Neutral Citation Number: [2022] EWHC 304 (QB)

Case No: QB-2020-002028

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2022

Before:

THE HON. MRS JUSTICE STEYN DBE

- -

Between:

REBEKAH VARDY	**Claimant**
- and -	
COLEEN ROONEY	**Defendant**
- and -	
CAROLINE WATT	**Respondent**

- -
- -

Hugh Tomlinson QC and Sara Mansoori (instructed by **Kingsley Napley LLP**) for the **Claimant**
David Sherborne and Ben Hamer (instructed by **Brabners LLP**) for the **Defendant**
Ian Helme (instructed by **Bindmans LLP**) for the **Respondent**

Hearing dates: 8-9 February 2022

- -

Approved Judgment

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

.....

THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn :

A. Introduction

1. This is a libel claim brought by Mrs Rebekah Vardy (the claimant) against Mrs Coleen Rooney (the defendant). This judgment is given after the hearing of two pre-trial applications issued by the defendant on 13 December 2021 and 2 February 2022 and one application issued by the claimant on 12 January 2022. Both the claimant and the defendant are well-known media and television personalities who are married to former England footballers. Ms Caroline Watt (the respondent) is the agent and a friend of the claimant, and she is the respondent to two applications brought by the defendant.

2. In summary, the matters for determination are these:

   i) **The defendant's Part 20/joinder application**: An application by the defendant to add to the proceedings a claim brought by her against Ms Watt for misuse of private information and breach of her rights under the General Data Protection Regulation (GDPR). The defendant seeks permission pursuant to CPR 20.9 to add this as an 'additional claim' or alternatively for an order pursuant to CPR 3.1(2)(h) that, brought as a separate (Part 7) claim, it should be tried on the same occasion as the libel claim, and for the claims to be managed together. In addition, in respect of the latter procedural route, the defendant seeks permission under CPR 31.22 to make use, in her proposed claim against Ms Watt, of the documents disclosed to her in the claim brought by Mrs Vardy.

   ii) **The defendant's application to amend**: The defendant applies for permission to re-re-amend the defence, and consequential permission for the claimant to re-amend her reply.

   iii) **The claimant's application for further information**: The claimant applies for an order requiring the defendant to provide a full and proper response to part of her request for further information.

   iv) **The defendant's disclosure application**: The defendant seeks an order for specific disclosure in relation to various categories, including on a 'train of enquiry basis' in respect of one category, along with ancillary orders for the provision of a supplemental list, witness statement and certain documents in unredacted form.

   v) **The claimant's disclosure application**: The claimant seeks an order for disclosure of relevant documents held by six individuals who have been identified by the defendant as 'custodians', that is, 'individuals who have, or may have, custody of disclosable documents', and some specific disclosure.

   vi) **The defendant's Instagram application**: The defendant seeks an order that the parties make a joint request for information to Instagram.

3. In addition, as the parties have not yet exchanged witness statements of fact or expert evidence, and in light of my rulings on the above applications, the directions to trial will need to be reconsidered on handing down this judgment.

4. The evidence filed in support of, or in reply to, the defendant's application dated 13 December 2021 consists of:

   i) **The defendant's evidence**: The second and third witness statements of Mr Paul Lunt, the defendant's solicitor ('**Lunt 2**', dated 13 December 2021, and '**Lunt 3**', dated 26 January 2022) and the first statement of Mr Matt Blackband, the defendant's digital information expert ('**Blackband 1**', dated 4 February 2022).

   ii) **The claimant's evidence**: The fourth and fifth witness statements of Ms Charlotte Harris, the claimant's solicitor ('**Harris 4**', dated 17 January 2022 and '**Harris 5**', dated 1 February 2022) and the first statement of Mr Ian Henderson, the claimant's digital information expert ('**Henderson 1**', dated 6 February 2022).

   iii) **The respondent's evidence**: The first witness statement of Ms Tamsin Allen, the respondent's solicitor ('**Allen 1**', dated 17 January 2022) and the first and second witness statements of Ms Watt ('**Watt 1**', dated 17 January 2022, and '**Watt 2**', dated 24 January 2022).

5. The evidence filed in support of, or in reply to, the claimant's application dated 12 January 2022 consists of:

   i) **The claimant's evidence**: Ms Harris' third witness statement ('**Harris 3**', dated 12 January 2022).

   ii) **The defendant's evidence**: Mr Lunt's fourth and fifth witness statements ('**Lunt 4**', dated 3 February 2022, and '**Lunt 5**', dated 4 February 2022).

6. I have provided a summary of my conclusions at paragraph 202 below.

B. History of the proceedings

7. The libel claim concerns a post published by the defendant on her Instagram, Twitter and Facebook pages on 9 October 2019 ('the Post'). The claim was issued on 12 June 2020, and Particulars of Claim were served on the same date.

8. On 17 September 2020, Nicklin J ordered that meaning be determined as a preliminary issue. Time for service of the Defence was extended until 28 days after the determination of the preliminary issue. However, the defendant chose to serve her Defence on 2 October 2020, prior to the meaning trial.

9. The trial of the preliminary issue as to meaning took place on 19 November 2020 before Warby J (as he then was). By an order made the following day, he made a declaration as to the meaning of the words complained of in these terms:

> "Over a period of years the Claimant had regularly and frequently abused her status as a trusted follower of the Defendant's personal Instagram account by secretly informing The Sun newspaper of the Defendant's private posts and stories, thereby making public without the Defendant's permission a great deal of information about the Defendant, her friends and family which she did not want made public."

10. In accordance with directions made by Warby J, Amended Particulars of Claim were served on 23 November 2020, an Amended Defence was served on 30 November 2020, and the Claimant's Reply was served on 8 December 2020. Directions Questionnaires were exchanged on 17 November 2020.

11. The proceedings were then stayed until 8 February 2021 while a mediation took place. That was unsuccessful.

12. On 16 March 2021, a costs and case management conference ('CCMC') took place before Master Eastman. In accordance with the timetable set by Master Eastman, the claimant issued an application to strike out or obtain summary judgment on some of the allegations in the defendant's Amended Defence on 30 March 2021. I heard that application on 18 June 2021 and gave judgment on 7 July 2021, allowing it in part and dismissing it in greater part. The Re-Amended Defence was served on 16 July 2021 and the Amended Reply was served on 30 July 2021.

13. A further CCMC took place before Master Eastman on 4 August 2021. Master Eastman gave directions to trial, setting a trial window of 26 April to 20 May 2022. The trial is fixed for 9 May 2022, with a time estimate of 7 days. (It had initially been fixed for 22 April 2022, but was re-fixed on 5 January 2022 to meet the court's availability.)

14. The claimant served a Part 18 Request for Further Information on 17 September 2021, to which the defendant provided a response on 15 October 2021.

15. Disclosure took place on 29 October 2021 and inspection on 12 November 2021, in accordance with Master Eastman's directions.

16. On 13 December 2021 the defendant's solicitors filed the first of the applications which is the subject of this judgment. Amongst other matters, the defendant's application sought an order varying the date for exchange of witness evidence, and the deadlines for expert reports and evidence (to unspecified dates). The witness statements of fact were due to be served on 20 December 2021. On 13 December 2021 the defendant's solicitors sought the claimant's solicitors' agreement to the revision of the then imminent deadline for exchange of witness statements, to the which the claimant's solicitors agreed.

17. By an order dated 16 December 2021 Nicklin J made directions for the listing of the defendant's application for hearing before me and for the filing and service of evidence, the exchange of skeleton arguments and the filing of hearing and authorities bundles. Nicklin J also required the defendant to serve a copy of the application notice dated 13 December 2021 on the respondent, noting that although CPR 20.5(2) permits an application to join a Part 20 defendant to be made without notice, the better course was for the respondent to be put on notice because otherwise there would be a risk of an application to set aside any order made without notice causing disruption and delay.

18. On 12 January 2022, the claimant's application notice was filed and Mr Justice Nicklin directed that it would be heard at the hearing listed on 8-9 February 2022. The defendant filed a further application on 2 February 2022, which has been heard at the same time.

C. The defendant's Part 20/joinder application

The rules, practice direction and pre-action protocol

19. The purpose of Part 20 is to serve the overriding objective and "*to enable counterclaims and other additional claims to be managed in the most convenient and effective manner*": CPR 20.1 and *Coll v Floreat Merchant Banking Ltd* [2014] EWHC 1741 (QB).

20. CPR 20.2(1) addresses the scope of Part 20. It applies, so far as relevant, to:

> "(a) a counterclaim by a defendant against the claimant or against the claimant and some other person;
>
> (b) an additional claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; …" (emphasis added)

An ""additional claim" means any claim other than the claim by the claimant against the defendant": CPR 20.2(2)(a). The terms 'contribution' and 'indemnity' are defined in the White Book glossary.

21. In her skeleton argument, the respondent raised the contention that CPR 20.2(1)(b) should be construed narrowly so as to cover such additional claims where the remedy sought is akin to a contribution or indemnity. The concern underlying this argument was that if the reference to an additional claim against any person for some other remedy is not construed narrowly, it would potentially ride roughshod over a number of other provisions in the CPR, such as those relating to the use of disclosed documents, joinder and consolidation. The respondent's counsel, Mr Helme, did not seek to pursue this argument in his oral submissions.

22. In my judgement, the concession that the proposed claim against the respondent is an 'additional claim' within the scope of CPR 20.2 was correctly made. This does not leave the court without powers to control claims brought pursuant to Part 20: see, amongst other provisions, CPR 3.1(2)(e) and 20.9. I agree with the defendant's submission that the scope of Part 20 is broad, but that it is managed by 'the robust procedure under CPR 20.9, which considers matters relevant to the question whether an additional claim should be separate from the claim'.

23. CPR 20.3(1) provides that an additional claim shall be treated as if it were a claim for the purposes of the CPR, except as provided by Part 20. The commentary in the White Book 2021 at 20.3.1 notes:

> "A party expecting to make an additional claim is not relieved of the obligation to comply with a relevant approved pre action protocol: to permit otherwise would result in unfair commercial advantage or threats of litigation without any real substance: *Daejan Investments Ltd v The Park West Club Ltd* [2003] EWHC 2872 (TCC)."

24. CPR 20.5 addresses counterclaims against a person other than the claimant. Although the defendant's application notice specified that the defendant sought an order under CPR 20.5(1), the draft Part 20 claim is not a 'counterclaim', it is an 'additional claim'.

CPR 20.5 is not, therefore, relevant. Nor is CPR 20.6 which addresses the position where the defendant brings an additional claim for contribution or indemnity from another party. That is not the position here. The defendant does not seek a contribution or an indemnity from the respondent, she seeks 'some other remedy'.

25. The applicable procedure to be followed where, as here, a defendant brings an additional claim against any person for a remedy other than a contribution or indemnity is provided in CPR 20.7, which states:

> "(1) This rule applies to any additional claim except—
>
> (a) a counterclaim only against an existing party; and
>
> (b) a claim for contribution or indemnity made in accordance with rule 20.6.
>
> (2) An additional claim is made when the court issues the appropriate claim form.
>
> (3) A defendant may make an additional claim—
>
> (a) without the court's permission if the additional claim is issued before or at the same time as he files his defence;
>
> (b) at any other time with the court's permission.
>
> (4) Particulars of an additional claim must be contained in or served with the additional claim.
>
> (5) An application for permission to make an additional claim may be made without notice, unless the court directs otherwise."

