable of amounting to their "circumstances". However, apart from their personal experience since the dates of publication, their individual knowledge of what happened to them and their associates and their having 'moved on' with their lives since the publications, there is not much in the claimants' evidence that can amount to relevant circumstances. A claimant cannot rely on their lack of knowledge or understanding if a reasonably attentive person in their position would have known and understood.

157. By the period 2011-2015, Ms Sanderson was no longer very young and Ms Wightman's period of serious ill-health was over – she does not say that she continued to suffer debilitating ill-health during the period 2011-2015. The circumstances of each claimant that are material are therefore their individual experience following publication of articles and the actual knowledge that they had as a result. In Ms Grace's case, her relevant knowledge developed during the period in question because of her close friendship with Ms Frost, whose claim was tried in Gulati, and her knowledge of Ms Frost's success.

158. There is nothing of a disabling nature in any claimant's evidence that arguably could have prevented them from learning what a reasonably attentive person in their position would have learnt. The fact that, as some of the claimants' witness statements explain, they did not know and did not pay great attention to the media coverage of phone hacking is irrelevant because the test is objective. Significantly, although Ms Grace says that she did not read the newspapers because the stories in them were so horrific, none of the claimants has said in their evidence that, as a result of their experiences, they cut themselves off from all forms of media coverage about the phone hacking scandal. Even if they had done, this would have been a personal character trait and not one of the circumstances in which they found themselves during this period.

159. Ms Grace's circumstances are different from the other claimants. Private information about her was not published. She therefore did not have that experience helping to put her on notice of a possible claim. There is likely to be a large category of claims coming to trial in this phase of MNHL, namely claimants whose personal information was not published, but who much later discovered that they might have been affected as a consequence of being an associate of someone else who brought a claim. Media reporting of hacking or other UIG would not necessarily put on inquiry someone who had no reason to think that their private information had been accessed and used. Ms Grace may not be typical of others in that category, in that she had a close and continuing relationship with someone whose claim was actually tried during the period in question. Nevertheless, there was, initially, less to put Ms Grace on notice of possible unlawful gathering of her private information, until a connection could

be made between her phone or other data and private information published about her associates.

160. In that regard, Ms Grace was aware that information about Ms Frost had been published that very few people (including her) knew about, and she was told by another friend who had settled a claim that there was a PI invoice with her name on it. However, the evidence of Mr Mathieson is that the information about the invoice may have been communicated only in or shortly before July 2016, which is less than 6 years before Ms Grace's claim was issued. The relevant question in Ms Grace's case is whether media reporting was sufficient to put a reasonably attentive person in her position on notice that her phone might have been hacked, or other data intercepted, as a way of obtaining private information about her associates.

161. MGN must therefore rely, against all 6 claimants, on matters that each claimant says that they did not know but that a reasonably attentive person in their circumstances would have been aware of, which would have put them on inquiry as to whether they were a victim of MGN's UIG. A claimant is deemed to be aware of matters that a reasonably attentive person in the circumstances of the claimant would learn (OTC). In my view, the matters must have been such that the claimant was on inquiry as to whether the previous conclusion they reached that friends and family were to blame might be wrong. It is arguably insufficient that a reasonably attentive person in the claimants' circumstances would have become aware that other well-known people were the victims of phone hacking by MGN. That is because the deception that MGN had practised was still operative in the claimant's case until they could reasonably be expected to see through it.

The media coverage of phone hacking 2013-2015

162. Although there was extensive but sporadic media coverage of phone hacking events from 2011, when the News of the World closed and the Leveson Inquiry opened, the principal events on which MGN relies are those leading up to the Gulati trial and the Gulati judgment itself. The amount and detail of the press coverage increased as the years between 2011 and 2015 went on and I shall therefore confine myself to a brief review of the period 2013-2015. The main events leading up to the Gulati judgment were:

    i) News coverage of the charges against MGN journalist Dan Evans in September 2013 – only he was charged at that time. He was at the Sunday Mirror from the end of 2002 to the end of 2004. The charges related to hacking of well-known people and their associates. As reported, the impression was given of it being an isolated case. In any event, it later emerged that the Metropolitan Police Service would be getting in touch with Mr Evans' victims.

    ii) Mr Evans' admissions in his evidence at the Old Bailey News Group Newspapers phone hacking trial were widely reported, as was Mr Evans' statement that he was taught how to hack and instructed to do so at The Sunday Mirror. The same material was reported again following the verdicts and at his sentencing in July 2014, but mainly in terms of Mr Evans

being the successor to Mr Mulcaire, i.e. as if it were still a few rogue journalists who were doing this, albeit possibly to the knowledge of MGN. There is a report of his having gained access to voicemails of at least 200 celebrities, politicians and sports stars. This was arguably not enough to put ordinary people on notice that they might have been victims.

