Neutral Citation Number: [2023] EWHC 1944 (Ch)

Case No: BL-2019-001788

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

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

Date: 27 July 2023

Before:

MR JUSTICE FANCOURT

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Between :

THE DUKE OF SUSSEX — **Claimant**

- and -

NEWS GROUP NEWSPAPERS LIMITED — **Defendant**

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- -

Mr Anthony Hudson KC, Mr Ben Silverstone, Mr Harry Lambert and Ms Radha Bhatt (instructed by **Clifford Chance LLP**) for the **Defendant**
Mr David Sherborne and Mr Ben Hamer (instructed by **Clintons**) for the **Claimant**

Hearing dates: 25-27 April 2023, 5 July 2023

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APPROVED JUDGMENT

This judgment was handed down via hearing at 10.00 am on 27 July 2023 by circulation to the parties or their representatives and by release to the National Archives.

Mr Justice Fancourt :

Introduction

1. By application notice dated 7 December 2022, the Defendant, News Group Newspapers Limited ("NGN"), applied to strike out, or alternatively for summary judgment on, the whole of the claim issued by Prince Harry, the Duke of Sussex, on 27 September 2019 in the Mobile Telephone Voicemail Interception Litigation ("MTVIL"). I will refer to the Duke of Sussex in this judgment as "the Duke" and to NGN's application as "NGN's Application".

2. Mr Anthony Hudson KC appeared with Mr Ben Silverstone, Mr Harry Lambert and Ms Radha Bhatt on behalf of NGN and Mr David Sherborne and Mr Ben Hamer appeared on behalf of the Duke. I heard NGN's Application initially over 3 days, together with an identical application issued by NGN in the MTVIL claim of Mr Hugh Grant. The applications were concerned with NGN's defence of limitation.

3. I handed down judgment in Mr Grant's claim on 26 May 2023. Resolution on the Duke's claim was delayed, owing to an application he made on day 3 of the hearing for permission to amend his Reply ("the Amendment Application"). Since the matter was adjourned, the Duke has issued a further application dated 15 May 2023 for permission to amend another statement of case, namely his Responses to NGN's Request for Further Information dated 22 November 2021 ("RRFI"). I will refer to that as "the RRFI Application".

4. The Amendment Application and the RRFI Application were made because, in his witness statement dated 20 March 2023 opposing NGN's Application, the Duke described for the first time how, in about 2012, he was informed by either a lawyer acting on behalf of the Royal Family or a senior employee at Buckingham Palace of a "secret agreement" between the Palace and senior executives of NGN's parent company, which was to the effect that senior members of the Royal Family should not bring phone-hacking claims against NGN at that stage and should wait and issue them after the MTVIL was concluded, when NGN would apologise to the affected Royals and pay compensation.

5. The Duke now relies on this "secret agreement" to contend that NGN is estopped from relying on a defence of limitation. He contends that he relied on the secret agreement in 2012, and on negotiations being conducted afterwards between the two camps, by not bringing a phone-hacking claim against NGN when he otherwise would have done so. Prior to service of the Duke's witness statement in March 2023, his pleaded case had been that until about 2018 he was unaware that he had a phone-hacking claim to bring, and his case relied on NGN's deliberate concealment of relevant facts to delay time running against him, pursuant to s.32(1) Limitation Act 1980 ("s.32(1)").

6. At the initial hearing of NGN's Application, Mr Sherborne on behalf of the Duke sought to rely on his evidence and a belatedly produced draft amended Reply to argue that NGN was (at least arguably) estopped from contending that the Duke's claim was time-barred, as an alternative to the existing pleaded case

relying on s.32(1), and that accordingly NGN's Application had to be dismissed so that these matters could all be determined at a trial.

7. Although NGN's Application was to strike out the Duke's claim pursuant to rule 3.4 of the Civil Procedure Rules and for summary judgment in the alternative, Mr Hudson readily accepted that, in reality, this was an application for summary judgment. If that did not succeed, the strike out application would not.

8. It is common ground that the primary limitation period under s.2 of the 1980 Act expired before the claim was issued, but the Duke in his Reply had pleaded reliance on s.32(1)(b) of the Act to suspend the running of time against him until about 2018. It was only then, he said, that he realised that he had a claim to bring against NGN in relation to the conduct of employees of its newspapers, the News of the World and The Sun.

9. Although the Duke's witness statement explained the circumstances of the secret agreement, his statements of case did not plead any estoppel. Mr Hudson therefore did not address any case of estoppel based on the secret agreement in presenting NGN's Application, but he did refer to the evidence of the Duke and explained that it supported NGN's case that the Duke had no prospect of succeeding on s.32(1) at trial. This was because (he said) the evidence made it clear that the Duke had all the knowledge that he needed in or about 2012 to consider bringing his claim then, or at the latest by 27 September 2013, six years before the Duke's claim form was eventually issued ("the Applicable Date").

10. It is self-evident that a factual case that one did not know before 2018 enough about deliberately concealed facts to be able to bring a worthwhile claim is inconsistent with a factual case that one would have issued a claim in 2012 were it not for an assurance that it was not necessary or appropriate to do so. A party is not permitted to plead alternative and inconsistent factual cases.

11. The difficulty facing the Duke at the hearing in April 2023 was that if the estoppel argument was to be relied on to defeat the summary judgment application, it needed to be pleaded; however, the court will not grant permission to amend to plead an inconsistent factual case. Without an amendment, the Duke's evidence appeared to undermine his pleaded case that relevant facts were concealed from him until 2018.

12. The Duke issued the Amendment Application at the end of the second day of the hearing. It was supported by short written evidence of the Duke's solicitor, Mr Chisholm Batten.

13. In the event, I decided that NGN could not reasonably be expected to respond to the Amendment Application without notice during the hearing, and I adjourned it for a further hearing, which was fixed for 5 July 2023. The parties concluded their submissions on the s.32(1) issue, as it stood, on the last day of the April hearing.

14. Having had time to reflect, the Duke then issued the RRFI Application on 15 May 2023. It seeks to remove any factual inconsistency between the pleaded

s.32(1) case and the intended estoppel plea. The parties adduced further evidence and exchanged new, lengthy skeleton arguments addressing the Amendment Application and the RRFI Application.

15. The position now, put shortly, is that if I am persuaded to grant permission to amend the Reply there will be a triable issue on the estoppel case based on the secret agreement, which is not inconsistent with any s.32(1) factual case pleaded by the Duke, and NGN's Application will therefore fall to be dismissed. In those circumstances, there would be no benefit in determining the s.32(1) issue at this stage. Indeed, the facts relating to the Duke's state of knowledge prior to October 2013 and the facts relating to the secret agreement overlap and it would be inappropriate to decide either issue without hearing the evidence in full at a trial. If, on the other hand, permission to amend the Reply is refused, the remaining issue for determination is the s.32(1) issue, on which I heard all the argument in April.

The Statements of Case

16. The starting point is the Duke's currently pleaded claim, which, as indorsed on the claim form, is for

> "Damages (including aggravated damages) for misuse of private information in relation to the obtaining or use of information relating to the Claimant or his private or professional life through accessing or attempting to access voicemail messages left for him or by him and/or blagging or the use of private investigators, and the publication of articles about the Claimant arising out of or containing or being corroborated by the same."

17. The claim is based solely on the tort of misuse of private information but encompasses phone hacking, blagging of private information and using private investigators ("PIs") to obtain private information.

18. The Duke filed his "claimant-specific" Particulars of Claim dated 30 October 2020 (over a year after issue of the claim form) following initial disclosure. This is standard procedure in the MTVIL. These Particulars were expressed to rely on the Re-Amended Generic Particulars of Claim for Pinetree and Weeting Claimants and the Amended Generic Particulars of Concealment and Destruction.

19. These generic statements of case give very detailed particulars of a claim relied upon now by all claimants within the MTVIL, alleging the considerable extent of phone hacking and unlawful information gathering ("UIG") by NGN, the extent of knowledge and encouragement of what was being done by senior executives and editors, and the lengths to which editors and executives went in an endeavour to conceal UIG and destroy evidence of it.

20. The Duke's claimant-specific Particulars of Claim advance his case that his mobile phone (and those of his associates) were hacked during the period 1996-

2011 ("the Relevant Period") and that during the Relevant Period NGN carried out other kinds of UIG targeted at him.

21. For the reasons given in my judgment, Grant v News Group Newspapers Ltd [2023] EWHC 1273 (Ch) ("*Grant*"), the legal test to be applied as regards s.32(1), following the decision of the Court of Appeal in Gemalto Holding BV v Infineon Technologies AG [2022] 3 WLR 1141 ("*Gemalto*"), is whether before the Applicable Date the Duke knew facts, or could with reasonable diligence have known facts, that would have led a reasonable person to conclude that there was a worthwhile claim, in the sense that such a person would have confidence to embark on the preliminaries to issuing a claim. It is not necessary to have confidence that the claim would succeed, to have the evidence to prove it, or even necessarily to be able to plead it at that stage, before further investigation. It is not necessary for every essential fact that has been concealed to have been discovered. However, if the claim that could be brought would then be struck out, it was not a worthwhile claim.

22. If a claim form comprises several distinct causes of action, pleaded as such, and a claimant knew more than six years before issue that they had a worthwhile claim in relation to some but not others, the fact that some causes of action are statute-barred does not mean that all others are: see *Grant* at [19] – [28].