26. In this case, the defence was filed on 2 October 2020. The defendant sought to bring an additional claim against the respondent on 13 December 2021. It follows, and is not disputed, that CPR 20.7(3)(a) does not apply. The court's permission to make an additional claim is required in accordance with 20.7(3)(b). The defendant was permitted to make the application without notice to the respondent (r.20.7(5)), as she did, prior to the order of Nicklin J directing that the respondent be put on notice to avoid the potential disruption of an application to set aside.

27. CPR 20.9 provides:

> "(1) This rule applies where the court is considering whether to—
>
> (a) permit an additional claim to be made;
>
> (b) dismiss an additional claim; or
>
> (c) require an additional claim to be dealt with separately from the claim by the claimant against the defendant.

> (2) The matters to which the court may have regard include—
>
> (a) the connection between the additional claim and the claim made by the claimant against the defendant;
>
> (b) whether the additional claimant is seeking substantially the same remedy which some other party is claiming from him; and
>
> (c) whether the additional claimant wants the court to decide any question connected with the subject-matter of the proceedings—
>
> (i) not only between existing parties but also between existing parties and a person not already a party; or
>
> (ii) against an existing party not only in a capacity in which he is already a party but also in some further capacity."

28. Practice Direction 20 – Counterclaims and Other Additional Claims ('PD20') provides, so far as material:

> "2.1 An application for permission to make an additional claim must be supported by evidence stating—
>
> (1) the stage which the proceedings have reached,
>
> (2) the nature of the additional claim to be made or details of the question or issue which needs to be decided,
>
> (3) a summary of the facts on which the additional claim is based, and
>
> (4) the name and address of any proposed additional party.
>
> 2.2 Where delay has been a factor contributing to the need to apply for permission to make an additional claim an explanation of the delay should be given in evidence.
>
> 2.3 Where possible the applicant should provide a timetable of the proceedings to date.
>
> 2.4 Rules 20.5(2) and 20.7(5) allow applications to be made to the court without notice unless the court directs otherwise.
>
> 3. The Civil Procedure Rules apply generally to additional claims as if they were claims. Parties should be aware that the provisions relating to failure to respond to a claim will apply.
>
> …

> 5.1 Where the defendant to an additional claim files a defence, other than to a counterclaim, the court will arrange a hearing to consider case management of the additional claim. This will normally be at the same time as a case management hearing for the original claim and any other additional claims."

29. The Pre-Action Protocol for Media and Communication Claims ('the Pre-Action Protocol') applies to misuse of private information and data protection law claims (amongst others). It explains the conduct and sets out the steps the court would normally expect parties to take before commencing proceedings for these types of claims. Paragraph 3.1 provides that the "Claimant should notify the Defendant of his/her claim in writing at the earliest reasonable opportunity". That applies equally to notification by the defendant to the respondent of an additional claim. Paragraph 3.3 sets out the information that should be included in a letter of claim in respect of a proposed privacy claim (including one for misuse of private information) and paragraph 3.4 details the information to be included in a letter of claim in respect of a proposed data protection claim. Paragraph 3.8 addresses settlement and alternative dispute resolution, stating that although ADR is not compulsory, the court will expect parties to have considered ADR. Paragraph 3.11 states:

> "**Stocktake**
>
> Where the procedure set out in this Protocol has not resolved the dispute between the parties, they should undertake a further review of their respective positions. The parties should consider the state of the papers and the evidence in order to see if proceedings can be avoided and, at the least, narrow the issues between them which can assist efficient case management."

30. CPR 3.1 provides:

> "2. Except where these Rules provide otherwise, the court may—"
>
> …
>
> (h) try two or more claims on the same occasion;
>
> …
>
> (4) Where the court gives directions it may take into account whether or not a party has complied with any relevant pre-action protocol".

The factual background

31. On 8 October 2021, the defendant's solicitors wrote to Ms Watt directly. She was at that stage unrepresented and she was not a party to the claim. Mr Lunt states that the letter of 8 October 2021 was prompted by the claimant's solicitors' letter of 6 July 2021 in which they wrote:

> "Finally, your letter contains reference to Caroline Watt's twitter account. Caroline Watt is not a party to these proceedings. As you know, our client's duty to disclosure [sic] documents is limited to those which are or have been in her control (CPR 31.8). Ms Watt's documents are not, and have never been, under our client's control. Our client has no right to possess or inspect Ms Watt's documents. However, we understand that Ms Watt has requested the relevant information from Twitter. To the extent that you wish to obtain further information about this we suggest that you contact Ms Watt directly, as we do not act for her." (Emphasis added.)

32. The defendant's solicitors' four page letter of 8 October 2021 to the respondent 'insist[ed]' that she should provide to them a wide range of documents and information, going far beyond information regarding her Twitter account, stating any 'failure or refusal to do so shall be treated adversely'. Unsurprisingly, the respondent read this letter as threatening her with adverse consequences. Mr Lunt's contention that it contained no such threat is semantic and fails to appreciate how hostile such a letter would seem to an unrepresented individual.

33. The respondent instructed solicitors who responded on 20 October 2021. The respondent's solicitors raised their concerns, fairly in my view, regarding the intimidatory tone of the defendant's solicitor's letter of 8 October to an unrepresented non-party. They stated that the proper procedure for seeking disclosure from the respondent was by way of a non-party disclosure application under CPR 31.17, but that in circumstances where the defendant had not yet received any disclosure from the claimant, the defendant could not assert that it was necessary to obtain non-party disclosure from the respondent.

34. On 13 December 2021, the defendant's application notice, seeking permission to bring an additional claim, was filed on a without notice to the respondent basis (but on notice to the claimant). On the same day, the defendant's solicitors replied to the letter the respondent's solicitors had sent nearly 8 weeks earlier in these terms:

> "We refer to the above matter and to earlier correspondence in which we invited your client to volunteer full details of her involvement with Mrs Vardy by way of providing disclosure relevant to the ongoing High Court proceedings between our client and Mrs Vardy.
>
> Your client's response has been to refuse, asserting that as a non-party she is under "no obligation whatever to make documents available or provide information".
>
> In the circumstances, we have now applied for permission to join your client as a Part 20 Defendant to the existing High Court claim.
>
> Although we are under no obligation to provide the same to you at this stage, as a matter of courtesy, we now enclose a copy of the draft Part 20 Claim Form and details of claim."

35. The defendant had given no prior indication that she was considering or intending to bring proceedings against the respondent. No letter of claim was sent. The defendant did not take any steps to comply with the Pre-Action Protocol before launching proceedings against the respondent.

36. The statement filed with the defendant's application on 13 December 2021, Lunt 2, made a passing reference in paragraph 6 to the fact that permission was also being sought 'in connection with a Part 20 claim against the Claimant's agent, Ms Caroline Watt', but did not address any of the matters required to be addressed by PD20 paragraph 2.1 or 2.2, or provide the information suggested in paragraph 2.3.

37. In her evidence, Ms Allen draws attention to the violation of the Pre-Action Protocol, stating that the causes of action 'were never intimated to Ms Watt in correspondence in any way during the period of this litigation', and addresses the unfairness to the respondent of proceeding in this way. She also draws attention to the defendant's failure to provide any evidence in support of the application. Ms Allen states:

> "12. The application concerns a proposed claim against Ms Watt for misuse of private information. Although there is plainly a crossover in the facts that are in issue in the current proceedings, it is a different cause of action raising different legal issues against a different proposed defendant. If there were grounds for a claim against Ms Watt (which there are not), the proper procedure would be to issue Part 7 proceedings separately which could be joined if the circumstances warranted.
>
> 13. For the avoidance of doubt, Ms Watt does not accept that the circumstances do warrant the cases being joined. It is not necessary or convenient for the cases to be heard together, although they concern a similar factual nexus. Firstly, the timing does not coincide – as to which see paragraph 21 below. Secondly, it would in fact be more convenient for the Court to determine first the factual issue about whether or not the Claimant and Ms Watt were the sources of the articles. If the Court determined that they did not leak private information, there could be no privacy claim and the cost and time of such a claim would be saved. On the other hand, if the Defendant's truth defence succeeded, the issues in any privacy claim against Ms Watt are likely to be significantly narrowed.
>
> …
>
> 19. One further reason for rejecting the use of the Part 20 procedure is the extremely late stage in proceedings at which it is made. Pleadings have closed, disclosure has taken place and a trial date has been fixed for May this year. In contrast, the "Part 20" claim has barely begun.
>
> 20. In fairness to Ms Watt, were this application to be allowed, she would have to be given full opportunity to plead a Defence, make any such applications (including pursuant to CPR Part 18

> and Part 24) as she is advised to make, and to have any continuing claim budgeted. There would then be disclosure and exchange of witness statements, at least. As briefly indicated above, there will likely be many issues between the parties different to those that arise in the main proceedings.
>
> 21. This would take a considerable amount of time. It is normal for privacy actions of this type to take two years. It would be profoundly unfair to Ms Watt if any of these steps were hurried so as to cause her prejudice – as it appears they would have to be to catch up with the timetable in the main proceedings. The alternative – significantly adjourning the trial in the main proceedings – is patently neither reasonable nor proportionate."

38. Mr Lunt has responded in Lunt 3. He states that he did not address the Part 20 application in Lunt 2 as it is a matter that is, largely, 'better dealt with by way of legal submission, as opposed to witness evidence'. He states that the defendant's 'objective in bringing these proceedings is to have her rights vindicated'. Mr Lunt states that the application was issued timeously as the claimant's disclosure, which he describes as containing 'late and important revelations', was received on 12 November 2021 and the application was issued on 13 December. Mr Lunt states that the contention that the application has been brought late is 'squarely at odds' with a letter from the claimant's solicitors dated 22 November 2021 in which they said:

> "As the trial of this matter is not listed until late April 2022 there is time for the various issues raised to be dealt with as far as possible between the parties in correspondence: there is absolutely no urgency."

39. It is important not to take out of context the claimant's solicitors' statement that there was no urgency. That was said in response to three lengthy letters from the defendant's solicitors, sent on Wednesday 17 November 2021, demanding a response by 4pm on Monday 22 November 2021.

The competing submissions

40. The defendant submits, in short, that there is a clear factual nexus between the additional claim and the main claim. Although the causes of action to be addressed in the two claims are different, there is a huge overlap in the facts to be heard, and the questions to be determined are very similar. Given the heavily overlapping factual and legal background, if the claims were to proceed separately, there would be a real risk of inconsistent judgments, as well as the duplication of effort and court resources. Applying the test in 20.9(2), these factors weigh in favour of granting permission for the additional claim to be made.

41. The primary objection raised by the respondent and the claimant is that the timing of the main claim and the additional claim cannot be synchronised without causing prejudice to the claimant, by delaying the determination of a claim in which she seeks to vindicate her reputation, and without causing prejudice to the respondent, by imposing an extraordinarily expedited timetable in relation to the additional claim.

42. The defendant acknowledges that if permission with respect to the additional claim is granted, the trial would not be able to proceed on 9 May: it would inevitably have to be refixed for a later date. But the defendant contends that even without the additional claim, the trial date is almost inevitably going to have to be moved to a later date, and the additional claim could be brought up to speed to enable the claims to be heard together in July 2022.

43. The basis for the defendant's contention that the trial fixture will have to be broken in any event is that (i) pleadings have not yet closed; disclosure is not yet complete; witness statements of fact have not yet been served (8 weeks beyond the current deadline of 20 December 2021); expert reports have not been exchanged (3 weeks beyond the current deadline of 24 January 2022); and it is unrealistic to expect all those matters to be dealt with in the period of just over eight weeks prior to the Pre-Trial Review on 13 April 2022.