iii) There were then reports from time to time of larger and larger numbers of claims being issued.

iv) On 24 September 2014, MGN sent letters to the then 8 representative claimants admitting liability and apologising. This was extensively reported on television, radio and in many newspapers. The admission was that some of MGN's journalists were involved, and that 300 individuals who were on Mr Evans' list as well as a further 1,300 individuals were being contacted by the Metropolitan Police. The names of victims included soap actors. The newspapers predicted that many more people would be able to make claims.

v) Pleaded admissions in the continuing claims were reported in The Independent in October 2014 as including unlawful interception of voicemails and the blagging of call data. These were stated to be "unauthorised acts" and MGN said that it could not establish and did not know the extent of the illegality.

vi) On 15 October 2014, a second MGN journalist, Graham Johnson, was charged with phone hacking – this was reported in some newspapers. The Independent in particular ran several stories about further prosecutions at this time. Mr Johnson pleaded guilty to hacking during a short period of 3-7 days directed at a single soap star, but said that he had been shown how to do it by a senior person at The Sunday Mirror. This was quite widely reported in news media.

vii) At the PTR for the Gulati trial on 22 January 2015, a number of settlements were announced in statements in open court. Mr Sherborne, on the claimants' behalf, told Mann J that the settlements related to "the widespread and habitual practice of voicemail interception and the unlawful obtaining of personal information" across MGN's newspapers between 2000 and 2006, and this was widely reported on television, radio and in the press.

viii) MGN then published an apology to all hacking victims on 13 February 2015 in The Daily Mirror and on 15 February 2015 in The Sunday People and The Sunday Mirror. The statement read:

> "***Phone hacking: We're sorry***
>
> *Trinity Mirror, owner of the Daily Mirror, Sunday Mirror and Sunday People, today apologises publicly to all its victims of phone hacking.*
>
> *Some years ago voicemails left on certain people's phones were unlawfully accessed. And in many cases the information obtained was used in stories in our national newspapers.*

Such behaviour represented an unwarranted and unacceptable intrusion into people's private lives.
It was unlawful and should never have happened, and fell far below the standards our readers expect and deserve.
We are taking this opportunity to give every victim a sincere and unreserved apology for what happened.
We recognise that our actions will have cause them distress for which we are truly sorry.
Our newspapers have a long and proud history of holding those in power to account. As such, it is only right we are held to account ourselves.
Such behaviour has long since been banished from Trinity Mirror's business and we are committed to ensuring it will not happen again."

Needless to say, Trinity Mirror's public shame was widely reported in the media. The apology, though sufficient to make news headlines, was nevertheless limited in its terms, in that only voicemail interception affecting "certain people" was mentioned. There was no indication of the breadth of the UIG or how widely it had been carried on by MGN. It is likely that a reasonably attentive person whose private information had been published by the newspapers would have picked up on that apology, either directly, from the media, or indirectly. But it is less clear that it would inevitably have led them to think that in their cases it might have been MGN who were to blame for what happened to them rather than friends or family.

ix) In opening statements at the trial on 3 March 2015, Mr Nicklin QC for MGN repeated the apology to all victims but stressed that there was no evidence that a large number of journalists were involved, and that it would be "quite wrong, unfair and unjust, to taint a large number of honest, hard-working journalists with the wrongdoing of a few".

x) There was then extensive coverage for days during the trial, including reports that phone hacking was on an industrial scale and that it was seen as "a bog-standard journalistic tool" on The Daily Mirror's showbiz desk. It was reported during the trial that 41 more celebrities had issued claims since the trial had begun and that 100 other people had come forward to bring claims. A summary of the media coverage of the trial that was exhibited to Mr Mathieson's witness statement is at Appendix A to this judgment.

xi) Following the hearing, The Independent reported on 26 March 2015 that the Media Standards Trust had released a report finding that the majority of people who had settled a claim with News Group Newspapers Ltd were connected to a celebrity rather than a celebrity themselves. The Times reported on 30 March that the Metropolitan Police were sitting on dozens of unopened bin bags of information seized as part of an investigation into MGN, and Mr Piers Morgan's second interview by the Police in relation to phone hacking allegations was widely reported on news and newspaper media on 21 and 22 April 2015. On 20 May 2015, The Guardian reported

that more than 100 prospective claimants were preparing claims against MGN.