23. The Duke's Particulars of Claim include the following material paragraphs:

    i) Para 3 of the claimant-specific Particulars of Claim pleads the Duke's use of mobile telephones and voicemail messages and that of his identified associates.

    ii) Para 4 pleads that during the Relevant Period the Duke experienced suspicious telephone and voicemail activity and the unexpected and sudden appearance of journalists and photographers in a way that could only be explained by voicemail interception. 206 articles published by NGN are identified "by way of example of instances of suspicious activity".

    iii) In para 5, the Duke contends that he was targeted during the Relevant Period for the purpose of writing stories about him and his associates, and that NGN engaged in unlawful acts such as accessing and interception of voicemails and the unlawful obtaining by PIs of his private information, at the News of the World and at The Sun. Different arrangements by the News Department and the Features Department of the News of the World and by The Sun are relied upon.

    iv) In para 6, the Duke pleads as examples of unlawful PI work 172 separate payments or emails, a very large proportion of which are payments made to Mike Behr, in South Africa, for reports on Chelsy Davy's activities. These were disclosed in initial disclosure.

    v) Particular evidence is then pleaded to support a case that the Duke was targeted by the News Department of the News of the World, in particular by Mr Mulcaire, and subjected to voicemail interception "on numerous

unidentifiable occasions" (para 9). Evidence is also pleaded that the Prince of Wales, Prince William, was similarly targeted.

vi) Para 11 pleads:

> "As a result of the activities of Mr Mulcaire and/or the Defendant's journalists, the Defendant obtained private and confidential information relating to the Claimant."

vii) Para 12 pleads that NGN also thereby obtained access to personal messages left by the Duke for or received from close friends and family

viii) There is then a plea that NGN engaged in unlawful information gathering activities through the Features Department of the News of the World, which includes allegations of widespread and habitual use of PIs, in particular ELI, TDI and Avalon/Rob Palmer. The inability of the Duke to plead fuller particulars until after disclosure is stated, and an inference asserted that journalists at the Features Department obtained the Duke's mobile telephone number from a PI such as ELI, TDI and Avalon/Rob Palmer.

ix) Paras 14-18 are a section of the Particulars of Claim relating to The Sun specifically. It is alleged by the Duke that he was targeted by NGN during the Relevant Period for the purpose of publishing stories about him in The Sun by means of unlawful activities, in particular by voicemail interception and use of PIs unlawfully to obtain private information about him. Disclosed invoices and payment records are pleaded. A finger of blame is pointed in particular at the Showbiz or Bizarre columns, the TV or TV Biz column and the News Desk.

x) The 206 articles in the schedule, so far as published by The Sun, are alleged inferentially to be derived from, based on or corroborated by information obtained from voicemails.

xi) Para 19 then pleads that certain articles in particular are blatant examples of the misuse of the Duke's private information through the accessing of voicemails and/or blagging or unlawful obtaining of personal information.

xii) In the remedies section of the Particulars of Claim, the Duke pleads that he has suffered considerable distress and loss of dignity, standing and personal autonomy, but cannot particularise his damage fully until he has ascertained the full extent of NGN's wrongdoing. He seeks, in addition to damages, an order that NGN reveal the full extent of its wrongdoing and identify those who were involved.

24. Mr Sherborne submitted that the claim pleads quite different types of claim, including phone-hacking by the News Department of the News of the World and separately by the Features Department of the same newspaper, and also phone hacking by The Sun. He pointed out that, in addition to phone-hacking, the claim includes allegations of UIG by PIs, including blagging, in relation to both newspapers.

25. The Duke's claim, as pleaded, does not comprise numerous, individually identified causes of action. It is an all-embracing claim for all incidents of phone hacking and other specified UIG in the Relevant Period, whether known or unknown, including the activities of Mr Goodman and Mr Mulcaire in 2005 and 2006. The Particulars of Claim contain much evidence on which the Duke intends to rely, such as invoices and call data, each said to prove an occasion on which a PI was commissioned on behalf of NGN to (and did) carry out an inquiry or obtain information by unlawful means, or when phone hacking took place. The claim does, however, clearly plead separate categories of claim: voicemail interception and types of UIG by PIs (including blagging), in relation to the News of the World and The Sun separately.

26. Limitation was raised by NGN at para 24 of its Defence. It relied on the Royal Family's being informed in about 2006 of actual voicemail interception (including in the case of the Duke himself) and extensive reports in the media from 2010 of phone hacking of members of the Royal Family, and more generally.

27. The Duke pleaded reliance on s.32(1) in his Reply and alleged deliberate concealment by NGN of relevant facts, by reference to paras 20-37 of the Re-Amended Generic Particulars of Concealment and Destruction. As to NGN's reliance on media reports of its phone-hacking activities, the Duke pleaded that he "had no detailed knowledge" of the reports, and denied that it could reasonably be inferred that he was aware of the facts relevant to his rights of action. Nothing was pleaded about any agreement between the Palace and NGN to the effect that senior Royals should not bring claims, which prevented the Duke from bringing his claim.

28. NGN then sought further information from the Duke about his s.32(1) case, to which he responded formally in a statement of case dated 22 November 2021, signed by the Duke with a statement of truth ("the RRFI").

29. The RRFI pleaded at Recital B that the Duke "has already fully pleaded his case on limitation in the Reply to the Defence dated 24 March 2021", thereby affirming the completeness and correctness of the pleaded case; but it then restated his case in Recital D in rather different terms, as follows:

> "a. In or around 2006, the claimant was informed by his private secretary at the time that a voicemail message between him and his brother had been accessed and published in the News of the World by Clive Goodman, the Royal Reporter at that newspaper.
>
> b. However, to the best of his recollection, the Claimant was not told of any other hacking of his messages nor was he provided with any documents by the MPS. He was informed that it was members of his staff who had been hacked as opposed to him. Save that he was aware of general reporting about the News of the World being guilty of hacking and the fact that some members of staff or associates were bringing legal claims (as opposed to any of the details), he was not aware of or informed that he could bring a legal claim prior to 29 September 2013 (which is six years before he started this action).

> c. Without in any way waiving legal privilege, the Claimant became aware through legal advisers to his family that he and his brother could bring a claim much later (in or about 2018) but was initially discouraged from doing so, not least because of assurances given by News Group Senior Executives to the family about resolving complaints over these activities once the MTVIL litigation had ended."

30. The Duke's pleaded case was therefore that he knew or was told about only one occasion of hacking of his mobile phone, in 2006, and did not otherwise know that he had a claim to bring, nor was he informed that he could bring a claim until about 2018. Recital D.c does however include a reference to assurances on behalf of NGN that Royal complaints about phone hacking would be resolved after the MTVIL.

31. Although Mr Sherborne on behalf of the Duke suggested otherwise, the only fair reading of Recital D is that, apart from being told of one incident of phone hacking by Clive Goodman in 2006, the Duke was unaware before the Applicable Date of 29 September 2013 of a claim that he could bring; and further, he only became aware in about 2018 of the fact that he had a claim to bring, at which time he was initially discouraged from doing so on account of assurances of NGN that his complaints would be resolved once the MTVIL had ended.

32. There is an ambiguity here, arising from the positioning of the words "much later (in about 2018)", but para c could not have been intended to mean that the Duke became aware before 29 September 2013 that he could bring a claim in about 2018, because para b pleads that he was not aware of or informed prior to 29 September 2013 that he could bring a claim. The purpose of para c, in context, is to assert that the Duke did not have the relevant knowledge of a claim more than 6 years before he issued his claim form, and indeed not until about 2018. (I note also that the drafting style that creates the ambiguity is replicated in para b, where "prior to 29 September 2013" follows rather than precedes "that he could bring a legal claim", and yet the meaning in context is clear, namely that the Duke did not know before that date that he could bring a claim.)

33. In responses 14, 15, 17 and 18 of the RRFI, the Duke said that he was generally aware of various facts and matters referred to by NGN in its Defence, but was not aware before 29 September 2013 of the hacking claims brought by his close friends, Guy Pelly and Thomas Inskip. The facts and matters that the Duke accepted in those responses that he was generally aware of include the MPS investigation into hacking of members of the Royal Family and their staff; the apologies made by Mr Goodman and Mr Coulson to the Duke and his brother, and further reports in the media in 2010 and early 2013 relating to the hacking of the Duke by or on behalf of NGN.

34. Prior to the strike out and summary judgment application having been made, therefore, the Duke's case was <u>not</u> that he was aware in 2012 or 2013 that he could bring a claim, but rather that he was unaware that he could, save only that he had been told in 2006 about one incident when his mobile phone was hacked

by the News of the World. His case was not that he was informed in about 2012 that he could not bring a claim at that time, but that he was discouraged from bringing a claim in about 2018 on account of assurances given by NGN senior executives that Royal complaints would be resolved later.

Evidence of the Duke

35. In his witness statement, made in response to the strike out and summary judgment application, however, The Duke says the following:

> "38 It wasn't until 2012, that I first became aware that civil claims were being made against NGN for phone hacking. Specifically, I was informed that Jamie and my former private secretary, Helen Asprey, would be bringing claims against NGN for phone hacking as a consequence of the Police investigation into phone hacking at the News of the World, which I'm told became known as Operation Weeting. Their claims were being brought, I was told, on behalf of the institution presumably to show that it was being proactive and taking action in light of the findings of the police investigation. I can't now recall who told me this – it could have been Jamie or perhaps my brother – but I certainly wasn't privy to any of the conversations where it was decided that they would be the chosen two, so to speak...
>
> 39 It must have been around this time (although I can't specify exactly when or by who) that I was also informed that there was further evidence (beyond the single voicemail mentioned above) to show that my voicemails and those of my brother had also been intercepted by Clive Goodman. However, I have no recollection of being shown any of this evidence by the police or anyone else.
>
> 40 My brother and I were also told by either the institution's solicitor, Gerrard Tyrrell of Harbottle & Lewis, or someone else from the institution that there was no possibility of either of us bringing a claim against NGN for phone hacking at that time. The rationale behind this was that a secret agreement had been reached between the institution and senior executives at NGN whereby members of the Royal Family would bring phone hacking claims only at the conclusion of the Mobile Telephone Voicemail Interception Litigation and at that stage the claims would be admitted or settled with an apology. The reason for this was to avoid the situation where a member of the Royal Family would have to sit in the witness box and recount the specific details of the private and highly sensitive voicemails that had been intercepted... This agreement, including the promises from NGN for delayed resolution was, obviously, a major factor as to why no claim was brought by me at that time, as I explain below."

36. The Duke's evidence is therefore, contrary to his pleaded case, that in about 2012 there was considerable activity in the Royal Household addressing and

bringing voicemail interception claims. This included his being told that there was further evidence that he had been hacked by Clive Goodman. However, it was desired to keep members of the Royal Family out of the witness box and so a secret agreement had been made with senior executives of NGN, the result of which was that the Duke could not bring the voicemail interception claim that he could and would otherwise have brought.

37. The Duke then explains in his witness statement that it was in 2016 that Her late Majesty The Queen's private secretary, Sir Christopher Geidt, suggested that then might be a good time to ask NGN how it proposed to deal with "our phone hacking claims, so as to put everything to bed once and for all in line with the secret agreement". He understands that there were then conversations between Palace staff and Rebekah Brooks, and as a result a letter was written to Robert Thomson, CEO of News Corporation before Christmas 2017, to which no reply was received. The Duke says that shortly before his wedding in May 2018, he was told by Gerrard Tyrrell that he understood that nothing could be done, as NGN was unwilling to apologise until the end of the MTVIL.

38. The Duke says that he now recognises that the Palace had a specific long-term strategy to keep the media on-side, and anything that might upset this was to be avoided: "[t]his was all because of the secret agreement which had been reached between NGN and the institution that there would be no actions until the end of the litigation". After the litigation between Associated Newspapers and the Duchess of Sussex he decided to take the initiative and appoint his own lawyers, which resulted in the claim form being issued in September 2019. The Duke was then summoned to the Palace and was told (he says) to drop the actions, as they would have an effect on the whole family.

