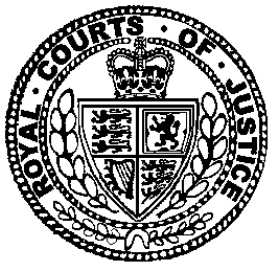

Neutral Citation Number: [2024] EWHC 274 (Ch)

Case No: HC-2000-000003

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday 9 February 2024

Before :

MR JUSTICE FANCOURT

- -

Between :

(1) The Duke of Sussex **(2) Nikki Sanderson** **(3) Michael Turner** **(4) Fiona Wightman**	**Claimants**
- and –	
MGN Limited	**Defendant**

- -
- -

David Sherborne and Julian Santos (instructed by **Thomson Heath**) as lead solicitor, **Clintons** for the **First Claimant**, **Charles Russell Speechlys** for the **Second and Third Claimants** and **Taylor Hampton** for the **Fourth Claimant**
Roger Mallalieu KC, Richard Munden and George McDonald (instructed by **RPC**) for the **Defendant**

Hearing dates: 29 January, 9 February 2024

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APPROVED JUDGMENT

This judgment was handed down at a hearing at 10.30 am on 09 February 2024 and via circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Fancourt:

1. Introduction

1. I now have to determine the incidence of the costs of the claims of Mr Turner, Ms Sanderson and Ms Wightman, on which I gave judgment on 15 December 2023. The Duke of Sussex's claim is not yet finally concluded and it is agreed that the costs of his claim should await that final determination.

2. There are also applications for payments of costs on account and, from MGN, for interest on costs.

3. To recap, Mr Turner's claim succeeded in part: he was awarded damages of £31,650, but he only succeeded on 4 out of 28 articles relied upon. He failed to beat Calderbank and Part 36 offers made by MGN at various times.

4. Ms Sanderson's claim failed on limitation grounds. But for that, she would have been awarded £67,500 in damages, but she would have failed to beat Calderbank and Part 36 offers made by MGN before her claim was issued.

5. Ms Wightman's claim failed on limitation grounds. But for that, she would have been awarded £22,750 in damages. There were no Calderbank or Part 36 offers in her case.

6. As is clear from my judgment, there were two main and distinct parts to the trial that took place last year. The first was the generic part of the claims, concerned with: the period during which MGN was carrying on unlawful and illegal activities and to what extent; the identity and nature of the use by MGN journalists of various private investigators (PIs); and whether the board and legal department of MGN knew about the unlawful and illegal conduct of its journalists and covered it up.

7. The second part of the trial was the individual claims for damages of the 4 sample claimants about articles that were published about them and UIG activity directed at them. This part included, in the cases of Ms Sanderson and Ms Wightman, the limitation issues on which MGN ultimately succeeded. Limitation is a fact-sensitive issue in individual cases, not a generic issue, though the reasoning in my judgment will, I hope, be of assistance to other claimants in deciding whether they have a prospect of success on the particular facts of their cases.

8. The generic issues were to all intents and purposes a separate trial, for the benefit of all the 4th wave claimants, with each side calling different and many witnesses to address the issues that I have identified. Only one witness was also a brief witness in relation to one article tried in the Duke of Sussex's individual claim. The issues in the generic claim were wholly distinct from the particular issues tried in the claimant-specific claims, and (subject to some timetabling requirements) the generic witnesses were heard before the parties opened their cases on the 4 individual claims.

9. That is not to say that the findings on the generic trial were unconnected with the findings in the individual claims. The findings about the extent and nature of the phone hacking and other activities carried on by MGN journalists with the assistance of particular PIs were directly relevant to the decision whether a particular article, or an invoice from a particular PI, was probably the product of UIG. Each claimant pleaded that MGN operated arrangements for the unlawful gathering of private information relating to individuals such as her, with a view to the publication of stories about her; alleged standing arrangements with particular PIs; and relied on the nature and extent of these activities in support of her allegations. Each claimant adopted and relied on the allegations in the generic particulars of claim as part of her claim. However, no specific relief was claimed (e.g. a declaration that the board of MGN knew of illegal activity and covered it up), though the claim for aggravated damages depended on establishing board knowledge.

2. Individual Costs and Common Costs: the correct approach

10. Like the trial, the costs also fall into two different parts. There is a common costs regime that was set up for the 2nd Wave of this managed litigation by order made by Mann J on 9 July 2015 at the 9th CMC. Common costs exclude individual costs, and vice-versa. For costs purposes, we are still in the 2nd wave and the terms of that Order apply, subject to any subsequent variations.

11. As the name common costs suggests, it was intended to cover the costs of managing the litigation generally, for the benefit of all claimants, and the costs of common issues in the litigation. The claimants instruct lead solicitors, who in turn instruct Counsel, to manage the litigation as a whole and advance the common issues. Then there are the individual costs of each claimant that relate to their personal claim. Each claimant instructs their own solicitors, who are different from the lead solicitors, who in turn instruct the same Counsel to advance their individual claim. The purpose of the common costs regime is to reduce overall costs, ensuring that each claimant is responsible to the lead solicitors for a fair proportion of the common costs incurred on behalf of all the claimants, and on the other side is responsible to MGN for a fair proportion of any common costs that turn out to be payable to MGN.