44. With respect to the speed with which the additional claim could be made ready for trial, the defendant does not challenge the evidence as to how long the pre-trial steps in a claim of this type would ordinarily take, but contends that the position is different here because the additional claim is so closely connected to the main claim, and Ms Watt has been engaged in the proceedings, albeit as a potential witness rather than a party. It is not anticipated, as the respondent acknowledged, that there would be much disclosure in the additional claim as it will very largely have been given in the main claim.

45. The claimant disputes the defendant's contention that the trial date cannot be maintained. She draws attention, for example, to the fact that until 13 December 2021 the parties were working towards exchanging witness statements 7 days later, and so the court can safely assume that they are essentially prepared, or very close to ready. The limitation period for bringing a defamation claim is short precisely because there should be no delay in seeking to vindicate one's reputation. The claimant is seeking such vindication and opposes this application on the grounds it would delay determination of her claim. She submits that with the imposition of strict deadlines the trial fixture can and should be maintained.

46. The respondent submits that it is impossible, realistically and fairly, for the ordinary pre-trial process to be so truncated as to enable the additional claim to be heard in July (assuming the court is prepared to delay the trial of the main claim until then). The defendant's suggested timetable would allow no time for the respondent to make any summary judgment or strike out application, or to seek further information pursuant to Part 18, or for the important step of cost-budgeting.

47. The respondent contends that it is realistic to anticipate that an application for summary judgment or strike out may be made, in respect of part if not all of the claim. By way of example, the respondent points to the fact that a "verbal disclosure does not constitute the processing of personal data" (see *Scott v LGBT Foundation Ltd* [2020] EWHC 483 (QB), [2020] 4 WLR 62, Saini J at [61]) and yet it appears the defendant brings a data protection claim in respect of matters alleged to have been disclosed in a telephone conversation. A further example is the issue the respondent raises as to whether the three posts in respect of which the additional claim is sought to be brought constitute information in respect of which the defendant had a reasonable expectation of privacy. An issue, in respect of two of the three posts relied on in the additional claim (namely, the Gender Selection and Flooded Basement Posts), is whether a person can be said to

have a reasonable expectation of privacy in respect of information if it has been concocted with a view to seeing if it will be published. In respect of the third post (the Car Crash Post), the respondent raises the extent to which the information was in the public domain.

48. In support of her opposition to the defendant's application, the respondent relies on the approach taken by the Court of Appeal in *Borealis AB v Stargas Ltd* [2002] EWCA Civ 757 and by Edwards-Stuart J in *Carillion JM Ltd v PHI Group Ltd* [2010] EWHC 496 at [19]. The respondent also draws attention to the Court's approach to very late amendments, as expressed in *Nesbit Law Group LLP v Acaste European Insurance Company Ltd* [2018] EWCA Civ 268, at [41], in particular that '[t]here is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it'. In reply the defendant drew attention to the approach of Hickinbottom J in *Coll v Floreat Merchant Banking Ltd* [2014] EWHC 1741 (QB). The defendant and respondent both acknowledged that in considering these authorities it is important to have regard to the specific facts of each case.

49. The respondent's secondary argument is that the additional claim is an abuse of process. First, the respondent submits that it is an abuse of process to bring a claim on the basis of the contents of a document disclosed to a party in the course of proceedings. Secondly, that the additional claim has not been brought for the purpose for which such proceedings are properly designed and exist, but for the collateral purpose of obtaining disclosure and/or putting pressure on a witness. Thirdly, the respondent relies on *Jameel v Dow Jones & Co Inc* [2005] QB 946.

50. The respondent submits that the court can determine now that the additional claim, even if brought pursuant to Part 7, would be an abuse of process. But if the court is not prepared to make that determination, the respondent contends the appropriate course would be for any Part 7 claim (if brought) to be stayed pending the conclusion of the main claim. Such a stay would avoid any procedural confusion. It would also give the defendant and the respondent the opportunity to take stock. Whatever the result, the defendant may not wish at that stage to proceed with the claim against the respondent, whether because she has lost on the factual points that underlie the additional claim or has won and obtained the vindication she seeks. However, if the additional claim were to proceed as a separate claim, the respondent's counsel, Mr Helme, made clear that, insofar as fundamental factual allegations are made in the claim against the respondent which directly correlate to allegations made in the main claim, the respondent would agree to be bound by the court's conclusions, subject to a possible reservation of the right not to be bound in exceptional circumstances. The respondent submits that this effectively removes any real risk of inconsistent judgments on the same factual allegations.

51. The defendant denies that this is a 'third party disclosure order in disguise', or an abuse of process. She points to the fact that the additional claim is pursued even though the respondent has offered to provide such disclosure as would be required of her in the threatened proceedings, as well as to search her telephone records and personal Instagram, and seek to obtain further information from Twitter, with a view to providing further disclosure in the main proceedings. The defendant contends that the additional claim is properly brought for the purpose of vindicating her rights.

Discussion and decision

The application for permission to make an additional claim

52. The principal question is whether to permit the additional claim to be made: r.20.9(1)(a). As r.20.9(2) makes clear, the matters identified in (a) to (c) are ones to which the court may have regard.

53. There is undoubtedly a strong factual connection between the main claim and the additional claim. The question whether the respondent disclosed the Car Crash, Gender Selection and Flooded Basement Posts to the *Sun* is, of course, an overlapping issue. Insofar as the question whether those Posts were private is a factual one (rather than a legal question), it also arises in both claims. It is likely that there would be only limited further disclosure in the additional claim, and a substantial overlap in relation to witness evidence. Some additional evidence would be required, such as evidence from the defendant in relation to the damage and distress she claims has been caused by publication of the three Posts which are the subject of the additional claim, but any additional witness evidence would probably be limited. It seems likely that there would be additional expert evidence.

54. The causes of action are different: the main claim is a libel claim, whereas the additional claim is for misuse of private information and breach of data protection laws. I accept the defendant's contention that the discrete matters raised by the additional claim are likely, to a large extent, to be legal rather than factual issues. I estimate that the addition of the respondent as a separately represented third party, and the hearing of the causes of action brought against her, would probably lengthen the trial that is currently listed for 7 days by about 2 to 3 days.

55. The defendant is not seeking substantially the same remedy from the respondent as the claimant seeks from her in the main claim. In the draft particulars of claim the defendant states that unless the respondent provides satisfactory undertakings in the meantime, she will seek an injunction. The respondent has agreed to provide the undertaking sought. The remaining relief sought is in the form of damages for misuse of private information and compensation pursuant to Article 82 of the GDPR and s.168 of the Data Protection Act 2018.

56. The defendant raises the prospect of factual matters, most notably on the question whether the respondent in fact disclosed the three Posts to the *Sun*, having to be determined again in a separate trial, with the prospect of inconsistent judgments. I accept that separate trials of these claims gives rise to a risk of matters that have been determined in the main claim being re-litigated, with the consequences that would entail for the parties' and the court's resources, and the possibility of inconsistent judgments. However, in my judgement, these risks are slim.

57. Ms Allen's evidence that if the main claim is determined first, it is likely that either the additional claim would not then be pursued or the issues would be significantly narrowed has not been challenged. Given that the respondent has offered undertakings, and it can be inferred (in the absence of any evidence to the contrary) that the defendant's aim is not to obtain the moderate monetary award attainable in her claim, it is likely that either the issues in the additional claim will be significantly narrowed or it will not proceed, whether because the court's conclusions regarding the allegations

against the respondent in the main claim give the defendant the vindication she seeks or because those conclusions render the claim against the respondent unsustainable. The risk of inconsistent judgments, or duplicative litigation, is further reduced by the approach that the respondent has indicated she will agree to take if the additional claim proceeds separately (see paragraph 50 above); and also by the fact that, unlike in *Coll*, there is no risk that the libel claim (in the absence of the additional claim) will be determined without optimal evidence (see paragraph 62 below).

58. In addition, to factors (a) to (c) of CPR 20.9, which I have considered above, the practical effect of giving permission pursuant to 20.9(1)(a), and any delay in bringing the application (together with any explanation for such delay) are important considerations.

59. In *Borealis* the Court of Appeal considered an appeal from a judgment of Moore-Bick J not to grant an application to join a party on a claim for contribution. Moore-Bick J was prepared to assume that the effect of not joining the third party was that the claim for contribution would be irremediably lost since it could only be made in England in the current proceedings. Nevertheless, he concluded that the balance of justice came down in favour of the existing litigant who opposed the joinder. The Court of Appeal upheld his conclusion on one of three bases, namely, the applicant had left its application too late, and had failed adequately to explain that lateness to the court.

60. Although the commercial claim had been proceeding for several years (including time taken by an appeal to the House of Lords), the delay Rix LJ regarded as critical was from late March 2001 until March 2002 when the application was brought four months before the trial, fixed in July 2002. Rix LJ observed at [51] that '[a]gainst the background of an increasingly imminent trial date, the importance in such circumstances of a proper and frank explanation of the reason for delay should not be underestimated'. The absence of an adequate explanation was a 'most important factor', which could be described as critical and could justify the judge's decision by itself ([53]). In addition, the Court of Appeal reached the same conclusion exercising its discretion anew.

61. There are a number of features of *Borealis* that differ from this claim. First, it was a claim for a contribution (i.e. a standard third party claim) rather than 'some other remedy'. Secondly, the contribution claim would be lost if it could not be brought as an additional claim (albeit the Court of Appeal considered there were alternative remedies available [54]), whereas the claim against the respondent can be brought separately (subject to the abuse argument). Thirdly, the adjournment of the trial would have resulted in costs being thrown away, albeit it was accepted that the applicant would have to bear those, whereas it has not been contended that costs will be thrown away in this case. Fourthly, the other party to the main litigation would have suffered no prejudice save continuing litigation and, as a shipowner, 'must be perfectly familiar with litigation' and, whether for good reasons or bad, had 'been responsible for five or six years of delay in the past' ([45]). By contrast, the claimant and the respondent are both individuals for whom the prolongation of this litigation is highly stressful and, in the claimant's case, delays a determination in a claim for vindication of her reputation. Fifthly, the judge considered that adding the claim would result in a delay of a year, but the Court of Appeal considered that a likely jurisdictional argument 'could well materially extend the judge's period of at least 12 months, possibly for a considerable

further period of up to or even beyond another year' ([55]). I consider the likely delay in this case below.

62. In *Coll,* Hickinbottom J considered an application by the claimant and third parties to set aside an order of Master Eastman adding the third parties. The judge rejected the application. He observed that without seeking 'to minimise the Claimant's rights over her confidential information on the machine, it is primarily about the confidential information of SWP and other group companies' ([73]). There was a very considerable overlap between the two claims, but without the proposed third party as a party in the trial there was 'a real risk that important issues will be determined without optimal evidence; and there is in any event a real risk of two trials, with the additional costs that would entail, compared with a single trial covering all issues' ([76]).

63. I shall first address the question of delay before considering the practical consequences. The application was filed on 13 December 2021. That was just over four months before the (then) fixed trial date. The normal time for making an additional claim is the same time as the party's defence, albeit permission may be given if the additional claim is made later: White Book §20.4.1; CPR 20.4(2)(a) and 20.7(3)(a). In this case, the application was issued more than 14 months after the defence was filed.

64. If a defendant intends to make an additional claim, not having done so when the defence was filed, 'this should be stated on the directions questionnaire': CPR PD 26 para.2.2(3)(b). The defendant's directions questionnaire, filed on 17 November 2020, did not state any intention to make an additional claim.

65. Further opportunities to indicate her intention to bring an additional claim arose, first, at the CCMC before Master Eastman on 16 March 2021, second, at the hearing before me on 18 June 2021, and thirdly, at the further CCMC on 4 August 2021 when Master Eastman gave directions to trial. None of those opportunities were taken. The application was made more than four months after the second CCMC before Master Eastman, long after the trial date had been fixed.