39. After referring to the alleged settlement of Prince William's claim against NGN, The Duke then says at para 61:

> "This goes to prove the existence of this secret agreement between the institution and senior executives at NGN – if it wasn't in place then why on earth did William wait until 2019 to bring his claim in circumstances where our two private secretaries brought and settled claims back in 2012, and where he knew far more about the matter than I did, and also why didn't NGN test its limitation argument against him? This is precisely the reason why I didn't bring a phone hacking claim against NGN until 2019 – if I had been allowed to put in a claim earlier and hold NGN properly to account then of course I would have, especially given my antipathy towards NGN and the tabloid press in general, as described above."

40. This is therefore an unambiguous statement that the Duke would have brought a phone hacking claim sooner, by inference in about 2012 at the same time as Palace staff brought claims, but for the secret agreement.

41. He then says that he was "deliberately kept out of the loop (beyond simply being informed by Gerrard that it was not possible to bring a claim at that point on account of this secret agreement)".

42. Importantly, there is no evidence in the Duke's witness statement to suggest that he became aware of new facts relating to his phone hacking claim against NGN between about 2012 and 2019, when he went to solicitors to issue his claim. There is therefore nothing identified that made him realise that he had a worthwhile claim to bring, beyond what he knew before the Applicable Date. The reason for the delay, he says, was his understanding that he could not bring the claim in 2012, or subsequently. He eventually became dissatisfied with being made to wait. His claim was issued before the end of the MTVIL, which still continues, with some vigour.

The Applications to Amend

43. By the Amendment Application, the Duke seeks permission to amend the Reply to add a plea of estoppel by convention, or promissory estoppel, based on the secret agreement and his reliance on what he was told in 2012. No other amendments are proposed to the existing terms of the Reply (asserting a case under s.32(1)). The new paragraphs read:

> "6. The Defendant should be estopped from raising a defence of limitation. Pending full disclosure by the Defendant, the Claimant's case is as follows:
>
> a. in or around 2012, the institution of the Royal Family ("**the Institution**") and the Defendant agreed that members of the Royal Family, and in particular the Claimant and his brother, HRH Prince William, would bring claims against the Defendant only at the conclusion of the Mobile Telephone Voicemail Interception Litigation and at that stage the claims would be admitted or settled with an apology ("**the Secret Agreement**"). The Claimant will rely in support of these contentions upon the following:
>
> (i) that the Claimant was informed by Gerrard Tyrrell of Harbottle & Lewis, or another representative of the Institution, in or around 2012 that the Secret Agreement was in place and so he could not bring a claim against the Defendant;
>
> (ii) the correspondence and negotiations between the Institution and the defendant until they broke down in around May 2018 including, pending further disclosure from the defendant, between: Rebekah Brooks (then Chief Executive of News UK) and Sally Osman (the Director of Royal Communications) on 19 June 2017; Ms Osman and Robert Thomson (then chief executive of News Corporation) on 17 July 2017; Ms Osman and Ms Brooks on 25 September 2017; Ms Osman and Mr. Thomson on 11 December 2017; Ms Osman and Jamie McAuley on 2 February 2018; Ms Osman and Mr. Thomson/Ms Brooks on 2 March 2018; Ms Osman and Mr. Thomson/Ms Brooks on 12 March 2018; Jacqui

Stanley-Johns and Ms Osman on 20 March 2018; Ms Osman and Ms Brooks on 26 April 2018; and Ms Osman and Ms Brooks on 8 May 2018 ("**the Negotiations**"). The existence of the secret agreement can be inferred from the nature and content of the correspondence and negotiations; and

(iii) that the Defendant settles the claim of the Claimant's brother HRH Prince William for a huge sum of money in 2020 without bringing a similar strike out application on limitation grounds, a claim which HRH Prince William waited to advance his claim from at least 2012 onwards [*sic*] and until after this breakdown of the negotiations.

b. as a consequence of, and in reliance upon, the Secret Agreement, the Claimant did not bring a claim against the Defendant in or around 2012 at or around the time he learned of the Secret Agreement, or thereafter, until he brought a claim on 29 September 2019. The Secret Agreement was fortified by the Negotiations, and similarly as a consequence of those the Claimant did not bring a claim while they were ongoing. Both the Secret Agreement and the Negotiations are relied upon as a basis for the Claimant's estoppel plea;

c. the Defendant is not entitled to raise a defence of limitation as the Claimant has established promissory estoppel:

(i) the Secret Agreement implied a clear and unequivocal assurance that the Defendant would not enforce any rights of limitation and/or the continued negotiations of the Claimant's claim after the expiry of the limitation period amounted to an assurance that the Defendant would not rely on a time bar;

(ii) such assurances were reasonably understood by the Claimant to be intended to affect the legal relationship between the parties and/or was so intended;

(iii) the Claimant acted upon the Secret Agreement by not bringing a claim in or around 2012 and upon the Negotiations by not bringing a claim while those were ongoing; and

(iv) the Defendant could have reasonably foreseen that the Claimant would act upon the assurances made, and or did not know the Claimant would act upon them, and these assurances and each of them were intended to affect the legal relationship between the parties as to the operation of limitation.

d. further or alternatively, the Defendant is not entitled to raise a defence of limitation as the Claimant has established stopping by convention. The Claimant will rely in support of this contention upon the following:

(i) there was a common assumption between the parties that (a) as a result of the Secret Agreement, the Claimant's claim would only be brought at the conclusion of the phone hacking litigation and would be admitted or settled with an apology (and so without any limitation defence being raised); And (b) during the Negotiations the parties were negotiating the settlement of a valid claim for compensation without regard to the limitation period and if agreement was not reached the matter would be dealt with by the courts. The Claimant will refer to the fact that the Defendant made no reference to any limitation defence in its response to the Claimant's letter of claim dated 20 September 2019 as further support for this contention;

(ii) the Defendant assumed responsibility for this common assumption by making the secret agreement and engaging in the Negotiations

(iii) the Claimant relied on this common assumption. Paragraph 6 B above is repeated;

(iv) this reliance by the Claimant took place in connection with subsequent mutual dealing in relation to the Claimant's future settlement or claim; and

(v) the defendant has since resiled from its position in relation to both the assurance of the Secret Agreement and the assurance of the Negotiations, in seeking to raise a limitation defence. This has benefitted the Defendant in providing it with a defence it would not otherwise have been entitled to, and vice versa, has caused detriment to the Claimant.

(vi) it would be unconscionable to allow the Defendant to benefit from a limitation argument in light of the Defendant's prior conduct which led the Claimant to not bring his claim as a result of the Secret Agreement, the Negotiations and each of them.

7. In these circumstances, it is inequitable for the Defendant to resile from or renege on the Secret Agreement and benefit from a limitation defence, and the Defendant should therefore be estopped."

44. The Duke is unable to say who on each side made the secret agreement, or even who told him about it: it might have been Gerrard Tyrrell or it might have been another representative of the Royal Family. However, for the estoppel to work, whoever made the secret agreement must have been acting on his behalf,

otherwise there was no promise of NGN made with the Duke, nor any relevant assumption shared by NGN and the Duke.

45. In the evidence in support of the Amendment Application, Mr Chisholm Batten accepts that the application to amend is made late but contends that the amendment will not derail the trial in January 2024, if the Duke's claim is to be heard at that trial (the selection of claims to be heard will not be made until the autumn of 2023). No explanation is given as to why the attempt to plead estoppel based on the alleged secret agreement is made so late, nor any explanation of why the Duke has changed his factual case. The only mitigation offered is that the factual basis of the plea of estoppel had been set out in the Duke's witness statement served on 20 March 2023, rather than raised when the Amendment Application was issued.

46. After the adjournment of the hearing in April and in the light of the court's observation that the proposed amendment to the Reply appeared to be inconsistent with the RRFI, the Duke issued the RRFI Application on 15 May 2023. The evidence in support of the RRFI Application (again Mr Chisholm Batten) states that the application to amend the RRFI is made "to properly clarify the Claimant's position and remove any potential ambiguity". That is not an accurate characterisation of the proposed amendments.

47. The Duke seeks permission to amend his RRFI to assert that NGN already has a sufficient understanding of his case from his Amended Reply, rather than the original Reply, to rely on his witness statement dated 20 March 2023, and to add the following text (all new) to the existing para b of Recital D (as set out in [22] above) and amend para c to read as follows:

> "b. …, given what he was told by Gerrard Tyrell, a lawyer acting on behalf of the Institution of the Royal Family, or someone else in the Institution in or around 2012: paragraph 6 of the Amended Reply is repeated. It is his recollection that at the time, the Claimant was told that he was not able to bring a claim by this individual due to the agreement ("the Secret Agreement") between the Institution and the Defendant. <u>The claimant was told, before or around this time, that there was further evidence that other voicemails of his (and his brother), beyond the single voicemail referred to at (a) above, had also been intercepted by Clive Goodman</u>. The Claimant has no recollection of being shown any underlying evidence by anyone, including by the police. Throughout this period, the Claimant served in the British Army (between 2005 and 2015). He was posted to Afghanistan between December 2007 and February 2008 and between September 2012 and January 2013, and so particularly during and around his service in Afghanistan he had limited contact with Institution lawyers and he was deployed when the Leveson Inquiry published its report.
>
> c. Without in any way waiving legal privilege, <u>the Claimant became aware that he and his brother could bring a claim over the unlawful acts he now claims (save, for the avoidance of doubt, the</u>

> voicemails referred to at (a) and (b) above over which a claim could have been brought but for the Secret Agreement) much later (in or about 2017 after he was given formal permission by Her late Majesty Queen Elizabeth II to seek a resolution) but was initially discouraged from doing so, not least because of assurances given by News Group Senior Executives to the family about resolving complaints over these activities once the MTVIL litigation had ended, namely the Secret Agreement: paragraph 6 of the Amended Reply is repeated."

48. The underlining added to the quotation above identifies the changes in the Duke's factual case, if he is given permission to amend. Instead of just one voicemail interception notified in 2006 and other people otherwise being the only victims of hacking, the Duke now accepts that he was told before or around 2012 that there were likely to be further intercepted voicemails involving him, and by para c he accepts that he could (and would) have brought a claim in respect of the intercepted voicemails of which he was notified in 2006 and in about 2012 but did not do so because of the secret agreement. In relation to other unlawful acts, the Duke's case is that he was not aware that he had a claim until 2017. The proposed amendment also deletes a plea that he became aware "through legal advisers to his family" that he had a claim, so that the awareness is said to stem from being given permission by Her late Majesty The Queen to seek a resolution.