12. Importantly for present purposes, the costs of preparing for trial of and then trying the generic issues that I have identified were treated as common costs by both sides. Each side in this litigation prepares and updates a common costs budget, which is (usually) agreed on each side and the court approves it. Included in the common costs budget of the claimants are the costs of the following:

    - Generic pleadings from 16 December 2020 to 22 March 2022
    - Generic pleadings from 23 March 2022
    - Additional Generic Witness Evidence from 16 December 2020 to 22 March 2022
    - Additional Generic Witness Evidence from 23 March 2022
    - Trial preparation of the generic case for the 5th group trial

- Trial preparation of the generic case for the 6th group trial
- The 6th group trial of the generic case

These all relate to the generic issues that I tried. By far the largest cost in this budget is the cost of trial preparation of the generic case for the 2023 trial and the cost of that generic trial.

13. On the generic issues, there can be little doubt that the claimants were successful. Although they did not establish all the points that they sought to prove, they were very substantially successful in proving illegal conduct of MGN that was carried on extensively from 1998 to 2011, and from at least 2003 until 2011 to the knowledge of at least one (and later two) main board directors and the legal department, who deliberately concealed it.

14. However, the right starting point is to consider who was the successful party overall. This is not a case like Kupeli v Kibris Turk Hava Yollari Sirketi [2019] 1 WLR 1235, where a series of preliminary issues in managed litigation were tried in sample claims, leaving clarity about the outcome in almost all claims in the managed litigation, most of which consequently failed. All 3 cases tried by me were final trials of all issues in those claims, including the generic issues. MGN was the successful party in the Sanderson and Wightman claims. Although Mr Turner was the successful party in his claim, the costs consequences that normally flow from that do not flow because of the admissible offers to settle that he did not beat. The claimants were successful on the generic issues, but that does not provide an answer to the outcome of the remaining individual claims in the 4th wave.

15. MGN's position is that it should be paid the individual costs of all 3 claims, but accepts that it should pay Mr Turner's costs up to the date of the first relevant offer of settlement. It submits, in reliance on Nationwide BS v Various Solicitors [2000] 1 Lloyd's Rep 70, that the generic costs should be dealt with in the same way as the individual costs, while accepting, on the basis of the Kupeli case, that it is important in managed litigation of this kind to consider, more broadly, the extent of the success that MGN had on the issues tried and their significance for the litigation as a whole.

16. The claimants say that even where they were the losing party, they should nevertheless have the costs of the trial of the generic issues. That is really the central issue on which much else in terms of costs depends.

17. Since, in the Sanderson and Wightman claims, MGN only succeeded on the basis of limitation and would otherwise have lost, it is unsurprising that Mr Mallalieu KC, who appeared with Mr Munden and Mr McDonald for MGN, sought to fasten on the implications of success on limitation for the remainder of the claims in the 4th wave.

18. He relied on the 30th witness statement of Keith Matheson, a partner of MGN's solicitors, RPC, who contends that of the 101 live claims remaining in the 4th wave, 75 were issued more than 6 years after the time at which I held that the limitation period started to run in Ms Sanderson's and Ms Wightman's cases, and 54 of the 75

were issued more than a month after the expiry of 6 years from Mann J's judgment in the Gulati trial. On this basis he contends that 75% of the remaining claims are liable to be dismissed on limitation grounds, on the basis of my findings.

19. That in my judgment is an over-simplification and is incorrect. As I explained to Mr Mallalieu, it turned out (somewhat unexpectedly) that neither Ms Sanderson nor Ms Wightman was in fact deceived by the language of MGN's deliberate concealment of its illegal conduct into believing that friends and family were to blame for the newspapers having their private information. My conclusion on the facts in their cases turned on this (and, in Ms Sanderson's case, also on an exchange that she had with a Hollyoaks press officer). The issue that it was believed would emerge at trial, namely when a claimant who was actively misled was put on notice to investigate whether MGN was to blame, has therefore not been decided. While I recognise that if it is decided that the answer is "a reasonable time after 21 May 2015" that will not avail the 54 claimants who issued their claims after the end of June 2021, that conclusion has not yet been reached.

20. Although, therefore, the decisions that I reached on limitation in Ms Sanderson's and Ms Wightman's cases may give some encouragement to MGN, and may prove to be very significant, it cannot be said that they will have all the consequences that MGN now claims.

21. Success for the claimants on the generic issues can, however, be said to have had an important effect for the remaining claims, in that it has removed the ability of MGN to argue that any claimant's allegations of UIG are unsubstantiated outside the Gulati period, or that those PIs regularly used by MGN journalists only acted lawfully, or that there was no knowledge or cover up of what was going on. Those issues have been determined once and for all. As a result, the focus in other claimants' cases will be on whether, against the background established by the generic findings, there is credible material to support MGN's case that the private information was obtained by other means. And in many cases, there will also be a fact sensitive limitation defence.

22. In considering what significance the outcome of the trial has for the litigation as a whole, it can fairly be said that each side has had a measure of important success (including, for the claimants, recovery of damages for distress resulting from publication, which MGN had previously indicated was a key issue to which it needed to know the answer, for the settlement of other claims). But, save where the limitation fact pattern is the same as in the Sanderson and Wightman claims, the remaining claims will, to a greater or lesser extent, depend on their own facts.

3. Individual costs of the Sanderson, Turner and Wightman claims

23. I consider that the right analysis in Sanderson and Wightman is that, although MGN is to be regarded as the successful party overall, by virtue of the limitation defence, the

Claimants were successful on important generic issues. In Turner, Mr Turner was the successful party overall, including on the generic issues, but failed to beat a Calderbank and a Part 36 offer.