66. In these circumstances, and having regard to the terms of PD20 paragraphs 2.1 and 2.2, an explanation of the late stage at which the application was being made was required. That is so even if the defendant contends that, in making the application, she did not delay but acted timeously in all the circumstances. *A fortiori* such an explanation ought to have been provided in circumstances where the application, when filed, was not on notice to the respondent. The evidence the defendant filed with the application did not address delay or, indeed, any of the matters referred to in PD20 paragraphs 2.1, 2.2 or 2.3. Mr Lunt's subsequent statement that he considered it was a matter largely for legal submissions rather than evidence (Lunt 3 §25) overlooks the terms of the practice direction.

67. Insofar as the defendant's reply evidence addresses the question of delay, Mr Lunt makes three points. First, that the application was issued timeously. Secondly, that it is inconsistent to criticise the defendant for failing to comply with the Pre-Action Protocol while at the same time contending the application was made late. Thirdly, Mr Lunt places reliance on correspondence in which the claimant's solicitors said there was 'absolutely no urgency' (see paragraph 38 above). The latter is, as I have already indicated, a bad point based on taking a statement in correspondence out of context, and it is unnecessary to address it further.

68. The defendant's position that the application was issued in good time is based on the contention that until they inspected the claimant's documents they only had a 'working theory' (as it is described in the defendant's skeleton argument) that much of the information was leaked via the respondent. This explanation (given in submissions, not evidence) has to be viewed against the pleadings and previous statements by counsel to the court.

69. On 2 October 2020, in the original defence, the defendant pleaded:

> "3. … The Claimant *was* in fact responsible for consistently passing on information about the Defendant's private Instagram posts and stories to *The Sun* newspaper…
>
> 4. Indeed, this was part of the Claimant's established history and habitual practice of providing private information to journalists and the press, including The Sun and The Sun on Sunday newspapers, with whom she has especially close relationships. The Claimant sometimes provided this directly, sometimes anonymously … and sometimes through third parties who were acting as approved or condoned by her (such as her friend and agent/public relations manager, Caroline Watt, or through a company known as 'Front Row Partnership' which was set up and supported by the Claimant, Ms Watt and Danny Hayward, who also ran the well-known paparazzi agency, Splash News).
>
> 6. … Even if it was not provided directly to the newspaper by the Claimant herself, it is the Defendant's case that Ms Watt and/or Mr Hayward did so with the Claimant's approval or condonement.
>
> …
>
> 15(6) The Terms of Use of Instagram prohibit the use of login credentials by anyone other than the user him/herself.
>
> …
>
> 15(32)(a) The Claimant was the person responsible for the provision of these stories to The Sun, whether providing them directly herself or indirectly through individuals whose activities were approved or condoned of [sic] by the Claimant and who had access to her Instagram account, such as Caroline Watt … and/or through Mr Hayward and their company, Front Row Partnership ("FRP").
>
> …
>
> 15(37)(k) Caroline Watt operated a Twitter account on behalf of FRP using the account @Caroline_FRP (which was changed on or around 24 December 2018 to @caroline_1_watt). It was a very active account. The account was deleted entirely on or

> around 11 October 2019, just two days after the Post was published. Ms Watt was employed at FRP to sell stories, and had full access to the Claimant's social media accounts. …
>
> (l) …The majority of the FRP social media cover stories that were sold to The Sun related to the Claimant.
>
> (m) As part of this arrangement, individuals at FRP, and in particular Caroline Watt, had access to the Claimant's Instagram account, and were authorised to utilise information obtained as a result by providing it to the press, including the Defendant's private Instagram, and/or such use was condoned by the Claimant who was aware of them doing so.
>
> (n) …FRP was scaled down around this time, with Caroline Watt being made redundant in early 2019. The Claimant also left the agency around the same time.
>
> (o) Despite her leaving the agency, this arrangement continued with the Claimant retaining or using the services of Ms Watt as her agent and public relations manager, and with Ms Watt being authorised to make use of the information which she remained privy to through her ability to access the Claimant's Instagram account (which the Claimant as confirmed in correspondence on 28 February 2020)." (Emphasis added.)

70. At the hearing before me on 18 June 2021, counsel for the defendant, Mr Sherborne stated:

> "… we say Mr Tomlinson mischaracterised the case that Mrs Rooney is running because when your ladyship asked him about Caroline Watt, he said that if the defendant wanted to say Ms Watt was responsible for leaking the information, then the defendant could say that and that would be relevant, but they do not. Well, we do and we do in paragraph 6.
>
> [Mr Sherborne referred to paragraphs 4 and 6 of the Amended Defence and then continued:]
>
> So, we very plainly stated what our case is and we do say that it was provided through Caroline Watt or FRP, which is Mr Hayward, Ms Watt and the claimant.
>
> …
>
> Earlier on, as you will see in the pleading which is not under challenge, we have said that it went through Caroline Watt and FRP to The Sun. So, in order to substantiate the fact that there was this relationship between the claimant and The Sun through FRP, we have given examples of how that mechanism worked; that is part of the inferential case. Otherwise, we say how can we

> substantiate it? That is our way of substantiating that the route was through Caroline Watt because this is how she provided information. She provided information about herself through Caroline Watt and she provided information, we say, about others through FRP.
>
> …
>
> As we say, we pleaded very extensively and it is not under challenge that Caroline Watt and/or Danny Hayward were responsible for the leaking of the information to The Sun. The FRP mechanism shows how they did it." (Emphasis added.)

71. In the Re-Amended Defence served on 16 July 2021, and her response to the claimant's Part 18 request for further information dated 15 October 2021, the defendant maintained her allegations regarding Ms Watt.

72. I acknowledge that the defendant received in that disclosure significant information on which she relies in both the main claim and the additional claim. However, given the terms of the defendant's pleading, verified by statements of truth, and the unequivocal submissions that the defendant's case was that Ms Watt was responsible for leaking the defendant's information to The Sun, I do not accept that these allegations were no more than a 'working theory' until the defendant received the claimant's disclosure. In my judgement, against the background of an increasingly imminent trial date, the absence of any explanation for the delay in the defendant's evidence is an important factor.

73. Nor do I accept that it is contradictory to criticise the defendant both for lateness and for failure to comply with the Pre-Action Protocol. On the contrary, the fact that the application was filed as late as it was, even though none of the preceding time was taken up engaging in pre-action correspondence, underlines the extent of the delay. In addition, the failure to comply with the Pre-Action Protocol has an impact on the likely length of the proceedings in the additional claim. First, where a claim has been issued prematurely, one possible way in which the court may react to non-compliance with a pre-action protocol is to give the defendant to that claim an extension of time to serve her defence: White Book 2021, C1A-006. Secondly, the purposes of the Pre-Action Protocol include the avoidance of litigation. If there has been no discussion before a claim has commenced, it is more likely that time may need to be allowed for ADR after it has begun. Thirdly, the purposes of the Pre-Action Protocol include the narrowing of issues between the parties. If the opportunity to narrow the issues through pre-action correspondence has not been taken, the prospects that a defendant to a claim may seek to strike out at least parts of the claim are increased.

74. The defendant's evidence asserts not only that the application was issued in a timely manner following the claimant's disclosure, but also that it was 'issued timeously following Ms Watt's refusal to engage in correspondence'. I note that the correspondence with Ms Watt was not about the proposed claim (of which she was unaware) and that it is inaccurate to say that she refused to engage in correspondence. The letter from the respondent's solicitor of 20 October 2021 stated:

> "If your client wishes to seek third party disclosure then the precise basis for this should be set out, in accordance with the

> requirements of CPR 31.17. Our client will then consider such a letter and respond appropriately. We do not, otherwise, expect to hear from you again, other than to receive your apology." (Emphasis added.)

75. What, then, are the practical consequences if I were to grant permission pursuant to 20.9(1)(a) to bring the additional claim? If I were to grant such permission, the trial date would undoubtedly have to be vacated and the trial would have to be re-fixed. I do not accept the defendant's submission that a postponement of the trial is, in any event, inevitable. On the contrary, there are 12 weeks before the trial is due to begin. The remaining amendments to pleadings and supplementary disclosure can be addressed swiftly. I agree with the claimant that very little further time should be needed for witness evidence given the late stage at which the parties agreed that the direction given by Master Eastman should be revised in view of the defendant's application. Expert evidence may take a little more time in view of the lack of progress to date, but it is far from impossible to maintain the current fixture.

76. I do not rule out the possibility that it may prove sensible to move the pre-trial review and, potentially, the trial back slightly (perhaps by about 7-10 days), if that is readily achievable. I will determine the revised directions at a hearing that will follow immediately on from the hand down of this judgment. Whatever the precise terms of the revised directions, it is clear that no substantial delay to the trial date would be needed if permission to bring the additional claim is refused.

77. In my judgement, if I were to grant permission, it is inevitable that the trial would be delayed far longer than the two month period suggested by the defendant. In suggesting that the additional claim could be synchronised with the main claim in time for a hearing in July, the defendant did not allow for a case management hearing in accordance with PD20 para 5.1. Nor did she allow time for the strict cost budgeting which would be necessary, having regard to the nature and likely value of the claim. It is highly likely that applications under Part 18 or Part 24 would delay the proceedings further. And as I have said, time may need to be allowed for ADR, given the lack of engagement in pre-action discussion (see paragraph 73 above).

78. It would be unfair to the respondent to condense the claim against her into a very short period. An action of the type which the defendant proposes to bring against the respondent typically takes around two years. Given the degree of overlap between the claims, and the relatively minimal level of disclosure that would be necessary, I am of the view that the additional claim can be determined significantly more speedily than a typical claim of this type. Even so, if I were to give permission, in my view, the determination of the libel claim would be delayed by at least seven months, and probably closer to 12 months.

79. Factors (a) and (c) of r.20.9(2), which I have addressed above, weigh in favour of granting permission. On the other hand, this is not a classic third party claim in which the remedy sought is a contribution or indemnity (factor (b)). Nevertheless, if the timing of the claims were aligned, it would be sensible for them to be heard together. However, that is not the position. In my judgement, this application has been brought too late. The effect of granting the application would be to delay the determination of the claimant's libel claim by 6-12 months. That would not be fair to the claimant who seeks to vindicate her reputation and would suffer the prejudice of the litigation being

prolonged. For the reasons I have given, I refuse to grant permission pursuant to 20.9(1)(a) for the additional claim against the respondent to be made or for permission to add the respondent as an additional party in the additional claim against her.

The application pursuant to CPR 3.1(2)(h)

80. The unfairness to the claimant if the trial of the libel claim were postponed to enable the defendant's claim against the respondent to catch up, and the unfairness to the respondent of greatly compressing the pre-trial period in the proceedings brought against her to enable the claims to be heard together, to which I have referred, apply with equal force if the claim is brought as a separate claim pursuant to Part 7. For the reasons I have given, I refuse the defendant's alternative application for an order that the two sets of proceedings shall be tried on the same occasion pursuant to CPR 3.1(2)(h) and managed together.

Collateral use of documents

81. The defendant applies for permission, pursuant to CPR 31.22(b), to use the documents disclosed in the libel claim in the defendant's claim against the respondent. The defendant's position is that no such permission is required to use those documents in an additional claim brought pursuant to Part 20. But the defendant acknowledges that such permission is required (insofar as the defendant seeks to use any documents disclosed by the claimant to which CPR 31.22(1)(a) does not apply) if her claim against the respondent is pursued as a separate Part 7 claim.