49. The effect of these amendments is to differentiate (a) claims against NGN in respect of the initial incident of voicemail interception by Mr Goodman, of which the Duke learnt in about 2006, and further such incidents involving Mr Goodman, of which the Duke learnt in or about 2012 from (b) claims against NGN in respect of all other incidents of voicemail interception or UIG. In relation to category (b) claims, it is argued that the Duke did not know that he had a worthwhile claim until after 2017. It was not explained in evidence or submissions whether or how the Duke became aware of the second category of wrongs prior to consulting his solicitors in 2019.

The 2017/2018 Correspondence

50. Mr Chisholm Batten explains in his evidence that the change in the year from 2018 to 2017 in recital D.c is the result of the Duke's refreshing his memory following a review of emails to and from Sally Osman. These internal emails, which show that the Duke was pushing hard for resolution of his complaint against NGN before his wedding in May 2018, were exhibited to the Duke's witness statement. In its responsive evidence, NGN then exhibited further external email communications between Sally Osman and Rebekah Brooks and Robert Thomson between July 2017 and May 2018.

51. I was taken through these emails in some detail by both parties. Mr Sherborne on behalf of the Duke relies on them heavily, and on the absence of any evidence from Ms Brooks and Mr Thomson on behalf of NGN, to support the credibility of the intended amendment. He said that the emails strongly reflect the

existence of an assumption common to the Palace (and therefore the Duke) and NGN's senior executives that lawyers would not be involved, that claims would not be brought by members of the Royal Family until after the MTVIL was over, and that in return NGN would admit them or apologise and pay compensation.

52. The internal emails start in December 2017. The Duke urges support for Sally Osman in chasing up NGN and pressing for a timeline for resolution. The earliest email implies that there had been previous attempts by Sir Christopher Geidt, before he left the Royal service in October 2017, to obtain some satisfaction from NGN. The Duke urges upon Sally Osman on 1 February 2018 that "they have NO excuse for not getting this sorted. We all want to draw a line under this …", and on 12 March 2018 Jason Knauf tells the Princes that Sally Osman had told Rebekah Brooks that "waiting until after the wedding to resolve this is not an option". This therefore implies that at that stage the Duke did not believe (or recall) that there was a secret agreement that claims would be brought only after the end of MTVIL. Rather, his complaint, in full context, was that the Royals are not being treated in the same way as other claimants, whose claims are being settled by NGN.

53. The external communications start with an email from Rebekah Brooks to Sally Osman, following discussions between them, confirming that Robert Thomson would be delighted to meet Sir Christopher while he is in London. The key emails that follow that meeting are:

i) Sally Osman to Robert Thomson 17.7.17:

> "Very many thanks for coming to see Sir Christopher [Geidt] and I recently to consider outstanding matters that Rebekah [Brooks] and I had first discussed.
>
> Given that there are now no formal criminal proceedings involving News or the Royal Household it seems an appropriate time to draw a line under such matters between our two institutions, with a view to facilitating untainted and normal business relations in the future.
>
> The fact that we can have this conversation, with The Queen's full authority and knowledge of the scale and effect of hacking and surveillance on her family, their staff, associates, friends and family, is important with a view to resolution in the near future.
>
> We look forward to hearing your thoughts on what shape that resolution and recompense might take."

ii) Sally Osman to Robert Thomson 11.12.17:

> "It was very good to see you recently and talk through our various issues.

I do hope that we can reach an understanding that resets the relationship with News and satisfies what many feel is 'unfinished business'

The Queen is aware that we have spoken. From a Royal Household perspective ... getting a sense of possibility and timescale would be helpful as new chapters begin.

I look forward to hearing from you."

iii) Sally Osman to Robert Thomson 2.3.18:

"I hope you are well. Things have clearly moved on since we met late last year in terms of the deal with Disney, Fox etc. and on- going UK civil action settlements...

Assuming you received my e-mail of December 11 last year, following our very genial and I thought constructive meeting, I was somewhat disappointed not to receive an acknowledgement, let alone a reply.

I do, of course, appreciate, that business is busy. However, there is also an increasing sense of frustration here at the lack of response or willingness to engage in finding a resolution to what is considered outstanding business between the Royal Household and News Corporation.

The hope is still to find a resolution without involving lawyers. However, if we do not receive a response and a sense of what might be done and by when, then we will need to reconsider."

iv) Robert Thomson's reply to Sally Osman 2.3.18:

"Genuinely sorry about the lack of a reply - your note was lost in the mountain of memos I seemed to get each day.... My understanding was that we would wait for the civil cases to be resolved and, thankfully, we seem to be in the final phases of that process. I'm not sure of the precise timing but the UK team has the best sense of how they are unfolding. I should be in London either around March 20 or in mid-April if either of those dates works for you."

v) Sally Osman to Robert Thomson and Rebekah Brooks 12.3.18:

"Our concern is that it is some time since we first raised these issues. We had hoped that by now we would have a sense of what response or recompense News Corporation might make and when. There seems no real necessity to wait until all of the other civil cases are addressed for reasons which are self-evident. It would be good to meet in London the week of 20 March... However may I suggest that a proposal is circulated beforehand addressing the matters raised. It would probably be the best use of everyone's precious time.

> We would really like to progress and settle things soonest, without reverting to our lawyers."

vi) Sally Osman to Rebekah Brooks 26.4.18:

> "Good to see you last week and thank you for breakfast.
>
> ... we all hope that outstanding matters can progress as we discussed in the very near future."

vii) Sally Osman to Rebekah Brooks 8.5.18:

> "... there is an institutional appetite to expedite things and start having a more tangible dialogue.
>
> While we appreciate the significance of the business context that you and Robert are currently working within, we do need to progress matters without further delay. One way to do so would be to receive an appropriate 'legally privileged' expression of intent as helpfully suggested by you. This would be reassuring and calm growing concern that our request is not being taken seriously.
>
> We are still very much of the mind that we don't want this to become embroiled in legal negotiation but it would clearly assist if our lawyers now spoke to yours. They can agree appropriate language and thus minimise their involvement thereafter."

The communications end there.

54. There are clearly likely to be other documents that have not been disclosed at this stage, relating to these communications. This is not a trial and it would be wrong to seek to reach conclusions about exactly what was happening before and during this sporadic correspondence, or indeed what it means. However, the correspondence does give some support to a case that there was, prior to July 2017, some understanding that the Royal Family's complaints against NGN would be resolved informally, not involving legal departments, but not before the criminal proceedings involving NGN employees and possibly other civil litigation was disposed of.

55. Although Ms Brooks and Ms Osman had had an initial discussion, some time before July 2017, the emails cast no light on when the original understanding was reached, though it seems likely that this would have been before the criminal proceedings were finally disposed of. What the correspondence does imply is that there was a desire by the Palace to have an informal settlement of their phone-hacking complaints, which would avoid publicity about the hacked communications, and so a reluctance to issue claims, but that NGN was unwilling to make any public admission at the time.

56. Mr Hudson KC on behalf of NGN warned against seeking to reconstruct a factual case based on much later email correspondence, and submitted that in

any event the correspondence was about "re-setting the institutional relationship between the Palace and NGN before certain large-scale events in 2018". He argued that it was also inconsistent with the Duke's case, in that the Palace was pushing for resolution at a time when the MTVIL litigation was still continuing (although in March 2018 Mr Thomson considered (wrongly) that it was entering its final phases). Mr Hudson also noted that there was no reference in any of the emails to the secret agreement itself, which one might have expected one side or the other to rely upon if the other was asking for something inconsistent with it.

57. The Duke's evidence about what was happening at the time of this correspondence is revealing. He says that he wanted to push for a resolution to the issues with NGN before his marriage in May 2018, and that he approached Her late Majesty The Queen for Her permission to "push the matter forwards", which was given, and so Sally Osman approached NGN. But Ms Osman was not supported by other Palace staff. The Duke was keen to give NGN an ultimatum, and says that he told Sally Osman so in the email on 1 February 2018. The pressure from the Palace for a resolution to be provided by NGN before the Duke's wedding and his belief that NGN had "NO excuse" for not resolving his complaint is, on the face of it, inconsistent with an agreement that matters would be resolved after the MTVIL had ended.

The test on late applications for permission to amend

58. The first question to determine is whether the Duke should be given permission to amend his Reply to plead an estoppel in the way that he does. The Amendment application is made at a late stage of the proceedings, more than two years after the Reply and 18 months after the RRFI confirmed that the Duke's case on limitation was fully pleaded in his Reply, as it stood. It was made less than 8 months before the likely trial date and, as a result of its lateness as a response to NGN's Application, was only able to be heard some 6 months before the trial date. The Amendment Application falls to be considered alongside the RFFI Application for permission to amend the RRFI to remove the inconsistent pleaded case that the Duke was not aware of his claim until 2018.

59. Although there was no dispute about the relevant test to apply when deciding whether permission should be granted to amend a statement of case to plead a new or different case, the parties referred to different authorities. The overriding principle, regardless of the degree of lateness, is that the pleaded case must disclose a case that is more than merely arguable and which has a real (as opposed to a fanciful) prospect of success.

60. In Elite Property Holdings Ltd v Barclays Bank plc [2019] EWCA Civ 204, Asplin LJ, giving the lead judgment with which the other members of the court agreed, said at [40] – [42]:

> "There was no dispute about the test to be applied in the circumstances of this case. The dispute was whether the Judge had

> applied it properly or whether he had fallen into error by conducting a mini trial. In any event, it is important to bear in mind that the overriding objective applies and the question of whether permission to amend should be given must be considered in the light of the need to conduct litigation fairly and justly and at proportionate cost.
>
> For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claimant has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No.3)* [2003] 2 AC 1.
>
> The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon."

61. In avoiding conducting a mini-trial, there is therefore an important distinction to be drawn between, on the one hand, facts alleged that are unsupported, implausible, or incoherent or a case that is inadequately particularised, which can be rejected summarily, and, on the other hand, facts for which there is some credible support and which establish at least a *prima facie* case.

62. The issue was considered further in Kawasaki Kishen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33. In that case, there was both a question of whether permission had properly been granted to serve out of the jurisdiction and an application to amend the points of claim. Popplewell LJ, with whom Henderson and David Richards LJJ agreed, said at [16] – [18]:

> "It was common ground that on an application to serve a claim on a defendant out of the jurisdiction, a claimant needs to establish a serious issue to be tried, which means a case which has a real as opposed to a fanciful prospect of success, the same test as applies to applications for summary judgment: *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd …*
>
> The court will apply the same test when considering an application to amend a statement of case, and will also refuse permission to amend to raise a case which does not have a real prospect of success.
>
> In both these contexts:

> (1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at paragraph 8; *Global Asset Capital Inc v Aabar Block Sarl* [2017] EWCA Civ 37; [2017] 4 WLR 163 at paragraph 27(1).
>
> (2) The pleading must be coherent and properly particularised: *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 at paragraph 42.
>
> (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: *Elite Property* at paragraph 41."