24. Dealing first with the Sanderson and Wightman cases, my conclusion is that those claimants should pay MGN its individual costs of their claims, which have failed. I reject their argument that, despite their claims failing, there should be no order as to the individual costs of their claims. Part of my reason for reaching that conclusion is that I consider that the generic issues, on the conduct of MGN in relation to which the claimants rely for saying that they should not have to pay any part of MGN's costs, should be dealt with separately. I do not consider that MGN's failure to make more extensive admissions than they did is a reason for denying them their costs. The claimants were plainly on notice of the risk of the limitation defence succeeding, as it was used by their Counsel to justify an uplift of 100% on their fees in the event of success.

25. It is true that Ms Sanderson succeeded in proving extensive phone hacking for a period of 2 months and that 9 articles were the product of phone hacking or other UIG, which was more than MGN admitted. These were in themselves very serious findings adverse to MGN. But MGN also made two generous offers to settle before the claim was even issued, for sums significantly more than Ms Sanderson would have recovered. In my judgment, that really removes any realistic argument on her part that she should not have to pay MGN's individual costs. I reject the argument that Ms Sanderson could not properly engage with such offers because of disclosure failings on the part of MGN. She made her own offer to settle for £242,500 and was apparently unwilling to settle for less.

26. Ms Wightman did succeed in establishing more occasions of UIG than MGN had admitted in her case, but not to a very significant extent, and she did not succeed in proving that her private information was obtained by hacking of her or her then husband's phone. On that basis, I do not consider that Ms Wightman had a sufficient degree of success to justify depriving MGN of its individual costs of her claim.

27. I will therefore award MGN its individual costs of Ms Sanderson's and Ms Wightman's claims.

28. Mr Turner's case is somewhat different because he was the successful party in his claim overall, though far from successful on all the issues that he raised; and his success is qualified further by his failure to beat relevant offers. MGN accepts that it is liable to pay Mr Turner's costs up to and including the last date for timely acceptance of the first relevant offer. Mr Turner contends that he should not be required to pay MGN's costs after that date. Whether he should do so turns on the significance to be given to the offers.

29. The offers that are relevant are the following:

a. A Calderbank counter-offer made by Mr Turner on 21 January 2021 to accept £175,000, costs, a private letter of apology and a joint statement in open court.
b. A Calderbank offer from MGN on 28 January 2021, which was for a sum less than Mr Turner was awarded in the event, but it offers him costs and a private letter of apology too, and says "If this offer is only acceptable to your client if other remedies are provided, please let us know and tell us what those other remedies are". That offer was refused by Mr Turner only on the basis that it was too low and that his claim was worth £175k if not more.
c. MGN then made a further Calderbank offer on 26 February 2021, which said that his valuation could not be understood but that, in view of impending substantial costs to be incurred on proceedings and in order to obtain greater protection on costs, MGN offered £50,000 plus a private letter of apology and costs, and was stated to be conditional on proceedings not being issued and was open for acceptance for 14 days. As such, it was clearly an offer that was intended to head off the issue of a claim. There was no response, probably because on the same day (whether before or after receipt of the offer and with or without knowledge of it is unclear) Mr Turner issued his claim for up to £150,000 damages. That meant that MGN's offer immediately lapsed. It was not renewed.
d. A further Calderbank offer was made by MGN on 18 February 2022, about a year later, said to be in view of escalating costs. The amount offered was £52,000 with costs and a private letter of apology, and it stated "If the terms of settlement offered in this letter are only acceptable to your client if other remedies are provided, please set this out so that MGN can consider and understand your client's position". There was no response at all to this offer. Had Mr Turner been willing to accept £52,000 on those terms only if a joint statement in open court was agreed, he could have said so.
e. On 3 February 2023, MGN made a Part 36 offer of £35,000 and a private letter of apology. It again repeated the invitation to identify any other remedies that were required, if there were any. The relevant period expired on 24 March 2023, still some 6 weeks before trial. There was no acknowledgment or response to that offer.

30. Mr Turner now suggests that he was not in a position to consider or accept the offers because of disclosure failings on the part of MGN; because his concern was with vindication, not money; and because it was known that MGN would not agree to a joint statement in open court. I unhesitatingly reject that explanation, which was advanced without any proper evidential foundation other than a bland assertion in Mr Turner's trial witness statement that the claim was about closure for him and MGN taking responsibility for what it had done. However, what MGN had done to Mr Turner was substantially exaggerated in his claim, and the suggestion that MGN was refusing to engage sensibly with his claim was clearly wrong. The sequence of offers shows that Mr Turner was unwilling to accept that there was only a limited basis for his allegations and so his valuation was much higher than MGN's. He did not ask MGN for a joint statement on agreed terms in response to any of its offers.

31. It is true that there was some late disclosure by MGN of public domain evidence, which led to some late amendments to MGN's pleaded case. However, all but two of these incidents related to articles published before October 2000 and so the claims as pleaded were bound to fail; one of the other two incidents was an article on which Mr Turner succeeded in any event. So the additional material that could have made a difference to Mr Turner's prospects of success was minimal. Had it made any difference, he could have applied for permission to accept the Part 36 offer out of time and asked for his costs to the date of acceptance, on the basis that late disclosure made a real difference to his assessment of his case – but he did not.