82. The respondent submits that the use the defendant has already made of the claimant's disclosure in the 'draft Part 20 Claim Form and details of claim' enclosed with the letter of 13 December 2021 to the respondent's solicitors, and in the Part 20 application, is in breach of the restriction on the collateral use of documents in CPR 31.22. It follows, the respondent submits, that the additional claim should be dismissed as an abuse of process and retrospective permission to make collateral use of the documents should be refused.

83. In my judgement, the question whether the additional claim that the defendant seeks permission to bring should be dismissed as an abuse of process does not arise given that I have determined that permission to bring it should be refused. Equally, I consider it premature to decide whether the alternative Part 7 claim is an abuse of process. No such claim has yet been brought. I have not even seen draft particulars of claim in respect of the proposed Part 7 claim. And this is not a strike out application. Nevertheless, in considering the defendant's application for permission pursuant to CPR 31.22(1)(b) an important factor is whether this is a retrospective or prospective application.

84. CPR 31.22 provides, so far as material:

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public."

85. In *Lakatamia shipping company limited & Ors v Morimoto* [2020] EWHC 3201, Cockerill J reviewed the authorities and summarised the propositions that they establish at [46] to [66]. So far as relevant to the current case, those propositions are:

i) The terms of CPR 31.22(1) reflect the terms of the implied undertaking as to the use of documents that arose at common law. The CPR provision now represents the complete code on this subject. The prohibition applies not just to documents themselves but to the information derived from those documents: *Lakatamia* [47] and [49], citing *Smithkline Beecham v Generics* [2004] 1 WLR 1479.

ii) The prohibition on collateral use exists for sound and long-established public interest reasons. One reason is that compulsory disclosure is "an invasion of a person's private right to keep one's documents to oneself and should be matched by a corresponding limitation on the use of the document disclosed". Another is in order to encourage those with documentation to make full and frank disclosure of it, whether helpful or not – on the footing that, subject to exceptions, it will not be used save for the proceedings in which it is disclosed: *Riddick v Thames Board Mills* [1977] 1 QB 881, 896; *IG Index v Cloete* [2014] EWCA Civ 1128[42-3]": *Lakatamia,* [47] and *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409, [66].

iii) On its face, CPR 31.22(1) provides a clear indication that the default position is that collateral use is not permitted: *Lakatamia,* [45].

iv) The court will only grant permission under rule 31.22(1)(b) if there are 'special circumstances which constitute a cogent reason for permitting collateral use': *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409, [66], *Lakatamia,* [51].

v) The burden is on the party making the application to demonstrate cogent and persuasive reasons for allowing the collateral use sought: *Lakatamia*, [53].

vi) What constitutes 'use' of a document for the purpose of CPR 31.22 is very broad: *Lakatamia,* [54] to [60]. "Absent some provision in the relevant order, doing anything other than realising in the course of review for the purposes of the proceedings in which documents are disclosed, that a document or documents would be relevant to other proceedings actual or contemplated, may constitute a collateral use": *Lakatamia*, [59(i)]. At [60] Cockerill J observed:

> "Moving on from the more difficult aspects of this area, it seems to be quite clear (were it not self-evident) that using

> information and/or documents from one set of proceedings to threaten a third party falls squarely within the scope of the restriction on collateral use (see, for example, Birss J at [162] of *Grosvenor Chemicals Ltd v UPL Europe Ltd* [2017] EWHC 1893 (Ch))."

vii) The court has jurisdiction to grant retrospective permission but will exercise it only in limited circumstances. The occasions when it will be proper to grant retrospective permission are likely to be rare. It may be appropriate to grant it if no prejudice has been caused to any other litigant by the unauthorised use. It will also be relevant to consider whether the breach was inadvertent, whether if a proper application had been made timeously it would have been granted and the proportionality of debarring the applicant from use of the documents: *Lakatamia*, [61] to [63], citing *Miller v Scorey* [1996] 1 WLR 112 and *Shlaimoun v Mining Technologies International LLC* [2012] 1 WLR 1276 at [43] to [46].

86. The key dispute is whether the defendant's use of the claimant's documents in the additional claim amounts to use for the purpose of the proceedings in which those documents were disclosed. The defendant relies on *Grosvenor Chemicals Ltd v UPL Europe Ltd* [2017] EWHC 1893 (Ch) in support of the submission that the use she has made of the documents in the additional claim was not in breach of CPR 31.22.

87. In *Grosvenor Chemicals* Birss J (as he then was) considered an application under CPR 81.14(1) for permission to bring proceedings for committal for interference with the administration of justice. The interference relied on was the use of documents disclosed in an action for a collateral purpose, contrary to CPR 31.22. Birss J held:

> "148. Overall taking the letter on its own, in my judgment there is no basis for an allegation that the 24th November letter to Gordon Dadds amount to use of the documents for any purpose other than purpose of the proceedings in which they were disclosed. That is because the party receiving disclosure is entitled to use documents produced on disclosure in the proceedings to raise new causes of action which relate to the same proceedings without fear of being in breach of rule 31.22 (see e.g. *Miller v Scorey* [1996] 1 WLR 1122 Rimer J at 1130 E-G, a case under the implied undertaking). The fact that the new causes of action may also involve a person not currently a party but who could properly be joined as a co-defendant does not make the circumstances fall outside r31.22. "The proceedings" referred to in the rule does not have a narrow meaning confined to a narrow view of the causes of action pleaded in the existing statements of case.
>
> 149. If the new matters raised in the letter had been entirely separate and distinct from the existing proceedings, and would raise issues which could never sensibly or properly be brought in the same proceedings, then the matter would be different. I will refer to that sort of case as a truly collateral case. …

150. I do not have to decide where the outer limits of the boundary is between "the proceedings" and a truly collateral case. One possibility canvassed in this case is that "the proceedings" in r31.22 ought to include anything which would fall within the *Henderson v Henderson* abuse of process doctrine. There is force in that since if *Henderson v Henderson* considerations mean a second claim could and should be brought in the same proceedings as a first claim, it would seem odd if the receiving party was not free to use documents disclosed in the proceedings in order to bring in the second claim. But I do not need to decide that question because on its face this case does not come close to whatever the outer limit of "the proceedings" is (and that includes taking into account that the allegations involve a third party).

…

152. The letter of 24th November to Dr Affi is clearly another use of the documents. Moreover, it threatens to issue proceedings. As drafted it is clearly contemplating separate proceedings from the existing main action. …

158. The correct approach to r31.22 is as follows. If a party reviewing documents disclosed in a given set of proceedings identifies that there is a properly arguable basis for joining a third party into those proceedings as a co-defendant with the existing defendants, in relation to the existing causes of action pleaded in the proceedings, then that party has done nothing other than use the documents for the purposes of the proceedings in which they were disclosed. Neither side before me argued to the contrary.

…

160. … Even when the causes of action are different, in other words when the new cause of action involving the third party is not one of the existing causes of action, in my judgment the same result follows as long as it is not a truly collateral case. To use documents disclosed in proceedings to write a letter before joinder to a third party (aside from a truly collateral case) is not a breach of r31.22. Again neither side has drawn my attention to a case in which the contrary was decided.

…

162. However the letter to Dr Affi did threaten to issue fresh proceedings against him and in my judgment that did make the letter a breach of the rule. It seems to me that the reasoning of Scott J in *Sybron* [*v Barclays Bank* [1985] Ch 299] leads to that conclusion. Subject to the exceptions in the rule itself, CPR r31.22 does not entitle a party receiving documents to use them without permission for any purpose other than the proceedings

> in which they are disclosed. To threaten a third party with fresh proceedings without permission is prohibited by the rule." (Emphasis added.)

88. The respondent submits that considerable caution should be exercised before concluding that the additional claim falls within the *Grosvenor Chemicals* exception. First, the respondent notes that Birss J was careful to say that it had limitations and that he did not have to decide where the boundary lies between 'the proceedings' and a 'truly collateral case'. Secondly, the respondent notes that *Grosvenor Chemicals* does not consider the implications of the broad ambit of CPR 20.2. If use only for the purpose of the proceedings were to be interpreted as covering use by a defendant bringing an additional claim against any person for any remedy, the rule against collateral use would be abrogated.

89. The respondent relies on the analysis in *Lakatamia* that it is 'quite clear', indeed 'self-evident' that use of disclosed documents to threaten a third party 'falls squarely within the scope of the restriction on collateral use'.

90. In my judgement, the defendant's use of the claimant's documents in the additional claim does not fall within the concept of use only for the purpose of the proceedings. This is not a case, like *Grosvenor Chemicals*, where a claimant was seeking to bring an additional cause of action against the defendant, joining another as a co-defendant. It concerns a separate claim, raising entirely different causes of action, brought by the defendant against a non-party. In my judgement, there is considerable force in the respondent's submission that if use of documents in an additional claim of this nature, which is not a counterclaim or a claim for contribution or indemnity, were treated as not engaging the prohibition on collateral use, that would significantly abrogate the rule. This is manifestly not a case in which the rule in *Henderson v Henderson* required the additional claim to be brought within the libel proceedings. In my judgement, the additional claim is properly viewed as a collateral claim and the prohibition on collateral use was breached.

91. Against this background, although the application for permission to use the disclosed documents is made in relation to a proposed Part 7 claim, and in relation to that claim it is made prospectively, considered more broadly it is a retrospective application. However, it seems to have been inadvertent and is, in my view, understandable given the uncertainty as to the claims which are to be regarded as truly collateral. In these circumstances, the key question is whether permission would have been granted if permission had been brought prospectively.

92. The defendant submits it would be appropriate to exercise the discretion in the instant case where the documents, to the extent that they have not already been referred to in a public hearing, soon will be. There is no real injustice to the claimant, the defendant contends, in her disclosure being used in a claim against her agent raising the same underlying allegations.

93. The respondent submits permission should be refused in circumstances where no attempt has been made in the application notice or the defendant's evidence to explain the special circumstances that warrant the grant of permission, or to give cogent reasons for finding this is one of the rare cases where it is appropriate to do so.

94. In my judgement, having regard to the important public interests underlying the rule against collateral use, the defendant has failed to satisfy the burden on her to show that permission should be granted. The application notice dated 2 February 2022 does not provide *any* information in support of the application for permission pursuant to CPR 31.22. The application indicates that the evidence relied upon is that filed in support of the defendant's earlier application (Lunt 2 and 3). The only evidence provided on the point is Mr Lunt's statement at paragraph 29(c) that if the respondent's objection to the claim being brought pursuant to Part 20 was not withdrawn, the defendant would issue 'under CPR 31.22 (to the extent this is necessary given CPR 31.22(1)(a))', and issue a separate Part 7 claim, with an application to consolidate the proceedings. That is an assertion that such an application would be made, not an explanation of the special circumstances that warrant the grant of permission.

95. Accordingly, I refuse the application for an order pursuant to CPR 31.22(1)(b).

D. The defendant's application to amend

96. By her application made on 13 December 2021, the defendant seeks permission to re-re-amend her defence. The claimant does not seek to shut the defendant out from relying at trial on any of the matters she seeks to plead in the draft Re-Re-Amended Defence, but takes the short point that the proposed amendments are not necessary, concise or proportionate.

The material CPR provisions and guidance

97. The general rules as to the contents of the Defence are set out in CPR 16.5 and supplemented by Practice Direction 16 - Statements of Case (PD16). CPR 16.5 provides, so far as material:

> "(1) In his defence, the defendant must state—
>
> (a) which of the allegations in the particulars of claim he denies;
>
> (b) which allegations he is unable to admit or deny, but which he requires the claimant to prove; and
>
> (c) which allegations he admits.
>
> (2) Where the defendant denies an allegation—
>
> (a) he must state his reasons for doing so; and
>
> (b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version."