63. The reference by Popplewell LJ to evidential support for the case should not be taken as implying that what needs to be pleaded in the amendment is evidence rather than the material facts. It is rather a recognition that, on an application for permission to amend to add a new or varied claim, it is not sufficient merely to advance a pleading containing alleged facts. At that stage, as with an application to strike out, the court requires to be satisfied by some credible evidence in support of (or opposing) the application that there is a sufficient foundation for what is alleged in the pleading. See also Zu Sayn-Wittgenstein v Borbon y Borbon [2023] 1 WLR 1162 at [63], per Simler LJ.

64. In relation to late amendments, there is additional focus on the disruption that may be caused to an orderly process of preparing for and conducting a trial. If a late amendment will, if allowed, cause significant disruption to the litigation, particularly a trial, the party seeking the amendment will bear a "heavy onus" to justify it: see Swain-Mason v Mills & Reeve (Practice Note) [2011] 1 WLR 2735.

65. There has been a flow of further decisions since 2011 applying and explaining the approach taken in the Swain-Mason case. NGN relied on one such case, a decision of Coulson J, CIP Properties (AIPT) v Galliford Try Infrastructure [2015] EWHC 1345 (TCC), in which the Judge summarised the right approach to late amendments at [19] by reference to previous decisions:

> "(a) The lateness by which an amendment is produced is a relative concept (*Hague Plant*). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of these significant steps in the litigation (such as disclosure or the provision of witness statements and experts reports) which have been completed by the time of the amendment.
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (*Swain-Mason*), even if the application

> is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (*Brown*).
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (*Brown*, *Wani*). In essence, there must be a good reason for the delay (*Brown*)
>
> (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (*Swain-Mason*, *Hague Plant*; *Wani*)
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (*Worldwide*), to the disruption of and additional pressure on their lawyers in the run up to trial (*Bourke*), and the duplication of cost and effort (*Hague Plant*) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (*Swain- Mason*).
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (*Swain-Mason*). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (*Archlane*)."

66. This summary was followed and apparently approved by Birss LJ in ABP Technology Ltd v Voyetra Turtle Beach Inc [2022] FSR 19, who stated at [24]:

> "The simple point about lateness is that it calls for an explanation justifying the lateness. That is because an amendment which might otherwise be allowed, could well be refused if its lateness has caused unjustifiable prejudice to the other party. Therefore an explanation is needed in order for the court to work out whether or not it is a case in which, despite the prejudice caused by the lateness, nevertheless the balancing comes down in favour of allowing the amendment."

Nicola Davies and Coulson LJJ agreed with Birss LJ.

Analysis

67. Mr Hudson contended that the Amendment Application was on the borderline of being a very late application to amend, as explained in the Swain-Mason case, on the basis that it does create a risk of losing the trial date. He submits that

there may be a need for further statements of case in response to the estoppel allegations (which seems correct in principle, if an estoppel case relying on different facts is to be relied on by NGN), and that extensive further disclosure will be required in relation to senior executives of NGN in 2012 and 2013, and possibly further witness statements.

68. I do not agree that the amendment is a very late application, but it is certainly late, given that it should have been pleaded in 2021, and it will require the statements of case and at least claimant-specific disclosure to be re-opened. Although in the MTVIL, as in the Mirror Group Hacking Litigation, disclosure is more of a continuous process than a single event, mainly owing to the approach taken by the defendants to giving disclosure, disclosure relating to an alleged secret agreement made in or before 2012 and negotiations alleged to continue until 2018 will place an additional burden on NGN, and to a lesser extent the Duke himself, before the trial. This is at a time when the focus should properly be on finalising generic and claimant-specific witness statements, which are due in November 2023.

69. No proper explanation was given in the evidence for the lateness of the Amendment Application. Mr Sherborne said in submissions that it was only when considering the evidential response to NGN's Application that the Duke's lawyers focused on the legal consequences of the factual case, and the lawyers' understanding "became fuller once one saw the witness statement that was prepared in response to the limitation application", i.e. the Duke's witness statement. If Mr Sherborne's assertion is accepted, it does at least explain why the estoppel plea could not have been advanced, by way of amendment, before the Duke's witness statement was prepared.

70. However, this does not explain why the Duke's factual account changed from his pleaded case and is put forward so late. There was no explanation as to how the Duke was unable to remember, before preparing his witness statement, that the secret agreement about which he was told in 2012 was the reason why he did not issue proceedings against NGN then. Nor does it explain why, following the witness statement, a draft amended Reply was only produced on the first day of the hearing of NGN's Application.

71. The obvious inference to draw is that the Duke did not remember in March 2021 (when the Reply was filed) being told of the secret agreement and relying on it in or about 2012, and only remembered it when he reviewed the 2017/18 correspondence with Sally Osman to prepare his evidence to respond to NGN's Application. Given that the now asserted facts are said to make it unconscionable for NGN to rely on a defence of limitation, it is surprising that, when setting out his case in response to NGN's Defence, the Duke did not recall his reliance on the secret agreement. The Duke did not react to the Defence by asserting that NGN was unfairly relying on limitation. Instead, he signed a statement of truth on a Reply that said that he was not aware or told that he had a claim until 2018.

72. Reliance on the secret agreement was not recalled even when the Duke signed off the RRFI in November 2021, which reaffirms the Reply but does refer in

general terms to assurances given by News Group senior executives to the Royal Family in 2018 about resolving complaints once the litigation had ended.

73. The terms of the secret agreement contended for by the Duke are surprising in themselves. The pleaded case is that it was agreed between NGN and the Palace on his behalf that the Duke and his brother among others *would bring claims against the Defendant only at the conclusion of the MTVIL* and at that stage the claims would be admitted or settled with an apology. This, if correct, would require the Princes and others to issue a claim, at a later stage, thereby giving publicity to the complaint, which the Palace did not want, rather than seek to resolve it in private. Further, the terms pleaded committed NGN to admit the claims brought later or settle them, without knowing in what terms the claims would be brought. This seems inherently unlikely, unless the secret agreement related only to the Goodman hacking, but that is not the Duke's pleaded case.

74. In trying to force a settlement and apology in 2017 and 2018, having been given permission by Her late Majesty The Queen to proceed, the Duke was therefore acting contrary to what he contends are the terms of the secret agreement, which required the Royal Family to bring claims only at the end of MTVIL.

75. The evidence in support of the pleaded case is limited to that of the Duke. It is not strong evidence. The Duke is unable to identify between whom the secret agreement was made, or even who it was who told him about it. His case is that it might have been Gerrard Tyrrell, a solicitor at Harbottle & Lewis who acted for the Royal Family, or it might have been "someone else at the Institution". The originally pleaded case was that the Duke became aware through legal advisers to his family in about 2018 that he could bring a claim against NGN; but by the intended amendment, that is to be changed to his becoming aware that he could bring a claim in 2017 after permission was given by The Queen. Given that Gerrard Tyrrell was acting on behalf of the Duke in 2012 – in connection with phone hacking and another matter – one might have expected to see some evidence from Mr Tyrrell, or from Ms Osman or Sir Christopher Geidt, giving support to the Duke's factual case, but there is none.

76. The documents in evidence from 2012 do not support a case that a secret agreement was made at that time. Correspondence between Harbottle & Lewis on behalf of the Royal Family including, specifically, the Duke, and Linklaters LLP, who at that time were acting for NGN, is concerned with data subject access requests made by Harbottle & Lewis and with disclosure of documents as a preliminary to either litigation in the MTVIL or resolution in the confidential scheme that NGN had set up to resolve hacking claims. This correspondence runs from March 2012 to March 2013 and there is no mention of an agreement such as that alleged by the Duke. Neither is there any mention of it in the Duke's autobiography, *Spare*. Further, in December 2012, the Duchess of York settled her phone-hacking claim against NGN, leading to a statement in open court on 7 February 2013. This settlement appears inconsistent with the alleged secret agreement.

77. The difficulty that the Duke faces here is two-fold: first, to adduce some credible evidence of the secret agreement having been made in or about 2012; and second, to adduce some credible evidence of his relying on such an agreement

at that time by not bringing a phone-hacking claim. As I have explained, there is some evidential support for an understanding or agreement reached prior to June 2017 (and still subsisting then) that the Royal Family's complaints against NGN would be resolved informally, without involving legal departments, but not before other proceedings involving NGN or its employees were disposed of. But that is not sufficient to support the pleaded case. There must be credible evidence that carries some degree of conviction that the agreement was made in the terms pleaded, in or about 2012 (in any event no later than the Applicable Date), and that the Duke knew about it and relied on it then by not bringing his claim.

78. In my judgment it is implausible that the Duke did not remember before March 2023 if a secret agreement was made, as he now alleges, that made it unconscionable for NGN to rely on a limitation defence against him at all. The Duke pleaded a case in March 2021 that was inconsistent with the estoppel case, relying on s.32(1) to delay the running of the limitation period. He then reaffirmed the inconsistent case in November 2021, even while pleading that he was discouraged from bringing a claim in 2018 because of assurances given by NGN senior executives about a resolution once the MTVIL had ended. It is not, in my view, realistically possible that the Duke confused assurances about which he learnt in 2018 with a secret agreement on which he positively relied in 2012 by not bringing a claim. Nor does he say that he did confuse them: there is simply no explanation.

79. In his witness statement in response to Associated Newspapers Limited's application for summary judgment against him (on limitation grounds) in the claim issued in 2022, the Duke says as follows:

> "16. I was aware in 2005 that the phones of certain members of staff of the Royal Family had been hacked by NGN. I also vaguely remember an apology from Clive Goodman, who had worked for the News of the World. My understanding was that a voicemail my brother had left for me had been accessed and published. Aside from that, I thought that the hacking had been confined to the phones of members of staff. I did not know that my phone had been hacked and thought that no one would be so stupid just to hack my own phone given the security implications and consequences of my private information and whereabouts ending up in the wrong hands.
>
> 17. It is important to emphasise that from 2005 I never had any interface or interaction with the family representative, Gerrard Tyrrell, who, in hindsight, was clearly getting instructions from within the Institution not to involve myself or William about phone hacking by the News of the World. No one was ever brought together for a discussion and there were no structured meetings of any sort, certainly none that I was invited to or made aware of. I only really started to regularly speak with Gerrard when I started dating Meghan, about the defamatory stories then being published.