163. The Gulati judgment was handed down on 21 May 2015. This was widely reported over two days in all media. The focus of the reporting was the scale of the damages awarded and the extent of the unlawful activity of MGN's journalists. The coverage was in terms about phone hacking, rather than other UIG, though The Independent did specifically report the findings of Mann J relating to the instruction of PIs to obtain information. There was coverage in most newspapers of the stories of some of the victims, particularly Ms Frost: how their lives had been ruined by paranoia and distrust of their friends and family, and how it was unlawful activity at MGN that was the source of the private information. Legal experts were reported as predicting that there would be hundreds more cases and that ordinary people who happened to know someone famous would get payouts too. A summary of the media coverage of the judgment that was exhibited to Mr Mathieson's witness statement is at Appendix B to this judgment.

164. The Gulati judgment was immediately publicly available. It explains how information was obtained by MGN in ways other than just phone hacking, in particular by instructing PIs to obtain phone numbers, call histories from phone bills, the identity of the owners of telephone numbers, credit card details and medical information. The judgment explains how data was obtained by blagging, conducted by PIs and journalists. It records MGN's admissions, in relation to many articles, that they would not have been written but for the fruits of the UIG. The claims made were divided into 3 categories: hacking, PI activity and publications based on UIG. The judgment rehearsed the history of MGN's denials and finally its admissions, and the extent to which the findings of institutionalised UIG went much further than what had been admitted.

165. Significantly, the judgment exposed the deception practised by MGN by attributing the private information to friends or family:

> "[50] Information that was obtained from hacking would, if published, have its source disguised by attributing the source to a "friend" or "pal". As will appear, this had a particularly caustic effect on the relationships of the victims. Sometimes the detail was changed so that a victim could not work out what the source was. Sometimes a comment was perceived as useful, and the victim, or a PR person, would be called to see if more detail could be elicited. Mr Evans said that Ms Weaver was particularly good at that ….
>
> [54] The newspaper was sensitive to the possibility that in some cases it would be possible for a victim of hacking to identify the source of a story by looking at it and working out where it must have come from, unless something were done about that. So steps were taken to disguise the source, and Mr Evans said that in some cases a week would be spent putting in place of the plausible sources of the story to achieve the disguise. This demonstrates both the importance of the hacking tool and the lengths to which the journalists would go to achieve concealment."

166. In 11 cases, MGN was unwilling to admit that UIG was the source of the information in a particular article, and the Judge had to make findings about it. In 7 of those cases, on the basis of evidence of the extent to which phone hacking was endemic at particular desks at the Mirror and Sunday Mirror, the Judge concluded that the only likely source was phone hacking, even though there was no call data or invoice directly to support that conclusion.

Conclusions on whether the claimants were put on inquiry

167. The series of events that I have summarised (which are not the only occasions on which there was some publicity about phone hacking at MGN) have a cumulative effect, which needs to be taken into account. The judgment did not arrive unheralded, as a departure from previous news coverage.

168. In my judgment, a reasonably attentive person, who had suffered greatly as a result of MGN's newspapers publishing private information about them, as the claimants say that they did, would have picked up on some of the pre-trial or trial coverage. It would be, on the contrary, only an unattentive person in the claimants' circumstances who would not have learnt in this period that phone hacking activities had been conducted by MGN. Nevertheless the scale and reach of the unlawful activity was still unclear before the trial. In most of the coverage there was an indication that, although many celebrities could have been affected, it was only a limited and focused hacking operation. That story only began to unwind in coverage of the Gulati trial itself.

169. The coverage up to the trial was, in my judgment, arguably insufficient to cause a reasonable person in the claimants' position (who was not a celebrity or otherwise in the public eye and who had been led to believe that their friends or family had leaked their private information) to think that they should investigate whether what had happened to them previously was to do with MGN's activities instead. It may also have been insufficient to make any claimant realise that they needed to monitor developments closely.

170. In that regard, it is material that MGN was still denying extensive phone hacking, even though it admitted that there had been some hacking (not other UIG) carried out by a few journalists. There was nothing in the publicity before the judgment to blow the cover off the deception that had been practised in these claimants' cases. The claimants could not easily know or find out whether the same deception had been applied in the cases of others, or whether those others had also been induced to believe that friends and family were to blame.

171. The Gulati judgment radically changed matters. The institutionalised nature and extent of the phone hacking activity at MGN then became clear for the first time, as did the breadth of the UIG, in particular the use of PIs to blag private information or obtain it by other unlawful means. MGN's partial denials or non-admissions of the extent of the activity were exposed. Most significantly, for the first time the deception that MGN had practised, by leading victims to believe that friends and family were to blame, was exposed in the clearest terms.