32. It was in my judgment Mr Turner who was not willing to engage sensibly with MGN to settle his claim. I am not willing to infer that, if asked on 18 February 2022, MGN would have refused a joint statement to settle his claim for £52,000. I do not accept that there is any parallel in this case with Mr Yentob's case, in Gulati. In that case, what was proved at trial was far more extensive than MGN was willing at any stage to accept, and the extent of hacking of him was breathtakingly high, so it was obvious that they would not have agreed to a statement that reflected the extent of wrongdoing later proved. Mr Turner has succeeded only in proving three occasions of VMI and another 3 occasions of other UIG. All but one relate to the time of his arrest and indictment in 2011.

33. Neither do I accept that Mr Turner was justified in not engaging with offers on the basis that he could wait to see what further material that might support his claim emerged – he could take that risk, and it may have been his lawyers' strategy – but if it did not turn out favourably he had to accept the consequences of not accepting a reasonable offer. The truth is, as I said in my judgment, that Mr Turner's claim was to a significant degree artificial and exaggerated.

34. In my judgment, the 2021 Calderbank offer of £50,000 should not be taken into account because it was conditional and it lapsed almost immediately. MGN could have repeated the offer following issue of the claim, for a lower or higher sum, or excluding the issue fees that Mr Turner had just incurred, but they did not. The 2022 Calderbank offer was however a reasonable offer and no objection was taken to its terms, e.g. the fact that it was only open for acceptance for 14 days. I consider that it was unreasonable for Mr Turner not to accept that offer.

35. In general, in those circumstances, the court orders the offeree to pay the offeror's costs from the relevant date (in this case, 5 March 2022), but that is not automatically the case with Calderbank offers: it is a matter of discretion. The offer letter said that if it was rejected, MGN would be relying on the offer in respect of Mr Turner's liability for its costs as well as his own costs. That is very material. Mr Turner was put on risk of non-acceptance in those respects. It is not unreasonable, despite the outcome of the claim, for MGN to expect to have its costs when it had offered on reasonable terms to settle the claim and offered to consider any further terms that Mr Turner required. I have rejected his arguments that there was good reason to refuse it (which in fact Mr

Turner did not do, he simply ignored it). I do not accept that Mr Turner was motivated by the need for vindication and not by money.

36. Although Mr Turner did prove seriously wrongful conduct by MGN in 2011, the limited degree of success that he achieved at trial does not justify no order for the individual costs of his claim in the way that that plainly was justified in Mr Yentob's case. Accordingly, the usual principles apply and Mr Turner must pay MGN's costs after 4 March 2022.

37. Mr Turner was given another chance to walk away with compensation in money and all his reasonable costs up 25 March 2023 when MGN made its Part 36 offer in March 2023, shortly before the trial, but he did not accept it. That failure to accept a reasonable offer at a late stage and recoup his costs reinforces the conclusion that I have reached, and indeed requires an order under CPR 36.17(3) that Mr Turner pay MGN's costs from 25 March 2023 unless I consider that it would be unjust to do so. I do not consider it would be unjust to do so as regards the individual costs of his claim.

4. Common costs of the generic issues

38. As I have said, the costs incurred on the trial of the generic issues were not just costs of managing the litigation or centralised costs of trying the individual claims. The generic issues were for all practical purposes a separate trial alongside (but supporting) the trial of the individual claims. In those circumstances, it would be wrong to conclude that the common costs of the trial of those issues should simply follow the incidence of the individual costs, or (for reasons that I have explained) to make that order on the basis that in overall terms MGN has won on the important issues for the future conduct of the managed litigation. Despite MGN being the successful party overall in 2 of the 4 claims tried, there were very substantial and important issues on which it failed and on which the claimants had a conspicuous success.

39. Given the scale and significance of the generic issues and the nature of the trial, this is not simply a case where I should make a proportionate costs order, or even an issues-based order with no order for the costs of the generic issues. Unusually, this is a case where justice is only done by awarding the claimants their costs of the generic issues separately, so far as I have power to do so. That is reinforced by the dishonesty and concealment that surrounded the defence of the generic issues, which justifies an issues-based approach to those costs. Given the nature of my findings on the generic issues – and the fact that they are generic issues tried for the benefit of all the claimants, not just the 4 sample claimants whose individual claims were tried – it offends all sense of fairness for the claimants as a whole not to be awarded their costs of the trial of those issues, on which they have collectively succeeded.

40. I have considered whether I should only make a costs order in favour of successful 4th Wave claimants and a different order in relation to the individuals whose claims have failed overall, so that in their cases their share of the common costs of the generic issues follows the individual costs of their claims. I do not consider that to be a just approach where the generic issues were such a discrete part of the claim, and where success on these generic issues would otherwise have supported an award of damages to the unsuccessful claimants. It would also be unjust because of the exceptional nature of the findings that I have made and the wrongdoing on the part of MGN that is established by them, which entirely justifies the pursuit of the generic allegations to trial. It was only through these claimants' claims that the generic issues were brought to trial on behalf of all the claimants. Despite the failures on limitation grounds, there is in my judgment no proper basis on which to distinguish these claimants' share of the common costs of the generic issues from all the other claimants' shares of them, where there has effectively been a determination of part of their claims in their favour. As a matter of discretion, I would reach the same conclusion even where a claimant had failed to beat a Calderbank offer.