> 18. I became aware that I had a claim that I could bring against NGN in 2018. However, there was in place an agreement between the Institution and NGN that we would not engage, or even discuss, the possibility of bringing claims against NGN until the litigation against it relating to phone hacking was over. The institution made it clear that we did not need to know anything about phone hacking and it was made clear to me that the Royal Family did not sit in the witness box because that could open up a can of worms. The Institution was without a doubt withholding information from me for a long time about NGN's phone hacking and that has only become clear in recent years as I have pursued my own claim with different legal advice and representation."

80. That evidence, which describes being kept out of the loop by the Palace and learning in 2018 of an agreement not to engage with NGN about claims until after the MTVIL was over, is inconsistent with the Duke's evidence in this claim that he was told in about 2012 about a secret agreement and relied on it then, by not bringing a claim in about 2012 or thereafter.

81. In response to the Duke's evidence about the alleged secret agreement, NGN provided both first-hand and hearsay evidence of a number of persons who had senior positions in its parent company in 2012 and subsequently. It is unnecessary to identify them all here. All of them said to Ms Mossman of Clifford Chance LLP or provided evidence that they had heard nothing about a secret agreement being made in that year, and that if such an agreement had been made they would have heard about it. NGN did not adduce evidence – not even hearsay evidence – on behalf of Ms Brooks or Mr Thomson, who were involved in discussions in 2017. Mr Hudson explained that that was because neither of them was employed by NGN in 2012. Ms Brooks had resigned her position in 2011, following the phone hacking allegations at the News of the World; and she was not re-employed by NGN until 2015. Mr Thomson did not take up his post as CEO of News Corp until January 2013.

82. In reaching my decision, I have not placed weight on this evidence of NGN. If the Duke's evidence had passed a threshold of cogency and plausibility, I would not have engaged on an exercise of weighing it against NGN's evidence. That is only appropriate in a trial. A claimant with some cogent, plausible evidence does not cease to have a properly arguable case because the defendant adduces contrary evidence, however many witnesses are proffered. But the problem with the Duke's pleaded case is that there is nothing other than his rather vague and limited evidence to support it: there is no documentary evidence that supports a case about 2012 and his reliance; there is no evidence from those acting for the Royal Family at the time who might have been expected to support his account, if it is correct; and his own previously pleaded case and evidence in other cases are inconsistent with it.

83. Mr Sherborne relied principally on the 2017/18 email correspondence, the settlement that the Duke alleges that Prince William made with NGN in 2020, the terms in which NGN responded to the Duke's letter of claim, and the likelihood that other documents will be provided on disclosure to support the Duke's evidence of the secret agreement. I will deal with these in turn.

84. *Email correspondence* I have already considered the email correspondence, which supports an argument that at some time an understanding arose between NGN and the Palace that the Royal Family's claims would be addressed informally after important litigation for NGN had concluded. For the reasons I have given, however, it does not support the Duke's more specific case that there was agreement that claims should be brought only after the MTVIL, which would then be admitted or settled by NGN, and that this agreement was made with the Duke in 2012 and relied on at that time by not bringing his claim. The formal correspondence between Harbottle & Lewis and Linklaters in 2012/13 and the terms of the 2017/2018 email correspondence do not support such an agreement. It seems to me, instead, that the internal correspondence in 2017/2018 is the origin of the new assertion that the secret agreement was made in 2012. But it is not a safe foundation: it shows that the Duke wanted to act in a way that would be contrary to the terms of the secret agreement alleged, by imposing an ultimatum on a defendant who was thought to have no excuse for not concluding matters with him.

85. *Prince William settlement.* As for Prince William's alleged settlement, this does not support an agreement in 2012 of the kind alleged by the Duke. What the Duke says in his witness statement is that NGN settled Prince William's claim for a huge sum of money in 2020 without subjecting him to a strike out application, without the public being told and seemingly with a favourable deal in return for him 'going quietly'. He asks, rhetorically: why on earth would Prince William wait until 2019 to bring his claim apart from the existence of the secret agreement, in circumstances where their private secretaries brought and settled claims back in 2012 and no limitation defence was raised?

86. Whatever the answer to the rhetorical question, the fact that Prince William did not bring a claim in 2012 does not indicate the existence of the secret agreement. It is clear that the Palace was very reluctant for senior members of the Royal Family to issue proceedings and attract publicity. At some stage, some kind of assurance was given by NGN that it would seek to resolve matters informally later and, following advice, it appears (if the Duke's evidence on this point is correct) that Prince William was willing to wait. When the assurance was given is quite unclear. This does not support the plea that a secret agreement was made and relied upon in 2012, nor does it demonstrate that NGN had agreed not to take a limitation defence. It demonstrates that NGN was willing to settle with Prince William rather than become embroiled in litigation, as it has with the Duke.

87. *Response to letter of claim* The Duke's letter of claim was sent to NGN on 20 September 2019. It said nothing about the secret agreement but invited NGN to agree to admit openly its responsibility for interception of voicemails and other unlawful activity at the News of the World and The Sun, to provide a private letter and a public letter of apology and to pay compensation and costs. Clifford Chance LLP responded on behalf of NGN as follows:

> "As you are aware, NGN has long been, and remains, committed to bringing claims for voicemail interception to a fair resolution as promptly as possible. In this regard we refer to our Without Prejudice Save as to Costs letter of today's date".

88. Mr Sherborne relies on the fact that NGN immediately offered a settlement as evidence of the secret agreement. I am unable to agree that an offer of settlement is evidence of such an agreement. The MTVIL was still continuing, and the Duke was in breach of the terms of the alleged agreement by threatening to issue proceedings. No doubt at that stage NGN made a settlement offer to the Duke (though its terms are unknown to the court) in order to seek to avoid a claim being brought. The fact that NGN did not wait until a claim was issued and then assert limitation does not tend to prove the secret agreement, any more than the alleged settlement of Prince William's complaint does. It proves that NGN was willing to make a settlement offer rather than become embroiled in public litigation with senior members of the Royal Family.

89. *Disclosure* As for the likelihood of documents emerging to support the pleaded case, there has been no disclosure relating to the issue and NGN has only exhibited documents of its choice. Disclosure may or may not provide documents that support the Duke's case. The possibility of something turning up cannot however be sufficient to justify granting permission to amend. There must be at least a credible reason to think that there are likely to be documents that support the case about the secret agreement.

90. Mr Sherborne was very critical of NGN for failing to provide witness statements of Ms Brooks and Mr Thomson in response to the Amendment Application, but Ms Brooks was not at NGN between 2011 and 2015, so her evidence could only be based on what she was told by others upon resuming her duties in 2015. Mr Thomson began his work as CEO of News Corporation (not NGN) in January 2013, and there is no particular reason identified by the Duke as to why he would have been involved in making a secret agreement with NGN, or been aware of one, before he became involved in the process of high level discussions in 2017. In any event, it is for the Duke to make the running on advancing a plausible case, not for NGN to disprove a draft pleading, and the Duke has not provided any evidence from those in the Palace who would have been aware of a secret agreement if there was one, in particular Sir Christopher Geidt, Sally Osman and Gerrard Tyrrell. It is therefore not persuasive for Mr Sherborne to say that the court is left without material evidence because NGN has not provided evidence from two executives who would not have been involved at the time.

91. For all the reasons that I have given, I am unable to conclude that there is a sufficiently plausible evidential basis for the new case based on the secret agreement to justify the grant of permission to amend at a late stage of the proceedings. The lack of credibility arises from: the unexplained lateness of the plea, linked to the nature of the estoppel plea; the improbability of a secret agreement being made in the particular terms pleaded; the inconsistency with the Duke's currently pleaded case, which is twice supported by statements of truth, and with his evidence in other proceedings, supported by a statement of truth; the absence of any explanation for the new factual case being raised; and the absence of any other witness or documentary evidence to support it.

92. NGN also resisted the Amendment Application and the RRFI Application on the basis that the pleaded case was insufficiently clear or coherent, internally inconsistent, and did not establish an arguable case for either estoppel by convention or promissory estoppel. In view of the conclusion that I have

reached, it is unnecessary for me to decide these points, but I will simply say that, although the pleading style is not a model of clarity and precision, and that in my view this would be a case of promissory estoppel (based on an implied promise not to take a limitation defence when the claim was much later brought), not an estoppel by convention (there being no mutual assumption that was contrary to the true facts or law), had there been cogent evidence to support the proposed amendment I would not have refused permission for it on any of these other grounds advanced by NGN.

93. I nevertheless refuse permission to amend the Reply to plead the estoppel arising from the alleged secret agreement for the reasons I have given. Since the RRFI Application was only parasitic upon the Amendment Application and also pleads the secret agreement, I refuse permission for that amendment too.

The s.32(1) summary judgment application

94. That means that I must consider whether the Duke has a properly arguable case under s.32(1).

95. As explained in [21] above, the test is whether before the Applicable Date the Duke knew facts, or could with reasonable diligence have known facts, that would have led a reasonable person in his position to conclude that there was a worthwhile claim, in the sense that such a person would have confidence to embark on the preliminaries to issuing a claim.

96. As in *Grant*, it is not in dispute, for the purposes of this application, that NGN deliberately concealed facts relevant to the Duke's rights of action. NGN accepts that all the allegations of deliberate concealment pleaded against it are to be assumed to be true for the purposes of this application. These allegations are found in the Amended Schedule of NGN's History of Concealment of Wrongdoing and Destruction of Evidence, and in paras 3 and 4 of the Reply and the Re-Amended Generic Particulars of Concealment and Destruction, which are (so far as material) repeated and incorporated into the Duke's Reply. If true – which will be a matter for the trial due to take place in January 2024 – the facts alleged would establish very serious, deliberate wrongdoing at NGN, conducted on an institutional basis on a huge scale. Of relevance for this application, they would also establish a concerted effort to conceal the wrongdoing by hiding and destroying relevant documentary evidence, repeated public denials, lies to regulators and authorities, and unwarranted threats to those who dared to make allegations or notify intended claims against The Sun.

97. NGN's acceptance that the concealment allegations should be assumed to be true for the purposes of this application means that the only matter in issue is whether the Duke has a realistic prospect at trial of proving that he did not know about the concealed facts and could not with reasonable diligence have discovered that he had a worthwhile claim until 28 September 2013 or later (the burden as to which will be on him). More specifically, since this is NGN's summary judgment application, the burden lies on NGN to satisfy the court at this stage that there is no real prospect of the Duke so proving at a trial.

98. The question of concealment and knowledge depends on a correct analysis of the claim that has been issued. It is facts relevant to the rights of action that are the subject of the claim that must have remained concealed beyond the Applicable Date: see Various v MGN Ltd [2022] EWHC 1222 (Ch) at [63] and [90].