98. PD16 provides, so far as material:

> "1.2 Where special provisions about statements of case are made by the rules and practice directions applying to particular types of proceedings, the provisions of Part 16 and of this practice

> direction apply only to the extent that they are not inconsistent with those rules and practice directions.
>
> 1.3 Examples of types of proceedings with special provisions about statements of case include—
>
> (1) defamation claims (Part 53); …
>
> 1.4 If exceptionally a statement of case exceeds 25 pages (excluding schedules) an appropriate short summary must also be filed and served."

99. Practice Direction 53B – Media and Communication Claims (PD53B) applies to this claim. PD53B provides, so far as material:

> "2.1 Statements of case should be confined to the information necessary to inform the other party of the nature of the case they have to meet. Such information should be set out concisely and in a manner proportionate to the subject matter of the claim
>
> (Part 16 and the accompanying practice direction contain requirements for the contents of statements of case.)
>
> ..
>
> 4.3 Where a defendant relies on the defence under section 2 of the Defamation Act 2013 that the imputation conveyed by the statement complained of is substantially true, they must—
>
> (1) specify the imputation they contend is substantially true; and
>
> (2) give details of the matters on which they rely in support of that contention." (Emphasis added.)

100. The Queen's Bench Guide 2022 notes that a statement of case which exceeds 25 pages is considered to be 'exceptional' (§5.26 and PD16 §1.4). The Queen's Bench Guide further states:

> "5.27 The function of Statements of Case is to state (or dispute) "facts" as opposed to evidence (which is the means by which facts are proved or disproved). They inform both the other parties and the court as to the case which they must meet. They should be concise and allow the reader to understand the case being put forward. They should state the case, and therefore should set out the legal claim (or any legal defence) which is being advanced; but they should not seek to argue the case."

101. In *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm), Leggatt J (as he then was) observed at [1]:

> "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of

> formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."

102. He further noted at [2] that adhering to the basic rules of pleading has become all the more important, not least because prolixity adds substantial unnecessary costs to litigation. Those observations were made in the context of commercial litigation but apply with equal force to proceedings in the media and communications list, albeit careful consideration must be given to the special rules in PD53B.

Analysis and decision

103. The Re-Amended Defence (i.e. the defendant's current statement of case) is a 47 page document, excluding schedules, albeit this includes a combined total of about 9 pages of deleted material. The proposed Re-Re-Amended Defence is 61 pages long, excluding schedules, again including about 9 pages of previously deleted material. In substance, the proposed amendments alone cover about 13 pages. All the proposed amendments are provided as particulars of truth, in circumstances where the current particulars of truth already cover about 25 pages alone (excluding deleted material).

104. Given that the CPR and the Queen's Bench Guide make clear that it should be exceptional for a statement of case to exceed 25 pages, the defendant's proposal to add a further 13 pages to a pleading that already far exceeds 25 pages requires careful scrutiny. The proposed amendments plead in extensive detail WhatsApp exchanges between the claimant and the respondent in June 2018, January, February, April, September and October 2019. The clear impression conveyed by the amendments themselves, strongly reinforced by the way in which the application was presented, is that the proposed Re-Re-Amended Defence has been drafted with a view to ensuring that the newly pleaded material would enter the public domain as early as possible, rather than with the focus firmly fixed where it should be, namely on the requirements of PD53B.

105. In considering the defendant's application to amend I have borne fully in mind that the defendant is required to plead details of the matters on which she relies in support of her contention that the imputation conveyed by the statement complained of is substantially true, and that her case is based on drawing together numerous strands and drawing inferences from them. Nonetheless, it is plain that the proposed Re-Re-Amended Defence is not set out in a concise and proportionate manner, nor is it confined to the material facts, rather than background facts and evidence. Far from it.

106. I have considered carefully whether, nonetheless, I should grant permission to make any of the proposed amendments. In my judgement, permission should be granted to make the following amendments:

i) Paragraph 15(33)(r)(iv).

ii) Paragraph 15(33)(r)(xiv) – the reference to the 'above exchanges' will need to be amended to refer to the exchanges by date.

iii) The deletion in the opening of paragraph 15(44A)(c).

iv) Paragraph 15(44A)(f)(iii) and (iv).

v) Paragraph 15(44A)(g).

vi) With respect to paragraph 15(44B), the defendant may plead:

> The Claimant also disclosed, via her agent Ms Watt, highly private and sensitive information about a professional footballer to *The Sun* between 6 February 2019 and 3 March 2019. The identity of the individual is provided in the Confidential Schedule to this Re-Re-Amended Defence. For the purposes of this pleading he is referred to by the pseudonym of 'Mr X'. It can be inferred that the Claimant, via Ms Watt, provided the information used in the Confidential Article about Mr X to *The Sun*. The Defendant relies in support of this contention upon the facts and matters set out in the Confidential Schedule.

In this regard, I reject the claimant's contention that this allegation is too speculative or fanciful to be permitted.

vii) The Confidential Schedule.

107. I refuse permission to amend save to the extent specified above. I consider that the other matters pleaded are background facts (and, to an extent, reiterations of allegations and inferences to be drawn which have already been sufficiently pleaded) which will be issues for cross-examination and submissions. It is not necessary for them to be pleaded. I accept Mr Tomlinson QC's confirmation that this is not a case where the claimant will allege, if these amendments are not allowed, that she does not know the case against her. Allowing these amendments would unnecessarily increase costs and potentially delay the determination of the claim, given that the claimant would be required to serve a re-amended reply (PD53B §4.7).

E. The claimant's application for further information

108. It is convenient next to address the claimant's application for further information, although it is not the order in which the applications were issued or addressed at the hearing.

109. The defendant has pleaded that the claimant was 'the source' for 'a regular gossip column in The Sun' called 'the Secret Wag' (§4) and that she was 'the columnist' or 'the primary source for' that column. This part of the defendant's case is relied on as an example of the claimant's alleged 'history and practice of publicly disclosing private information about other people she was friendly or associated with' (§15(38)).

110. On 17 September 2021 the claimant made a request for clarification and further information in relation to the Re-Amended Defence. With respect to paragraph 15(41) of the Re-Amended Defence, the claimant made the following request:

> "19. So that the Claimant can understand the case that she has to meet, in respect of each of the 11 Secret Wag Articles relied upon and listed in paragraph 15(41)(b)-(l) of the Re-Amended Defence, set out the precise 'private information' relating to third parties for which it is alleged that the Claimant was the source stating, in each case, the facts and matters relied on in support of the contention that this information was private."

111. In response, the defendant stated:

> "This request is neither necessary nor proportionate and is a matter for submissions. The Defendant's case is already sufficiently pleaded."

112. Ms Harris exhibits to her fourth statement a table analysing examples of information contained in the Secret Wag articles and commenting on whether the information was already in the public domain. The claimant submits that without the further information sought she does not know the case against her and, further, that if on analysis the 'Secret Wag Articles' contain no private information then this part of the defendant's case would fall away and it would be unnecessary for court time to be wasted on it.

113. If this were a misuse of private information claim brought against the claimant, the further information that she seeks would be required pursuant to PD53B §8.1. But it is not. In my judgement, the claimant's contention this further information is necessary and proportionate is inconsistent with her position that the defendant's proposed re-re-amendments are not necessary or proportionate for her to understand the case she has to meet. For example, the proposed re-re-amendments which I have rejected include a pleading of the precise private information allegedly provided by the claimant, via the respondent, to *The Sun* about Mr X (§15(44B)(e) of the draft Re-Re-Amended Defence). The table attached to Harris 4 in fact demonstrates that the claimant is well able to respond to the contention that she disclosed other people's private information in those 11 articles, without the need for further information or clarification. Accordingly, I refuse this aspect of the claimant's application.

F. Search, Disclosure and Inspection: the material CPR provisions and guidance

114. Both the defendant and the claimant make applications with respect to the other party's disclosure. In this section I address the material provisions before considering their respective applications in the sections that follow.

115. The test for standard disclosure is contained in CPR 31.6 which provides:

> "Standard disclosure requires a party to disclose only—
>
> (a) the documents on which he relies; and
>
> (b) the documents which—
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or

> (iii) support another party's case; and
>
> (c) the documents which he is required to disclose by a relevant practice direction."

116. Whether a document falls into subparagraph (b) is to be judged by reference to the statements of case. Masking irrelevant parts of a document by way of redaction is in principle possible under r.31.6 but care must be taken, as the deletion of parts that fall within the standard disclosure test may give rise to a specific disclosure order under r.31.12.

117. CPR 31.7 addresses the duty of search. It provides so far as material:

> "(1) When giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c).
>
> (2) The factors relevant in deciding the reasonableness of a search include the following—
>
> (a) the number of documents involved;
>
> (b) the nature and complexity of the proceedings;
>
> (c) the ease and expense of retrieval of any particular document; and
>
> (d) the significance of any document which is likely to be located during the search.
>
> (3) Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document."

118. CPR 31.8 provides:

> "(1) A party's duty to disclose documents is limited to documents which are or have been in his control.
>
> (2) For this purpose a party has or has had a document in his control if—
>
> (a) it is or was in his physical possession;
>
> (b) he has or has had a right to possession of it; or
>
> (c) he has or has had a right to inspect or take copies of it."

119. The procedure for standard disclosure is provided in CPR 31.10. Insofar as material that provision states:

> "(1) The procedure for standard disclosure is as follows.
>
> (2) Each party must make, and serve on every other party, a list of documents in the relevant practice form.
>
> (3) The list must identify the documents in a convenient order and manner and as concisely as possible.
>
> (4) The list must indicate—
>
> (a) those documents in respect of which the party claims a right or duty to withhold inspection; and
>
> (b)
>
> (i) those documents which are no longer in the party's control; and
>
> (ii) what has happened to those documents.
>
> (Rule 31.19(3) and (4) require a statement in the list of documents relating to any documents inspection of which a person claims he has a right or duty to withhold.)
>
> (5) The list must include a disclosure statement.
>
> (6) A disclosure statement is a statement made by the party disclosing the documents—
>
> (a) setting out the extent of the search that has been made to locate documents which he is required to disclose;
>
> (b) certifying that he understands the duty to disclose documents; and
>
> (c) certifying that to the best of his knowledge he has carried out that duty."

120. The duty of disclosure continues until the proceedings are concluded: CPR 31.11.

121. CPR 31.12 provides that a court may make an order for specific disclosure or specific inspection. CPR 31.12(2) provides:

> "(2) An order for specific disclosure is an order that a party must do one or more of the following things—
>
> (a) disclose documents or classes of documents specified in the order;
>
> (b) carry out a search to the extent stated in the order;
>
> (c) disclose any documents located as a result of that search."

An order for specific inspection is an order that a party permit inspection of a document referred to in r.31.12(2): 31.12(3).