41. However, where a relevant Part 36 offer was made in respect of the whole of a claimant's claim and was not beaten, as is the case in Sanderson and Turner, the effect of rule 36.17(3) is that that the court must order that the defendant is entitled to costs from the expiry of the relevant period and interest on the costs unless it considers it unjust to do so. That rule clearly encompasses in principle all the defendant's costs of the claim. In deciding whether it is unjust to order the claimant to pay all the defendant's costs from the expiry of the relevant period, the court must take into account all the circumstances of the case, including the terms of any offer, when it was made, the information available to the parties at the time, the conduct of the parties relating to the provision of information to enable the offer to be evaluated, and whether the offer was a genuine offer to settle the proceedings. Once the court has decided that it would be unjust to order the claimant to pay the defendant's costs, it has a general discretion as to what part of those costs the claimant should pay.

42. The Part 36 offer made to Ms Sanderson was clearly a genuine attempt to settle the proceedings, and it was made before the claim was issued. Ms Sanderson's solicitors did reply saying that her own valuation of her claim could not be fully evaluated at a time when full disclosure had not been given by MGN. That would only come once a claim had been issued, even though some disclosure is given voluntarily pre-action. MGN did not in fact provide some of that post-issue disclosure until a relatively late stage of the claim, but I have rejected the argument that that prevented Ms Sanderson from engaging with the offer and seeking to negotiate.

43. There is obviously a strong presumption that arises from non-acceptance of a Part 36 offer that has not been bettered – to show injustice is "a formidable obstacle to the obtaining of a different costs order" (per Briggs J in Smith v Trafford Housing Trust [2012] EWHC 3320 (Ch), approved by the Court of Appeal in Webb v Liverpool Women's NHS Foundation Trust [2016] EWCA Civ 365). The genuineness and size

of the offer and the early stage at which it was made support the presumption in this case.

44. However, I am satisfied that, in the exceptional circumstances of the trial of the generic issues in this case, it would be unjust to order Ms Sanderson and Mr Turner to pay the whole of MGN's costs of their claims, including the costs of preparation and trial of the generic issues. It would be unjust because the claims as issued, despite only claiming damages and injunctive relief, were also concerned with proving the illegal conduct of MGN and the extent of that illegal conduct as a whole, not just the particular circumstances of a claimant's own loss; and the claimants have uncovered and proved the shockingly dishonest way that MGN acted for many years. It would also be unjust because the common costs of the generic issues were incurred for the benefit of all the claimants, not just for the benefit of the 3 claimants.

45. All the claimants have been vindicated by the generic findings that they have obtained by pursuing the generic issues, at very substantial expense to themselves and MGN. The costs on both sides have been significantly increased because of MGN's attempts to conceal the truth, in particular the extent of the unlawful and illegal activity. It would therefore be unjust for these claimants to pay MGN their share of MGN's common costs of contesting the generic issues. The fact that Ms Sanderson and Mr Turner did not accept an offer that they should have accepted does not mean that they should have to pay a share of MGN's very high costs of seeking to defend the indefensible.

46. That does not mean that a MNHL claimant can refuse a Part 36 offer with impunity. It puts them at risk of having to pay all the individual costs of the claim and their share of any other common costs, apart from the common costs of the trial of the generic issues.

47. For reasons that I have already given, I consider that, exceptionally, MGN should pay the claimants, including Ms Sanderson, Ms Wightman and Mr Turner, their common costs of the generic issues.

48. Before reaching that conclusion, I did consider whether, depending on the outcome of other individual claims that have not yet been tried, it could later be considered appropriate that other claimants whose claims fail for other reasons ought not to recover their share of the common costs associated with the generic issues. If that might be appropriate, it would be necessary to limit any order at this stage to the 3 individual claimants' shares of the common costs of the generic issues, with all other shares of those costs awaiting the outcome of all the other claims.

49. I do not, however, consider that that could be appropriate for the following reasons.

50. It is conceivable that another claimant might fail on their claim entirely, and not only on the basis of limitation or failure to beat a relevant offer. In such circumstances, no UIG or phone hacking relating to an article or invoice having been proved, there

would be a respectable argument that such claimant ought to pay all MGN's costs of their claim, or at least not receive any common costs.

51. However, in the light of my judgment, I consider that such a case would be an outlier. I am also aware of the pattern of settlements in the last two years, which supports that conclusion. An outlier should not be allowed to deflect from what is otherwise the appropriate order to make in this kind of managed litigation, where there are so many claimants; nor should the fact that it cannot be predicted with accuracy what might happen with other claims: see in this regard the Nationwide Building Society case.

52. This case, like that one, is hostile litigation and it is the policy of the court to make costs awards following the determination of issues and not wait to make a final costs order on the basis of overall success in the claim. In the Nationwide Building Society case, Blackburne J considered that it was appropriate to share the burden (as it was in that case) of the relevant generic costs between all those who at the time of the decision could be said sufficiently proximately to have benefited from the determination of those issues in their claims. I see no reason why the same approach should not apply in reverse in this claim, with all those who have benefited from the determination of the generic issues in their favour as preliminary issues being entitled to be awarded their share of the common costs relating to those issues. The remaining costs of those other claims will be dealt with at a later time.