99. The Duke's case, in the light of the evidence in para 39 of his witness statement, is that he knew in 2006 that his mobile telephone had been hacked on one occasion by Mr Goodman, and knew in about 2012 that there was further evidence to show that his voicemails and those of Prince William had been intercepted by Mr Goodman on other occasions. Beyond that, he did not know about any voicemail interception or UIG practised by NGN at the News of the World or at The Sun.

100. Mr Sherborne submits that the Duke did not know and could not reasonably have discovered sufficient facts for a worthwhile claim, such as he has now brought. Thus, while the Duke may have known enough to appreciate that he had a worthwhile claim for the Goodman-specific incidents of voicemail interception, he did not know enough to realise that he had a much broader claim to bring, alleging other voicemail interception at the News of the World and in particular at The Sun, UIG, and blagging of confidential information on behalf of both newspapers.

101. For the reasons given in my judgment in *Grant*, in view of the way that the claim is pleaded, knowledge of the facts relating to each individual occasion of phone hacking, blagging or use of a PI to carry out UIG is not necessary before such a claimant can know that they have a worthwhile claim. What is required is knowledge of (or the ability by reasonable diligence to discover) the essential facts relating to discrete categories of rights of action.

102. Once someone like the Duke knows or is on notice in 2012 that he has been hacked on particular occasions by a tabloid newspaper, the likelihood is that there will have been other occasions, and he is in a position to bring a claim, as he has in 2019, for all such occasions, whether known or unknown, with disclosure then providing the evidence with which to prove the separate occasions. However, knowledge of one or more incidents of phone-hacking does not necessarily mean that the Duke knew that NGN had commissioned PIs to blag his confidential information or otherwise obtain information by other unlawful means.

103. The relevant question is therefore whether the Duke knew (or could have discovered) that he had a worthwhile claim to bring for any occasions of NGN's phone hacking, blagging of confidential information, and use of PIs to conduct UIG directed at him during the Relevant Period, by each of the News of the World and by The Sun. Although both newspapers are owned by NGN, it would not be right in principle to say that knowledge (actual or constructive) of illegal activity at one newspaper amounts to knowledge of illegal activity at another newspaper. They had different editors, editorial managers, journalists, staff and management. Indeed, it would not be right for NGN to contend that knowledge about the activities of one amounts to knowledge in relation to the other, given that it has long ago admitted illegal conduct at the News of the World but to this

day determinedly denies any illegal or unlawful conduct at The Sun. If the Duke's allegations are right, those denials constitute continued concealment, which is only admitted now for the purposes of the NGN Application.

104. I do not, however, accept that it is requisite for the Duke to have knowledge (actual or constructive) that different departments within the News of the World were separately conducting such activities. Knowledge of voicemail interception by one desk at the newspaper is sufficient knowledge – for the purposes of bringing a comprehensive claim – of voicemail interception at the newspaper generally. The allegations of voicemail interception by the Features Department therefore should not be treated as a different category of claim for these purposes from voicemail interception alleged against the News Department.

The Issue of Constructive Knowledge

105. As s.32(1) expressly provides, the claimant who seeks to rely on that subsection is assumed to use reasonable diligence to discover whether they have a worthwhile claim.

106. The application of the test as regards constructive knowledge of concealed facts was clearly explained by Males LJ in OT Computers Ltd (in liquidation) v Infineon Technologies AG [2021] EWCA Civ 501; [2021] QB 1183, as follows:

> "[35]… 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."
>
> [47]… although the question what reasonable diligence requires may have to be asked at two 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.

> [48] 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.
>
> [49] 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."

107. It is that test that I seek to apply when assessing whether, with reasonable diligence, the Duke could reasonably have discovered by the Applicable Date that he had a worthwhile claim for each of the different types of UIG at each newspaper. The Duke cannot rely on personal traits or characteristics to say that he could not have discovered what a reasonable person in his position would have discovered: OT Computers at [38]. Nevertheless, the question is what a reasonable person in his position could have discovered.

The burden and standard of proof on NGN's Application

108. The court has on numerous occasions observed that issues about what a party to litigation knew or could have found out at a particular time is a question of fact that is, by its nature, generally unsuited to summary determination. In refusing permission to appeal my decision in Various v MGN Ltd, Andrews LJ said that:

> "The question whether a claimant has sufficient information to know that they have a worthwhile claim, in this case a UIG claim, is dependent on a factual investigation that is quintessentially inapposite for summary judgment. So too is the issue of reasonable diligence …."

109. Mr Hudson accepted that general proposition and the often cited guidance of Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), which has repeatedly been approved by the Court of Appeal. But he said that this was a rare case in which the relevant facts were very clear indeed and undisputed, on the basis of which the court could safely come to the conclusion that the Duke did in fact know enough to conclude that he had a worthwhile claim. Mr Hudson drew my attention to the observation of Cockerill J in King v Stiefel [2021] EWHC 1045 (Comm) at [21] to the effect that there is no bar in a summary judgment application on the court *evaluating* the evidence and, where justified, reaching a conclusion adverse to the respondent.

110. Mr Hudson accepted that the onus was on NGN to persuade the court, on the basis of evidence, that there was no real prospect of the Duke proving at trial, on the balance of probabilities, that by 27 September 2013 he did not know, and could not reasonably have discovered, sufficient facts to conclude that he had a worthwhile claim, in the sense explained above. Mr Hudson said that he wholly accepted that the court would not embark on a mini-trial of factual disputes, and he explained that he relied principally on evidence that was undisputed and even evidence given by the Duke himself, not on evidence that was disputed. I accept that there may be a case where contemporaneous evidence of a person's state of knowledge, or facts that were readily available to that person, are really incontrovertible, when properly analysed, which would entitle the court to resolve such a question summarily, without cross-examination; but such cases will by their nature be relatively rare.

Analysis

111. In making his submissions about the evidence, Mr Hudson did not distinguish between the Duke's knowledge of voicemail interception by the News of the World and by The Sun, or between knowledge of voicemail interception and any other form of UIG alleged by the Duke in his Particulars of Claim. He asserted that the claim was a comprehensive and inferential claim alleging UIG generally throughout the Relevant Period, as defined, with examples of UIG and evidence in support of the allegations of UIG pleaded. I have given my reasons above for concluding that matters are not that simple: the claim form and Particulars of Claim plead distinct categories of voicemail interception and different UIG activities, at two different newspapers, which cannot be treated simply as examples under the UIG umbrella.

112. There can be no doubt that the Duke, knowing that he had been hacked and that this led to a publication of his private information, and so being on notice of wrongdoing, could with reasonable diligence have become aware of all the publications about which he complains in this action. 141 of the 206 articles in issue were published before the arrest of Goodman and Mulcaire, and a further 65 afterwards. There was no concealment of the publications, which were in the News of the World and The Sun in approximately equal numbers. The fact that private information was published without the Duke's consent would (or reasonably could) have been as evident to him in 2012/2013 as it was when the claim was pleaded in 2019. Although the Duke no longer pursues a claim based on publication itself, each publication is evidence of something having gone wrong that enabled NGN to obtain the private information.

113. Further, the Duke actually knew about the Goodman hacking of his mobile phone, not just on the one occasion that he was told about in 2006 but on more occasions, as he was told in about 2012 that there was evidence to show that he had been hacked on further occasions too. Knowing that the original hacking had led to publication of an article in the News of the World, he clearly could have followed up the further evidence to establish what other articles were published as a result of the Goodman hacking. Mr Sherborne relied in his skeleton argument on the Duke's statement, at para 35 of his witness statement,

that he remembered thinking "(naively as it now turns out) who would be stupid enough to hack a member of the Royal Family with all the security that we have?". However, this was the Duke's reaction to being told in 2006 of the single Goodman voicemail interception. By 2012 he knew that he had been hacked by Goodman on more occasions.

114. The Duke was also aware that claims had been brought against NGN by two Palace employees, who had been selected to bring claims to show that the Palace was being proactive about dealing with phone hacking by NGN. He accepted, in his proposed amended RRFI, that he had some awareness of claims having been brought by his friend, Guy Pelly, and one by Jude Law, both of whom made allegations against The Sun and whose claims were settled in 2012, but felt that he was being kept out of the loop by the Palace. The lawyers acting for those claimants were Mr Sherborne and Mr Thomson. Alleged concealment by The Sun was pleaded at the time.

115. As a result of claims being brought by associates of the Duke and members of the Palace staff in 2011 and 2012, it is clear that Harbottle & Lewis knew (or had been notified) that there was evidence of voicemail interception that related to the Duke. The Duke says that this information was not passed on to him by Harbottle & Lewis, but nevertheless they knew of it. The Duke accepts that he had a conversation with Gerrard Tyrrell in or about 2012 relating to his complaint, but it is evident that the Palace did not want senior members of the Royal Family to be issuing claims. Mr Tyrrell therefore may not have been too encouraging.

116. The Duke's lawyers at the time (who acted on behalf of the Royal Family generally and were not instructed by him personally) were nevertheless communicating with NGN's solicitors, Linklaters, both about disclosure of documents relating to senior members of the Family and about the claims of the Palace employees and others. On 13 March 2012, Harbottle & Lewis made a data subject access request to News International Group Ltd on behalf of the Duke, among others, relating explicitly to data processed by NGN at the News of the World and at The Sun.

117. On 15 June 2012, Harbottle & Lewis wrote to Linklaters on behalf of a female friend of the two Princes, referring to the Weeting generic particulars of claim that had by then been served and "compelling" evidence provided by the Metropolitan Police Service ("MPS") to show that the individual was a victim of sustained voicemail interception and the obtaining of information by dishonest means, carried out by Mr Mulcaire, Mr Miskiw and Mr Thurlbeck. The letter states that their unlawful activities enabled access to voicemails and the tracking of movements of others with whom the individual was associated, including members of the Royal Family. It continues:

> "It should also be pointed out that the information is clear and compelling evidence of a general conspiracy to target members of the Royal Family which includes HRH Prince Harry. It also demonstrates that our client was not the only person who had been placed under surveillance due to her relationship with HRH Prince Harry. We

> would also assert that the primary purpose of that surveillance was not to write about our client but about others." (emphasis added)

118. The letter then identifies five articles, at four of which were published in The Sun, referring to the individual's friendship with the Duke.

119. On 2 August 2012, Harbottle & Lewis wrote to Linklaters on behalf of clients including the Duke, seeking MPS disclosure pursuant to the Order of Vos J that enabled potential claimants to have access confidentially to such material. On 5 November 2012, Linklaters provided Harbottle & Lewis with the generic disclosure of NGN in the MTVIL, in redacted form, and by letter dated 2 December 2012 Harbottle & Lewis sought unredacted disclosure where it related to their named clients. It is not clear from the evidence whether or when this arrived.