122. The relevant legal principles are set out in the White Book 2021 at paras 31.12.1-31.12.2. In particular:

> "The application should set out the documents or classes of documents for which disclosure or inspection is sought, or the extent of the search sought. If a class of documents is specified, the class should be carefully defined so it is limited to what is relevant and proportionate, and so the disclosing party is in no doubt as to the scope of their obligation: *City of Gotha v Sotheby's* [1998] 1 W.L.R. 114 at 123H, CA; *Berkeley Administration v McClelland* [1990] F.S.R. 381 at 382. It may also be appropriate to explain why it is reasonable and appropriate for that disclosure or search to be done. …
>
> The court will take into account all the circumstances of the case and in particular the overriding objective …
>
> The rationale for the discretion to order specific disclosure is that the overriding objective obliges the parties to give access to those documents which will assist the other's case: *Commissioners of Inland Revenue v Exeter City AFC Ltd* [2004] B.C.C. 519. …
>
> The court will need to satisfy itself as to the relevance of the documents sought, and that they are or have been in the party's control, or at least that there is a prima facie case that these requirements will be met. …"

123. Practice Direct 31A – Disclosure and Inspection (PD31A) provides, so far as relevant:

> "**The Search**
>
> 2 The extent of the search which must be made will depend upon the circumstances of the case including, in particular, the factors referred to in rule 31.7(2). The parties should bear in mind the overriding principle of proportionality (see rule 1.1(2)(c)). It may, for example, be reasonable to decide not to search for documents coming into existence before some particular date, or to limit the search to documents in some particular place or places, or to documents falling into particular categories.
>
> …
>
> **The List**
>
> 3.3 The obligations imposed by an order for disclosure will continue until the proceedings come to an end. If, after a list of documents has been prepared and served, the existence of further

documents to which the order applies comes to the attention of the disclosing party, the party must prepare and serve a supplemental list.

Disclosure Statement

4.1 A list of documents must (unless rule 31.10(8)(b) applies) contain a disclosure statement complying with rule 31.10. The form of disclosure statement is set out in the Annex to this practice direction.

…

Specific Disclosure

…

5.4 In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective described in Part 1. But if the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents or otherwise) the court will usually make such order as is necessary to ensure that those obligations are properly complied with.

5.5 An order for specific disclosure may in an appropriate case direct a party to—

(1) carry out a search for any documents which it is reasonable to suppose may contain information which may —

(a) enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure; or

(b) lead to a train of enquiry which has either of those consequences; and

(2) disclose any documents found as a result of that search." (Emphasis added.)

124. Practice Direction 31B – Disclosure of Electronic Documents (PD31B) materially provides:

"The parties and their legal representatives must also, before the first case management conference, discuss the disclosure of Electronic Documents. … The discussions should include (where appropriate) the following matters—"

…

(3) the tools and techniques (if any) which should be considered to reduce the burden and cost of disclosure of Electronic Documents, including—

(a) limiting disclosure of documents or certain categories of documents to particular date ranges, to particular custodians of documents, or to particular types of documents;

(b) the use of agreed Keyword Searches; …

The reasonable search

20. The extent of the reasonable search required by rule 31.7 for the purposes of standard disclosure is affected by the existence of Electronic Documents. The extent of the search which must be made will depend on the circumstances of the case including, in particular, the factors referred to in rule 31.7(2). The parties should bear in mind that the overriding objective includes dealing with the case in ways which are proportionate.

21. The factors that may be relevant in deciding the reasonableness of a search for Electronic Documents include (but are not limited to) the following—

(1) the number of documents involved;

(2) the nature and complexity of the proceedings;

(3) the ease and expense of retrieval of any particular document. …

(4) the availability of documents or contents of documents from other sources; and

(5) the significance of any document which is likely to be located during the search.

…

Keyword and other automated searches

25. It may be reasonable to search for Electronic Documents by means of Keyword Searches or other automated methods of searching if a full review of each and every document would be unreasonable.

26. However, it will often be insufficient to use simple Keyword Searches or other automated methods of searching alone. The injudicious use of Keyword Searches and other automated search techniques—

> (1) may result in failure to find important documents which ought to be disclosed, and/or
>
> (2) may find excessive quantities of irrelevant documents, which if disclosed would place an excessive burden in time and cost on the party to whom disclosure is given.
>
> 27. The parties should consider supplementing Keyword Searches and other automated searches with additional techniques such as individually reviewing certain documents or categories of documents (for example important documents generated by key personnel) and taking such other steps as may be required in order to justify the selection to the court."

125. *Documentary Evidence*, Hollander (13th ed.) ('Hollander') states at 7-42:

> "There are in principle two types of circumstances where an application for specific disclosure may be made. One is where the application alleges that documents within standard disclosure have not been disclosed. The other, and less usual, is where the circumstances of the case require *Peruvian Guano* documents which fall outside standard disclosure. The two circumstances should be kept separate."

126. This reflects PD31A para 5.5. The defendant's specific disclosure application seeks both documents that she contends fall within standard disclosure and 'train of enquiry' documents, so it is necessary to consider the circumstances in which such an enhanced, 'train of enquiry' order (otherwise known as *Peruvian Guano* order) is appropriate.

127. Hollander states at 7-43:

> "An early edition of the Commercial Court Guide suggested it may be particularly relevant in cases involving fraud, dishonesty, misrepresentation, knowledge, disclosure or non-disclosure. The current edition does not identify specific case, although these still seem good examples. These examples were removed, presumably because the Commercial Court did not want practitioners to think that the jurisdiction was in any way limited to these categories. Where the knowledge or state of mind of one party is in issue, it may well be more important to have wider disclosure. But there is no rule: it will always be for the party seeking disclosure on a wider basis to justify the order. Wherever there is reason to believe that disclosure is of special importance in respect of a particular issue or class of documents, or where there is reason to believe that the help or hinder test will not be sufficient in respect of particular documents or types of documents, such an order should be sought.
>
> In general, the *Peruvian Guano* order should be limited to particular issues or classes of documents. The burden will be squarely on the person seeking the order to show it is justified by

> the particular circumstances, not disproportionate, and does not extend over too many classes of documents. The person seeking the order should remember that the rules were intended to cut down the amount of documents disclosed."

128. In *Berezovsky v Abramovich* [2010] EWHC 2010 (Comm), Gloster J considered that 'given the seriousness and the nature of the allegations involved, the amount at stake, the reputational issues on both sides, and the allegations of dishonesty that are being made', it was the type of case where it might well be appropriate (albeit at some future stage) to make an order for enhanced 'train of enquiry' disclosure (12]). The sums at stake were in excess of US$3.5 billion and there were serious allegations of intimidation, wrongful denial of proprietary rights and breach of trust.

129. Gloster J observed at [12(iv) to (vi)]:

> "iv) In my judgment, if any order for enhanced disclosure is to be applied for, the applications should be focussed, directed at an identifiable category or class of document and linked to specific issues, not broadly aimed at the whole gamut of issues as presently is the case with the Claimant's application. Moreover some explanation should be provided as to the nature of the enquiry envisaged.
>
> v) The burden imposed on a party to conduct wide-ranging searches for documents which might reasonably be expected to lead to an enquiry does not simply have the consequence of imposing an increased costs burden on that party. The task is an onerous one not only because of the difficulty which may exist in identifying or defining the categories of document that may come within the ambit of such an order, and thus will have to be reviewed, but also because the decision-maker has to apply the relevant test to each document "Is it reasonable to suppose that this particular document might lead to or might advance a train of enquiry?"
>
> vi) Moreover, if a document is not searched for or disclosed when it should have been, the consequences for a party may be serious, as he may be accused of deliberately withholding it. I take the view that if such an order is to be made in this case, then the relevant party who is being asked to conduct disclosure on such a basis, and the court before whom the application is being made, should have an appropriately clear idea as to: what documents are likely to fall within the scope of the order; to what specific issues the relevant documents to be searched on the enhanced basis relate; and what the relevant "trains of inquiry" might be. …" (Emphasis added.)

130. In *Jefferies & Anor v News Group Newspapers Ltd* [2021] EWHC 2187 (Ch) an order for disclosure on the 'train of enquiry' basis was made in the context of the mobile telephone voicemail interception litigation. The claimants brought claims against NGN for invasion of privacy of their private telephone messages, with unlawful information

gathering alleged to have led to the publication of articles in *The Sun* and *News of the World* newspapers. Fancourt J concluded at [34]:

> "The terms of paragraph 5.5 of CPR Practice Direction 31A are, in my judgment, apposite. I accept that a train of enquiry approach to disclosure is appropriate, given the allegations in and the nature of this case and the jigsaw exercise that the claimants have to conduct to find documents."

131. An order for specific disclosure should only be made if it is 'necessary for fairly disposing of the proceedings': see *Beck v Canadian Imperial Bank of Commerce* [2009] IRLR 740, [22].

G. The defendant's disclosure application

132. The defendant's specific disclosure application sought a search, disclosure and inspection in relation to 10 categories of documents. For a variety of reasons that it is unnecessary to address in this judgment, the application in respect of paragraphs 1.1, 1.5, 1.8 and 1.9 of the defendant's (amended) draft order is no longer pursued. With respect to one category of documents, namely that identified in paragraph 1.4 of the draft order, the defendant applies for the search to be undertaken, and disclosure given, on a train of enquiry basis. In relation to the remaining five categories (1.2, 1.3, 1.6, 1.7 and 1.10), although as drafted the defendant's order does not specify that the search should be for, and disclosure limited to, documents that meet the standard disclosure test in CPR 31.6, it appears that is in fact what is sought.

133. In making this application the defendant relies, in summary, on the following matters:

i) The documents disclosed by the claimant were, the defendant contends, improperly redacted, withholding information that falls within the standard disclosure test. As a result of a software error, the defendant's representatives were able to see the material that the claimant's representatives had attempted to redact. The defendant submits the claimant's failed redactions clearly demonstrate that the claimant has applied a narrower test than required by CPR 31.6 and has not met her standard disclosure obligations.

ii) The way in which the claimant has undertaken the standard disclosure exercise falls to be viewed against the following background:

a) Missing from the claimant's disclosure of her WhatsApp communications with the respondent are any images or audio files, although it is apparent from the disclosure that such files existed. The evidence on behalf of the claimant states that, at the outset of the litigation, in the process of exporting the claimant's entire WhatsApp chat to an Intralinks workspace created by her solicitors, due to difficulties with the upload the claimant selected the option to remove the images, audio files and videos. The claimant's computer crashed twice when attempting to upload the material. Ms Harris states: "During the process of exporting the data the images, audio files and videos completely disappeared from the Claimant's WhatsApp conversation with Ms Watt." The defendant relies on a note written by Mr Ian

Henderson, the claimant's digital forensics expert, who describes what occurred as 'somewhat surprising', although the possible result of 'an unusual combination of actions or events'. The WhatsApp communications were not backed up and the images, audio files and videos have been found to no longer exist.

b) The respondent was told by the claimant's solicitors that at the CCMC on 4 August 2021 Master Eastman confirmed that her mobile phone would have to be analysed. The respondent's evidence is that in August 2021 she lost the mobile phone that she had used during the period January 2019 to August 2021. The respondent states that this occurred while on a boat trip during a holiday, when the boat hit a wave, and she accidentally dropped her phone. Her WhatsApp communications were not backed up on iCloud, although other information was retained on iCloud. The respondent's evidence is that she routinely deletes WhatsApp communications and so any messages from the relevant period would no longer have been on her lost mobile phone, in any event.

c) Reference is made in the WhatsApp exchanges between the claimant and the respondent on 26 August 2019 to the claimant "messaging" Mr Andy Halls, a journalist with *The Sun*, but the evidence of Ms Harris is that the searches have revealed no copy of such a message and it 'appears to have been deleted' (Harris 4, §28(c)(iv)).

d) The defendant has pleaded that the respondent operated a Twitter account which was 'a very active account but was deleted entirely on or around 11 October 2019, just two days after the Post was published' (Re-Amended Defence §15(32)(a)). The timing of and reason for deleting this account are the subject of dispute. The respondent has stated it was later and the reason was to limit her exposure to abuse following the defendant's Post.