53. Accordingly, I will order that the identified common costs (that is, those relating to the pleading, evidence for and preparation and trial of the generic issues – items 1-7 (but not items 8 and 9) of the Claimants' approved budgeted common costs of the 6th Group Trial - shall be paid by MGN to the claimants (which for the avoidance of doubt means the 3 trial claimants and the other 4th wave claimants who are currently on the register whose claims have not settled or been finally determined – it appears that there are 100 of them, excluding the 4 trial claimants), and that all other costs of Ms Sanderson's and Ms Wightman's claim, including their share of any other common costs, shall be paid by them to MGN (and, in Mr Turner's case, the costs to be paid are from 5 March 2022). I will return to the proper basis of assessment of those costs shortly.

5. Costs of the authenticity dispute

54. There was an additional head of costs that the claimants sought, relating to a notice of non-admission of the authenticity of 141 documents disclosed by the claimants during the litigation. This was served by MGN on 10 March 2023, being the last possible date for doing so under CPR rule 32.19, being the date of service of the last batch of witness statements. No explanation for the notice was given at the time.

55. The effect was that, on the day when any new generic witness statements for trial were to be exchanged, the claimants had to start to investigate the provenance of these documents and seek to obtain further evidence to prove their authenticity. 69 of the

141 documents turned out to be materially the same as documents that MGN itself had disclosed. 5 new witness statements were prepared and served by the claimants, with an application for permission to rely on them. An additional trial bundle of 1,200 pages was prepared.

56. At about 9pm on the day before the trial started, MGN wrote abandoning its authenticity challenge save in relation to 3 documents that two of the witnesses had provided to the claimants. The witness statement of one of these witnesses was then not challenged in any respect, and Mr Green KC told me on day 1 of the trial that MGN had no positive case to advance about the 3 documents but was simply putting the claimants to proof. No further explanation of why the notice was served was given.

57. In the absence of explanation, I draw the conclusion that it was served simply because the rules allowed it to be served, and in the knowledge that the claimants would have to divert resources from the orderly preparation for trial to deal with a new evidential problem. Preparation for trial since the start of 2023 had featured assertions from each side that they were desperately short of time or resources to comply with the directions for trial of so many articles, as well as the generic claim issues, and then to prepare for the pre-trial review and the start of the trial itself. Every deadline for compliance was hard fought over. Both legal teams were up against it, and MGN knew that any substantial additional work required would create a real difficulty. MGN's conduct was a failure to comply with the overriding objective. It is unnecessary to go further, as I have formed the view that the costs associated with the exercise, which are substantial and which of course were not budgeted, should be paid by MGN to the claimants, to be assessed on the indemnity basis.

58. I note in passing that the Commercial Court Guide states at para E4.1(a) that rule 32.19:

> "requires notice to be served within 7 days of disclosure of the document or, if later, by the latest date for serving witness statements. The latter time limit will typically apply, unless the document is disclosed late, but as a matter of proper practice notice under rule 32.19 should normally be served well before the deadline for witness statements so that the party required to prove the document can take that into account when considering what witness statement evidence to obtain."

The reason why the rule permits notice to be given as late as the final date for exchange of witness statements eludes me, but the good sense of what the Commercial Court Guide states is self-evident.

6. Basis of Assessment of Costs

59. The next substantial issue for decision is whether any of the costs that I have ordered (in addition to the costs of the challenge to authenticity of documents) should be

assessed in detail on the indemnity basis rather than the standard basis. That is appropriate when a party has conducted the litigation in a way that is "outside the norm" such as to justify a higher rate of recovery by the receiving party. It has the consequence that there is no proportionality fetter on the assessment, and that the onus lies on the paying party rather than the receiving party to establish that costs were either unreasonable in amount or unreasonably incurred.

60. I have no doubt that indemnity basis costs are appropriate for the costs of the generic claim payable by MGN to the claimants. As I have explained at some length in my judgment, the defence that MGN ran in the proceedings was supported by dishonesty of those who were running the litigation within MGN and by some of the witnesses called by it, and was an attempt to continue to conceal the extent of the unlawful and illegal activity between 1995 and 2011. It also involved an attempt to row back from the extent of the findings of Mann J in the Gulati case, which increased the costs. Disclosure that should have been given sooner was wrongly resisted until a relatively late stage of the proceedings. It is difficult to imagine a clearer case for costs to be paid on an indemnity basis.

61. As for the individual costs that I have awarded to MGN against Ms Sanderson, Ms Wightman and Mr Turner, MGN only seeks a standard basis assessment against Ms Wightman, so I need say nothing more about her case.

62. As for Ms Sanderson, MGN strongly argues for an indemnity basis order, relying on various aspects of the way that her claim was pursued that are said to be out of the norm, namely: (a) a wholly unreasonable approach to attempts to settle her claim; (b) exaggeration of her claim; and (c) misleading of the Court at the summary judgment stage and at trial. I deal with these as follows:

63. Settlement negotiations. MGN pushed Ms Sanderson before issue to engage in negotiations, and she did make an offer to settle for £267,500. There was then a "without prejudice save as to costs" meeting, at which MGN offered £50,000. On 18 August 2020, MGN requested a breakdown of Ms Sanderson's valuation, which her solicitors refused to provide. They said that the gap between £50,000 and £267,000 was not capable of resolution before action. MGN proposed mediation, and then responded promptly with an offer of £105,000 plus costs, to which Ms Sanderson responded, saying that MGN's offer was too low and was rejected, and making a counteroffer of £242,500 and costs and a joint statement in open court. On 8 October 2020, Ms Sanderson refused the offer of mediation and said that she could not properly value her claim before full disclosure.