172. As to whether a reasonably attentive and self-interested person in the position of the claimants would have been put on notice of the possibility of UIG in their

cases, that would depend on whether such a person was attentive to national news broadcasts and the 'quality' newspapers. Although, as Appendices A and B show, there were some columns written in the 'tabloid' papers, the majority of the printed coverage was in The Guardian and The Independent and to a lesser extent in the other quality newspapers. The coverage of the judgment was mainly in the newspapers and television news on a single day, though that followed sporadic coverage of the hacking issues over the previous year and almost daily coverage for 10 days during the trial in March 2015.

173. To be aware of the coverage of the judgment, a claimant would have had to ensure that, from 20 March 2015 until 22 May 2015, they listened to the evening news or glanced at the main stories in a quality newspaper on a daily basis, or asked someone else to do so. If they missed a day, they might miss the critical news. MGN did not, in evidence for this hearing, rely on evidence to the effect that, following the judgment, word about it spread widely by other means. If the claimants were already on notice that they needed to be monitoring developments closely, one might expect them to take steps to monitor the news daily, but if they were not then it might be expecting too much of a reasonably attentive person.

174. In relation to the significance of newspaper publicity and the question of what degree of attention or monitoring can be assumed of a reasonably attentive person, I have considered two cases where the issue has arisen, albeit in a business and corporate context.

175. In OTC at first instance, Foxton J had to decide whether administrators were put on notice of possible claims by articles about proceedings in the USA written from time to time in the Financial Times and The Times. There were 8 articles in 4 years in the Financial Times and 4 articles in The Times in the same period, described by the judge as "infrequent, episodic, and in many cases … in sections of the newspaper or under headlines which, on their face, would not have been of any obvious interest to the administrator of an English computer company which had gone into administration". The judge found at [143] that the suggestion that the administrators should be scanning one or other newspaper cover-to-cover on a daily basis over a period of years when the company was no longer trading was "wholly unreal" and amounted to a requirement to take "exceptional measures".

176. In Boyse (International) Ltd v Natwest Markets plc [2021] EWHC 1387 (Ch), Trower J dismissed an appeal against a conclusion that "widespread publicity in the mainstream and financial press" about Natwest being fined for LIBOR manipulation was sufficient to put Boyse (which had been sold LIBOR-based hedging products by Natwest) on notice of an arguable case in fraudulent misrepresentation. That conclusion was upheld on the basis that there was a sequence of reporting about LIBOR issues, which "set the scene" for a reasonably diligent person in the position of Boyse to be on the lookout for such publications. There was no analysis of the nature of the publicity beyond the fact that it was "widespread". Boyse was still operational and in the business of protecting its assets, though not a trading company.

177. The OTC decision turns principally on the fact that the administrators were performing limited functions, having already sold the assets of the company, and that administrators would not in the ordinary course be expected to scour

newspapers for stories that might give them some useful information about claims that the company could bring. The publicity was very limited in extent. The Boyse decision appears to turn on very widespread publicity in the kind of newspapers that those directing Boyse might be expected to read, and so find the decision that Natwest had been fined for involvement in LIBOR fixing. Whether that publicity was more or less widespread than the publicity given to the Gulati judgment is unclear, but what a reasonably attentive private individual may be expected to read or listen to is more difficult, for reasons that I have addressed.

178. In the final analysis, MGN must persuade me that, regardless of any evidence the claimants may call at trial and any further arguments they may address in relation to this issue, they have no real prospect of proving that they were not put on inquiry by media coverage of the Gulati trial and judgment. That would be a conclusion of fact, applying the objective test under s.32 to the facts relating to the coverage of the judgment. I have already concluded that it is arguable that pre-trial coverage was insufficient to put the claimants on notice, and that it is likely to make a difference whether that coverage, or the trial coverage, was enough to make a claimant think that they should keep a watch for the judgment.

179. It would be a strong thing to decide an elusive and subtle question of fact at this stage that has very substantial implications, not just for these claimants but also for many others in this phase of MNHL who are in a similar position. There are about another 30 claimants against whom MGN has now issued a summary judgment application on the same basis.

180. However much it may appear that the essential facts are before me and the test is objective, I am left in real doubt that it would be appropriate to determine this issue on a summary basis. There may be further facts to emerge (from both sides) about the nature and extent of the publicity about the judgment, or indeed about the earlier coverage of the developing hacking story and the coverage before and during the trial.