120. On 28 March 2013, Harbottle & Lewis wrote to Linklaters on behalf of a number of clients, including the Duke, seeking disclosure of documents, and stating:

> "As both you and your client are aware, all of our clients have already established more than good and meritorious claims and yet your client has done little or nothing by way of satisfying their requests." (emphasis added)

121. In the light of this, NGN submits that it is impossible for the Duke to contend that he could not with reasonable diligence have discovered (if he did not in fact know) that he had a worthwhile claim to bring relating to all NGN's unlawful activities. All that the Duke had to do was consult the Royal Family's solicitors at the time; or consult another solicitor, as the Duke eventually did after having been introduced to Mr Sherborne at Elton John's summer party in 2019.

122. Mr Sherborne on behalf of the Duke submitted that the critical fact for the bringing of any claim, which was concealed by NGN, was the circumstances in which each individual occasion of UIG took place. He submitted that one needed to identify these facts and how they were concealed, in relation to each occasion of unlawful conduct individually, before one can determine the question of knowledge of misuse of private information. However, that is not the basis on which the claim issued by the Duke has been pleaded, and I have rejected that approach. Admittedly, the Duke was able to plead in 2019 a large number of invoices as evidence of individual occasions of UIG, but these were obtained on initial disclosure *as a result of a claim having been notified and issued*. The Duke was in no better position in this regard immediately before the claim was notified, and yet the claim was brought before the Duke had the benefit of this disclosure.

123. Another difficulty with Mr Sherborne's argument is that, in his evidence, the Duke nowhere explains what further facts about voicemail interception or other UIG directed at him he had become aware of by 2019, when he issued his claim. The material obtained in initial disclosure in 2019 cannot be relied on to distinguish his claim from the sort of claim that might have been brought in 2012.

124. Further, the Duke cannot convincingly allege that he was deceived by journalists' concealment of the source of their stories, as for the most part he accepts that he did not see or read at the time the articles that were written about him. But he does say that, for those that he did read, he did not suspect they were the product of phone hacking or other unlawful methods but thought they were a leak from someone close to him.

125. Unlike Mr Grant, the Duke does not allege that he was aware of and believed NGN's elaborate and repeated denials of wrongdoing at The Sun, or that he only later discovered that the denials were false.

Conclusion on voicemail interception claims

126. There is no doubt that the Duke actually knew in about 2012, and certainly before the Applicable Date, that he had a worthwhile claim in relation to phone hacking at the News of the World by Mr Goodman.

127. The fact that the Duke knew of that claim was self-evidently sufficient to put him on inquiry as to what other voicemail interception was carried out by NGN on him and his associates. Although the Duke did not then know or believe that he had been hacked by journalists at The Sun too, by the exercise of only limited diligence he had the means of knowing that articles inexplicably containing his private (and in some cases highly confidential) information were published before and after the arrests of Mr Goodman and Mr Mulcaire, in the News of the World and The Sun alike. The publication of private information about which the Duke complains therefore did not apparently end with their imprisonment.

128. That would inevitably have caused a person who knows that he has been the victim of hacking and who desires to know and investigate what wrongs have been committed against him (*per* Neuberger LJ in Law Society v Sephton & Co [2004] EWCA Civ 1627 at [116]) to inquire further. There can be no doubt that the Duke was on notice to investigate these matters. There being, in the Duke's case, no reason given by him in evidence, or pleaded, to differentiate the case against the News of the World from The Sun, the Duke was on notice of the possibility of voicemail interception by NGN's journalists at The Sun and, in my judgment, could readily have discovered that he had a worthwhile claim in that regard by exercising reasonable diligence.

129. The Duke's then legal representatives, Harbottle & Lewis, were fully aware before the Applicable Date of allegations made by others against The Sun and that some of these involved the Duke. They were pursuing disclosure of documents by The Sun and the News of the World on behalf of him and others. Mr Sherborne and Mr Thomson had by that stage pleaded claims on behalf of others, including members of the Royal Household, alleging voicemail interception by the News of the World and The Sun. Had the Duke instructed Mr Tyrrell or another solicitor at Harbottle & Lewis to investigate, a much fuller picture would have emerged, if Harbottle & Lewis were willing to do so.

130. What the evidence establishes is that Mr Tyrrell was obtaining his instructions from a high level at the Palace and that the Palace did not want senior Royals to issue claims. It may well be, therefore, that Harbottle & Lewis would have been unable to conduct all the preliminaries to issuing a claim for the Duke, but they were *already* conducting investigations on his behalf in any event, on the basis of instructions apparently given on an umbrella basis by the Palace in relation to members of the Royal Household. The relevant legal test does not turn on whether and when a claim could have been issued but on when, by the exercise of reasonable diligence, a claimant could have known that they had a worthwhile claim, at which point they could start the preliminaries to a claim, including further investigation, as necessary.

131. Even if Harbottle & Lewis had declined to take instructions from the Duke, other solicitors would have acted and would have had access to Mr Sherborne and Mr Thomson, who by then had already acted on behalf of other claimants making claims in relation to The Sun as well as the News of the World. It is clear that they did not believe NGN's denials in relation to The Sun. They had also settled Re-Amended Generic Weeting Particulars of Claim, dated 11 October 2012. These made extensive allegations, at paras 12, 20-22 and 24 in particular, against NGN and Mr Mulcaire and his associates of voicemail interception and UIG, including obtaining information needed to facilitate hacking, obtaining call data, account numbers, financial information and other data using PIs such as Mr Whittamore, by blagging and other forms of unlawful activity. There is also a plea that Mr Andy Coulson instructed journalists at both newspapers to carry out voicemail interception.

132. I am satisfied that there is no reasonable prospect of the Duke proving at trial that he did not know and could not with reasonable diligence have discovered facts that would show that he had a worthwhile claim for voicemail interception in relation to each of the News of the World and The Sun. He already knew that in relation to the News of the World, and he could easily have found out by making basic inquiries that he was likely to have a similar claim in relation to articles published by The Sun.

Conclusions on blagging and use of PIs

133. The remaining question is whether the Duke was sufficiently on notice of other forms of UIG, including blagging, since his claim as issued is not limited to voicemail interception but includes claims based on those different rights of action too, against both the News of the World and The Sun.

134. I remind myself that I must be cautious in seeking to reach any conclusions of fact without having the benefit of a full evidential picture at a trial. The questions of what investigations should reasonably have been done, on the basis of what the Duke knew about voicemail interception but going beyond those rights of action, and what the outcome of any such reasonable investigations would have been, require careful, fact-sensitive analysis.

135. There is no evidence currently before me that the Duke knew before the Applicable Date that NGN had done anything other than hack his mobile phone (at the News of the World). Knowing or being on notice of a worthwhile claim for voicemail interception does not of itself amount to knowledge or notice of a worthwhile claim for other forms of UIG, save for those activities that were in fact ancillary to the voicemail interception: *Grant* at [113] – [116]. It is a question of fact whether what the Duke knew or would have discovered about phone-hacking would reveal to him, or put him on further inquiry about, other types of UIG divorced from voicemail interception, in particular blagging of confidential information (i.e. obtaining information by deception), and use of PIs to obtain confidential information by other unlawful means.

136. Although the Duke did not explain in his evidence what led him to issue his claim form for damages based on blagging and use of PIs to access private information, the answer may well be that by 2019 the generic claim in the MTVIL had advanced much further than in 2012/2013, and that it was by then obvious to a lawyer that a claim for voicemail interception would also be likely to encompass a claim for blagging and misuse of PIs. The likely source of this information is indicated in a passage from *Spare* at p.369, where the Duke says:

> "It was partially down to Elton and David. At the end of our recent visit they'd introduced us to a barrister, an acquaintance of theirs, a lovely fellow who knew more about the phone-hacking scandal than anyone I'd ever met. He's shared with me his expertise, *plus loads of open court evidence* ….."

137. By 2019, there had been numerous applications for disclosure and, incrementally, a picture of allegedly unlawful activity had been built up. There had been generic disclosure too that provided a clearer picture of what was allegedly happening and how claimants generally were affected by it.

138. The circumstances of the Duke are a little unusual, in that his private affairs at the relevant time were being looked after by an institution, as he refers to it, and things were being done on his behalf, without his knowledge, with others having a degree of control or influence over his affairs. He says that the Palace instructed Harbottle & Lewis to act on his behalf in 2012 in relation to a free-standing privacy claim. It is not, however, crystal clear to what extent Harbottle & Lewis would have conducted investigations beyond the brief that the Palace had given them for members of the Royal Family generally. The investigations that they were already conducting appear to have uncovered some evidence of obtaining information by dishonest means and surveillance of members of the Royal Family, including the Duke (see [100] above – letter 15.6.12), but whether this extended in the Duke's case to blagging and use of PIs as distinct from wrongdoing by journalists is unclear.

139. Ultimately, the question that I have to answer at this stage is the following: is it clear now (such that the contrary is no more than a fanciful possibility) that, had the Duke instructed Harbottle & Lewis to investigate and pursue his claims for voicemail interception – which at the time would have been the reasonable thing for a person circumstanced as the Duke was to do – any investigation by Harbottle & Lewis (or a different firm instructed) would by the Applicable Date

have produced evidence that the Duke had a worthwhile claim? The worthwhile claim might be a claim for UIG by blagging of confidential information, or for obtaining private information through PIs by unlawful means, or both, in relation to one or both newspapers.

140. I feel unable to answer the question in the affirmative in relation to either newspaper. It may well depend on what Harbottle & Lewis were already instructed to do, what emerged in fact from the attempts that they were making in 2012 and 2013 to obtain disclosure from NGN, and what impact different instructions from the Duke might have had on their investigations. It may also depend on whether, had Harbottle & Lewis declined to go further than their instructions from the Palace, a reasonable person in the Duke's shoes would have resisted the brake that the Palace apparently wanted to put on Royal claims and gone to private solicitors. These are not questions that can be simply answered on the basis of the evidence before me at this stage.

141. Investigation into the extent of NGN's voicemail interception at both newspapers might well have led to material suggesting a worthwhile claim for different UIG activities, but that is not such an obvious outcome that I can regard any other conclusion at this stage as being fanciful. In my judgment, this is an issue that should be determined only at a trial, with a fuller evidential picture.

Disposal

142. As in *Grant*, therefore, though for different reasons, I consider that the Duke's claim for voicemail interception (and for any other wrongs accessory to any voicemail interception) are time-barred, both in relation to the News of the World and The Sun. That is because the Duke has no realistic prospect of establishing at trial that before the Applicable Date he did not know and could not with reasonable diligence have discovered facts that establish a worthwhile claim in that regard.

143. To that extent only the application for summary judgment succeeds. The remaining claims must be tried.