64. On 27 October 2020 MGN offered £125,000, which was explained to be in order to settle quickly and protect themselves on costs. Ms Sanderson did not respond. In November 2020, Ms Sanderson again refused to give a breakdown of her valuation. In response, on 20 November 2020, MGN made a Part 36 offer of £160,000, a private letter of apology and a statement in open court in terms to be agreed. There was no response. On 7 December 2020, Ms Sanderson wrote an open letter explaining that a claim was being issued because MGN had consistently undervalued her claim and left

her with no alternative. The refusal to break down her valuation, the refusal of mediation and the absence of a response to the offers made was unreasonable. It is not the case that Ms Sanderson was saying only that, until disclosure, she was not in a position to put a figure on her claim. She was trying to force MGN to offer much more.

65. Exaggeration. Ms Sanderson's claim was exaggerated. 28 of her 37 articles failed as did most of the claim based on invoices, and some of the articles and invoices were hopeless allegations. Materially, Ms Sanderson had refused in pre-claim correspondence to set out the private information that she relied on in respect of for each article. That might have been a salutary exercise, though when eventually done for trial it did not lead to any reduction of her claim. At trial, she claimed £334,500 in damages. There was also exaggeration in the accusations that Ms Sanderson made, suggesting that MGN had abused her as a child. That was quite wrong.

66. Mileading evidence. Ms Sanderson has been consistent throughout that she cannot recall having read any of the articles. She did not say in her summary judgment witness statement that she did or say that she was misled by MGN's attributions to "friends or family". I acquit her of the allegation of giving misleading evidence in that regard. Her witness statements have simply analysed some of the articles with the benefit of hindsight, having read many of them for the first time in 2020 or thereabouts.

67. In her trial witness statement, Ms Sanderson said critically of MGN that "at least News Group Newspapers settled my claim and are not continuing to abuse me as MGN is doing through how they have deliberately chosen to conduct this process ... by dragging this out". That was not something that it was fair or honest for Ms Sanderson to have said, given that the true picture shown by MGN's offers to settle could not be referred to at trial. MGN had made very generous offers before the proceedings were started, but Ms Sanderson's desire for more money (and only money) prevented her from accepting them.

68. I am concerned about the way that the claims of claimants like Ms Sanderson and Mr Turner are being conducted. The pleadings and witness statements often appear to say what is needed to advance the claim, rather than what the claimant or witness can properly recall; the claim is maximised without apparent regard to whether it is realistic; and there is no proper engagement in attempts to resolve the claim without a full trial. There was a serial failure on the part of the individual claimants to comply with the requirements of PD 57AC, which requires evidence to be limited to relevant facts that could properly have been given in examination in chief, and not argument on the merits of the case. I understand the additional difficulty of settling claims when MGN was in default of its disclosure obligations, but that issue does not justify a claimant in sitting tight, not cooperating or negotiating at all and hoping that something will eventually turn up to support the more outlandish claims made. By definition, settlement negotiations are not a valuation exercise done with the accuracy that might result from a full trial. Parties are required to be reasonable and realistic, even at a stage where they do not have full information.

69. I bear in mind that I have been very critical of MGN's conduct in various respects, both as regards the events of 1995 to 2011 and as regards the conduct of the litigation, both the Gulati claim and these claims. However, I have awarded the claimants their costs of the generic issues on the indemnity basis on the basis that those should be regarded as separate from the costs of the individual claims. The same points about conduct cannot be used by the claimants to justify a more favourable costs order or basis of assessment on the individual claims than would otherwise be made. The question for me is whether the claimants conducted their individual claims in an unreasonable or improper way that is "out of the norm" and so the focus is on their conduct.

70. In my view, there is considerable force in MGN's submission that the conduct of Ms Sanderson's claim was so unreasonable that the court should lay down a marker for the consequences of misleading and exaggerated claims being brought and an unreasonable attitude to settlement then preventing their early and fair resolution. The mere fact that a claimant has succeeded on some issues does not mean that they are exempt from a conclusion that the case was pursued in an unreasonable way that was "out of the norm". The individual costs of Ms Sanderson's claim have been significantly increased by the exaggeration of her claim and failure to engage in attempts to resolve it outside court. I consider that the burden should now lie on her to persuade the costs judge that any of MGN's costs of meeting her individual claim were unreasonable in amount or unreasonably incurred.

71. I will therefore order that the individual costs of Ms Sanderson's claim payable to MGN be assessed on the indemnity basis. Ms Sanderson's share of the residual common costs (excluding the common costs of the generic issues) will be paid to MGN on the standard basis. Those common costs should follow the event, but there is no indication of any conduct in relation to those common costs matters that justifies an indemnity basis of assessment.

72. In making the indemnity basis order, I am conscious of the striking fact that I am awarding some of the costs of this litigation against each party and in both cases on an indemnity basis. That must be quite unusual, and I have considered carefully whether its exceptional nature is an indication that it is a wrong exercise of discretion. Having done so, I come to the conclusion that it serves rather to demonstrate two things: first, that there were two quite distinct parts to the trial that I heard, with different outcomes and very little costs overlap between them; and second, that each side has conducted this litigation in an extreme and confrontational way, pushing everything to the limits and sometimes exceeding them. It is that conduct on both sides that is reflected in the orders that I will make.