181. Even if I were to decide now that the claimants were sufficiently on notice from 21 May 2015, that would not dispose of Ms Sanderson's and Ms Grace's claims. The question of whether they – and others in a similar position who issued their claims before 21 May 2021 – were put on notice of a possible claim at any earlier stage, and exactly when, would have to be tried. There are also claimants in a materially different category, such as those like Ms Grace who did not have their own private information published, where different circumstances are in play.

182. Unless the answer in a particular case is clear-cut, it would obviously be preferable to decide at exactly what stage different claimants were put on notice of a possible claim at the same trial, as part of a single analysis of all the relevant facts. For the reasons I have given, I consider that it is not possible to consider only the media coverage on 21 and 22 May 2015 and decide whether that put the claimants on notice. That means that the issue is better suited to determination at trial, when all the evidence can be weighed to decide all live cases together.

Conclusion on summary judgment applications

183. For the reasons just given, namely that the answer to the question of whether a reasonably attentive individual in the claimants' circumstances was put on notice on 21 May 2015 is not clear-cut, and that the issues in each case are better disposed of at a trial, I decline to enter summary judgment in MGN's favour on the underlying UIG claims of these 6 claimants.

Appendix A

(a) 3.3.15 – claimants' opening submissions, including that hacking was on an industrial scale at the daily Mirror, the Sunday Mirror and the People, reported by BBC News and Sky News, live and on website, and in detail in the Guardian and the Independent. MGN's admission of liability similarly reported.
(b) 4.3.15 – further reports from trial in The Sun, The Guardian (front page) and The Times
(c) 5-7.3.15 – witness evidence of Alan Yentob reported by BBC News, the Independent, the Guardian and The Times.
(d) 10.3.15 – witness evidence of Shane Richie, Steve McFadden, Lauren Alcorn, Shobna Gulati and Robert Ashworth reported on BBC and Channel 4 News and in the Guardian, the Independent and the Telegraph.
(e) 11-12.3.15 – witness evidence of Paul Gascoigne widely reported including by BBC News, the Evening Standard, mail online, the Telegraph and the Guardian.
(f) 12-13.3.15 – witness evidence of Sadie Frost widely reported, including by BBC News and the Guardian
(g) 13.3.15 – The Guardian and The Independent report that over 40 further claims for voicemail interception had been issued against MGN since the start of the trial, and that between 60-100 individuals were preparing to sue following the conclusion of the trial. Witness evidence of Dan Evans reported in the Guardian and the Independent.
(h) 14.3.15 – the Guardian and the Independent report that MGN told the court that it was being investigated by the Metropolitan police, with speculation about size of MGN's compensation fund
(i) 19.3.15 – claimants' closing submissions reported by BBC News in terms of phone hacking being "rife" at MGN and "the systematic gathering of private information for profit, using illegal means". 100 new claimants had come forward.

Appendix B

(a) BBC News reported on 21.5.15 that celebrities won phone hacking damages from Mirror Group and that MGN had increased provision for compensation from £12 million to £28 million. It reported a statement from a claimant's solicitor that the judgement should encourage "ordinary people who have found themselves to be victims of phone hacking to take steps to bring the offending parts of the media to account".

(b) Sky News broadcast and put on their website the record payouts awarded and that the court had found that most of the claimants had their phones hacked by MGN journalists "twice a day over a number of years", and that hundreds more claims were expected to be made (and the increased provision).

(c) BBC Newsnight broadcast interview with a witness, Graham Johnson, previously convicted of phone hacking, stating that phone hacking was a widespread culture at MGN, across the 3 newspaper titles.

(d) Channel 5 news reported that the court had found the scale of the hacking to be very substantial and that the claimants' mobile phones were repeatedly hacked. Mark Stephens, a media lawyer, stated that hacking would have been used against "ordinary folk as well, people who just got done because they knew someone famous".

(e) The Independent reported that phone hacking had become endemic on the Daily Mirror showbiz desk by mid-1999, and that private investigators had been used to obtain the key details needed to hack mobile phones. It was a "sophisticated, industrialised methodology for gathering news stories by unlawful means". It reported that lawyers from leading firms were anticipating a flood of new claims.

(f) The Guardian reported conclusions that there had been widespread use of phone hacking at MGN titles and that phone hacking victims' lives were torn apart by a decade of mistrust and paranoia; and that the Metropolitan police were examining claims that at least 16 MGN journalists were aware of or involved in phone hacking.

(g) The outcome of the judgement and the judge's conclusions were also reported in detail in The Mail online, the Evening Standard and the Daily Star.

(h) On 22.5.15, The Sun reported that Mirror Group was reeling after being hit with massive privacy damages over the phone hacking scandal, and the judge's conclusion that invasions of privacy were very substantial indeed.