73. The position in Mr Turner's claim is similar to that of Ms Sanderson, so far as the costs are payable by Mr Turner. Costs are only payable by Mr Turner because he did not beat the offers to settle that were made to him from 2022. That does not determine the basis of assessment of those costs. It does however mean that I am only

concerned with MGN's costs after 4 March 2022. Did Mr Turner act in the litigation after that date in a way that was "beyond the norm" such as to justify those costs being assessed on an indemnity basis?

74. I have found that Mr Turner's claim was significantly exaggerated and unrealistic in relation to many articles. It was first pleaded well before March 2022, but it was amended and re-amended later in 2022 and again shortly before trial. The opportunity was not taken to drop hopeless allegations. The witness statement failings were similar to those that I have already identified: there were several instances where it was clear that Mr Turner's recollection or words were not the source of what was written in the statement. I referred in my judgment to occasions of "incorrect material being wrongly written into witness statements" and the statement being used as a vehicle for asserting and arguing his case. That is a serious failing. There was a lack of realism shown in the articles that were pursued even in closing submissions at trial.

75. In relation to settlement, the failings were not as egregious as in Ms Sanderson's case. Although MGN offered more than Mr Turner recovered, it was not so significantly more that it was manifestly unreasonable to decline the offer, as it was in Ms Sanderson's case. But for the offers, Mr Turner would have been receiving costs. His refusal of the specific offers relied upon was not wholly unreasonable or "out of the norm". However, I have already characterised his conduct generally as being unwilling to engage sensibly with attempts to settle his case. On top of that, the considerable exaggeration of his claim and pursuit of hopeless allegations with a misleading witness statement means that, in my judgment, Mr Turner's conduct can be characterised as "out of the norm" to a significant degree.

76. I will therefore make the same order in relation to MGN's individual costs of his claim and his share of the common costs other than the costs of the generic issues, as in Ms Sanderson's case: individual costs from 5 March 2022 to be assessed on the indemnity basis and share of common costs (other than the costs of the generic issues and the authenticity challenge) from 5 March 2022 on the standard basis.

77. The individual costs and share of those same common costs payable by MGN to Mr Turner up to 4 March 2022 will be assessed on the standard basis.

7. Summary of Conclusions

78. To summarise:

<u>Costs payable by the claimants</u>

a. Ms Wightman shall pay MGN's individual costs of her claim and her share of the common costs (excluding the generic trial issues and the authenticity of documents challenge) to be assessed on the standard basis
b. Ms Sanderson shall pay MGN's individual costs of her claim to be assessed on the indemnity basis, and her share of the common costs (excluding the generic

trial issues and the authenticity of documents challenge) to be assessed on the standard basis

c. Mr Turner shall pay MGN's individual costs of his claim to be assessed on the indemnity basis and his share of the common costs (excluding the generic trial issues and the authenticity of documents challenge) both from 5 March 2022, to be assessed on the standard basis

Costs payable by MGN

d. MGN shall pay the 4th wave claimants their common costs of the generic trial issues to be assessed on the indemnity basis.
e. MGN shall pay the 4th wave claimants their common costs of the authenticity of documents challenge resulting from the notice dated 10 March 2023, to be assessed on the indemnity basis
f. MGN shall pay Mr Turner his individual costs of his claim and his share of the other common costs, up to and including 4 March 2022, to be assessed on the standard basis.

8. Interim payments

79. The next question is about interim payments of costs.

80. The claimants seek 90% of the budgeted costs of the generic issues, which they say amounts to £1,937,860.58, plus 60% of the unbudgeted additional common costs relating to the authenticity issue, which is a sum of £38,799.98.

81. MGN seeks an interim payment of £110,261.25 from Ms Sanderson, £95,962.50 from Ms Wightman and £108,731.25 from Mr Turner, being 90% of each respective individual costs budget (in Mr Turner's case that figure omits only the pre-action/initial investigation costs, as MGN sought to rely on the February 2021 Calderbank offer made at the time of issue of the claim).

82. I am satisfied that, subject to an adjustment of the sum sought by the Claimants to exclude 90% of £52,261.61 plus VAT that relates to items 8 and 9 on the Common Costs Approved Budget, which are not directly common costs of the generic issues, and an adjustment of the sum sought from Mr Turner to take account of the fact that his liability for costs only runs from 5 March 2022, the payments sought are principled and appropriate. Doing the best that I can in Mr Turner's case, which is not a matter of simple arithmetic, I reduce the interim sum payable by him to £65,000. The parties can calculate arithmetically the reduction to the sum payable by MGN to the claimants by excluding the amount that I have indicated.

9. Interest on costs

83. The next issue is interest on costs. MGN seeks pre-judgment interest at 1% above base rate from time to time from the date of each invoice, in respect of individual costs and any common costs payable by the claimants. The claimants did not seek any specific order for interest on costs. Interest will automatically run on costs at the judgment rate from the date of the costs order. To the extent that rule 36.17(3) requires interest to be ordered unless I consider it unjust to do so, I do not consider it unjust to order interest on any individual costs payable to MGN. However, the share of common costs payable by MGN to the three claimants will substantially exceed any share payable by them, and in those circumstances it would be unjust to award interest on common costs theoretically payable to MGN when the payment in fact will be in the other direction.

84. I will therefore order interest on the individual costs payable by Ms Sanderson, Ms Wightman and Mr Turner, at the rate of 1% above base rate, from the date on which any such costs were paid by MGN until today.