134. In relation to the matters referred to in paragraph 133 above, the defendant questions the veracity of the accounts of the circumstances in which information has been lost. However, I have heard no evidence and cannot, at this stage, reach any conclusions as to whether there is any foundation to any of the defendant's suspicions. It would also be fair to point out that it appears the defendant does not have a copy of her WhatsApp correspondence with Rachel Monk (who is described by the claimant as being a member of the defendant's PR and management team), and the screenshot version of a document on which the claimant relies is cut-off. In my view, at this stage, the relevance of the matters referred to in paragraph 133 above is that it may be said to be more important to ensure that such relevant documents as exist are disclosed in circumstances where some potentially relevant information no longer exists.

135. The more important consideration is that which I have referred to in paragraph 133 above. The first set of redactions has been made to WhatsApp messages between the claimant and the respondent on 23 January 2019, the day after the defendant had published a post on Instagram of a damaged car with the message 'RIP half a Honda…". The WhatsApp messages on 23 January 2019 which were (properly) disclosed are in these terms:

> "[20:32:55] Caroline: Am I imagining this or did you say yesterday that Coleen had crashed her Honda? x
>
> [20:33:11] Bex ❤️‍🩹: She defo has 😂😂 x
>
> [20:33:15] Bex ❤️‍🩹: Go in the Instagram x
>
> [20:33:59] Caroline: She must have taken whatever it is down as it's not there now x
>
> [REDACTIONS]
>
> [20:36:36] Caroline: I would have tried to have done a story on Coleen but the evidence has been deleted x
>
> [20:38:14] Bex ❤️‍🩹: Wonder why she deleted it! X
>
> [20:39:27] Caroline: Insurance?
>
> [20:39:37] Caroline: What was it?
>
> [20:42:53] Bex ❤️‍🩹: A pic of the side of the car knackered x
>
> [20:43:47] Caroline: Can you remember what the caption said or wasnt there one? x
>
> [20:44:03] Bex ❤️‍🩹: Yeah it was something like goodbye half a Honda x
>
> [20:44:36] Caroline: I bet she was buzzing 😂😂 I suppose it would be a guess to say she crashed it but I could try it x

136. The redacted messages include a message from the claimant to the respondent in which she states at 20:35:18: 'Would love to leak those stories x'.

137. The claimant contends that this information did not meet the test in CPR 31.6. The basis for this contention is that this was a reference to a third party, not the defendant. In my judgement, it is plain that this information met the test in CPR 31.6 and should have been disclosed. This claim concerns the alleged leaking to *The Sun* by the claimant of stories about the defendant and about others. The defendant has also alleged that the claimant condoned the respondent leaking stories to which she had access via the claimant's accounts.

138. First, in circumstances where, in the midst of a WhatsApp account that appears on its face (and I do not understand it to be disputed) to concern the defendant, the claimant states that she would 'love to leak those stories', I do not accept that it is open to the claimant's representatives to make the determination, on the basis of their client's instructions, that she was not referring to stories about the defendant. That may or may not be so: it is a matter for trial. I appreciate that a party's representatives will often need to seek their client's instructions as to what certain information relates to when determining relevance. But that does not mean that information can be withheld on the

basis of the client's account if it is plain on the face of the document that there is a credible alternative interpretation which would support the opposing party's case and on which they would be bound to rely if the document is disclosed.

139. Secondly, even if the claimant's message concerned stories about someone else, it would meet the test in CPR 31.6. The imputation found by Warby J is not limited to disclosure of information about the defendant, and nor is the defendant's case limited to the disclosure of private information about herself. I also appreciate that it can be said that the comment does not itself show that the claimant had or intended to leak any stories. But part of the defendant's case concerns the alleged condoning of the disclosure of information by the respondent. That being so, evidence that the claimant wrote to the respondent '[w]ould love to leak those stories' 1½ minutes before the respondent's message at 20:36:36 regarding 'a story on Coleen' plainly meets the standard disclosure test.

140. The second set of redactions concerns WhatsApp messages between the claimant and the respondent on 6 February 2019. The communications (again, quite properly disclosed) begin at 17:50:57 with a message from the respondent, 'Babe has Coleen unfollowed you???' The messages continue on the same subject for the next 25 minutes and then state:

> "[18:15:38] Caroline: If she does try to say it or that it was me and it's undeniably obvious what we'll do is say I left the company I was working for in jan and one of the girls in the office has my old laptop that had your passwords saved on it so it will have been them and now you will have to change everything x
>
> [18:16:29] Bex 💔: Ok! Just don't know how she ever would know that unless halls has leaked it <u>in which case please don't give him the [INITIALS] stuff x</u>
>
> [18:18:12] Bex 💔: I've messaged her x
>
> [18:18:34] Bex 💔: It's delivered! I swear she better not cunt me off x
>
> [18:18:52] Caroline: No I messaged him and he said absolutely not and he never would say what his source was for anything at all. I know he wouldn't either x
>
> …" (Underlining added.)

141. The underlined words are those that were redacted by the claimant's legal representatives on the grounds that they did not meet the test in CPR 31.6. The defendant contends that those words concern a person they have referred to as 'Mr X', in relation to whom they allege an article subsequently appeared in *The Sun*. Ms Harris states that Mr Lunt has misinterpreted this exchange between the claimant and the respondent: it 'did not concern the leaking of private information about this, or any other, individual' (Harris 4, §26(a)(ii). Again, that may or may not prove to be the case:

that is a matter for trial. What is clear, in my judgement, is that the information in the redacted half-sentence met the test in CPR 31.6.

142. Given the context in which it appeared, a message that appears to convey an instruction from the claimant to the respondent to hold off giving information of some kind to a journalist at *The Sun* if he could not be trusted not to reveal his source, ought to have been disclosed. Part of the defendant's case concerns her allegation as to the closeness of the relationship between the claimant and this particular journalist. That the information meets the standard disclosure test is all the more plain, in my view, given that what has been redacted is half a sentence in the context of a lengthy WhatsApp chat that is (rightly) recognised by the claimant to be information that supports or undermines one or other party's case.

143. Mr Tomlinson QC has made clear that if the court considers that the test was misapplied in relation to the information in these documents, the responsibility for the misjudgement lies with him, as he determined whether these pieces of information were required to be disclosed.

144. Against this background, I turn to consider the specific applications the defendant makes.

Paragraphs 1.2 and 1.4 of the defendant's amended draft order

145. I will address paragraphs 1.2 and 1.4 of the defendant's draft amended order together. The orders sought in these paragraphs are:

> "1.2 All documents (without limiting the search by way of keyword searches), including but not limited to emails, letters, WhatsApp messages, iMessages, texts, voice notes, images, Twitter direct messages and Instagram direct messages, between 1 September 2017 and 9 October 2019 ("the Relevant Period") and between the Claimant and Caroline Watt.
>
> …
>
> 1.4 All WhatsApp messages, including media, between the Claimant and Caroline Watt with the search to be conducted <u>on a train of enquiry basis</u> on:
>
> (a) 23 to 27 January 2019;
>
> (b) 6 February 2019;
>
> (c) 8 April 2019;
>
> (d) 14 April 2019;
>
> (e) 11 September 2019;
>
> (f) 29 September 2019;
>
> (g) 16 August 2019;

(h) 1 October 2019; and

(i) 9 October 2019."

146. The information referred to in paragraph 1.4 is a subset of that referred to in paragraph 1.2 in respect of which the defendant seeks an enhanced disclosure order. In relation to paragraph 2, the defendant submits that in circumstances where the claimant maintains that the redactions to which I have referred were properly made, the court can have no confidence that the claimant has properly applied the standard disclosure test to other material in this category.

147. First, paragraph 1.2 asks not only for searches and disclosure of communications between the claimant and respondent via WhatsApp, but also by other means: emails, letters, iMessages, texts, voice notes, images, Twitter direct messages and Instagram direct messages. Ms Harris has given evidence that:

> "with the exception of email (in relation to which relevant communications have been disclosed) the Claimant and Ms Watt did not use these other methods of communication." (Harris 4, §32)
>
> "WhatsApp was the main communication platform used by the Claimant and Ms Watt. To the limited extent messages were sent using email or some other means, they were searched using the agreed keyword search terms. In addition, searches were carried out of documents on this firm's electronic document management system." (Harris 5, §6(a))

148. In my judgement, no need to undertake further searches of means of communication between the claimant and the respondent other than via WhatsApp have been shown. Any concerns about the test that the claimant's representatives have applied has little impact in relation to those other means of communication given the evidence as to the very limited use that they made of other means of communication. I also bear in mind that the claimant has provided supplemental disclosure since the defendant's application was filed, and the disclosure duty is a continuing one which the claimant's representative will be aware must be exercised in light of the rulings I have given in relation to the redactions.

149. Secondly, paragraph 1.2 seeks a manual review of the Whatsapp communications between the claimant and the respondent in the relevant period. Ms Harris has given evidence that all the claimant's electronic devices were subjected to the agreed key word search with the assistance of the claimant's expert, Mr Henderson. She states:

> "24(1) … All the documents which responded to the search terms were viewed and a second tranche downloaded and separately considered by my firm in conjunction with the Claimant and with counsel. The agreed search terms (for example "kids" and "strictly") threw up a very large number of irrelevant documents and this review took a considerable time.
> …

> (2) I also conducted a manual search of the record of the Claimant's WhatsApp conversations with Ms Watt on and around the relevant dates in August, September, October 2019 and around other dates mentioned in the pleading."

150. In correspondence, the claimant's solicitors have stated that the documents encompassed by paragraph 1.2 of the defendant's amended draft order amount to over 1,200 pages of communications and they estimate that such a search would take at least 90 person hours. The claimant submits that given what they describe as the comprehensive nature of the search that has already taken place, there is no proper basis for a further manual review and this would be wholly disproportionate.

151. In my judgement, against the background that I have described above, given the centrality of the communications between the claimant and the respondent, and given that I have found the claimant's representative have taken too narrow a view of the information that meets the standard disclosure test, it is necessary and proportionate to order that the claimant's WhatsApp communications with the respondent during the relevant period should be manually reviewed.

152. I am not persuaded that the circumstances warrant a train of enquiry order in respect of any part of those communications. Such an order would be likely to significantly increase the time and cost. The disclosure exercise would have to be approached with a much keener eye if, in relation to every document, the claimant's solicitors were required to ask themselves, and making enquiries of the claimant to discern, whether it should be disclosed because it is reasonable to suppose it might lead to a train of enquiry. The justice of the case can be met by a manual review applying the test in CPR 31.6 with the rulings I have given in mind.

Paragraph 1.3 of the defendant's draft amended order

153. Paragraph 1.3 of the defendant's draft amended order seeks the following:

> "1.3 All documents, including but not limited to emails, letters, WhatsApp messages, iMessages, texts, voice notes, images, Twitter direct messages and Instagram direct messages during the Relevant Period between the Claimant and/or Caroline Watt and any Sun journalist, including but not limited to Andy Halls, Amy Brookbanks, Simon Boyle, Ellie Henman, Jane Atkinson and Victoria Newton."

154. First, I note that in seeking disclosure with respect to "any Sun journalist", the proposed order overlooks the terms of the preamble to my order of 9 July 2021 in which I stated that in respect of paragraph 15(34(f) of the Amended Defence it would be appropriate to limit the search to the journalists named in that paragraph.

155. Secondly, in relation to communications between the claimant and journalists from *The Sun*, Ms Harris has given evidence that 'all relevant communications between the Claimant and journalists from *The Sun* have been disclosed' (Harris 4, §39). Mr Tomlinson QC underlined that no concern in relation to the application of CPR 31.6 can arise because *all* communications between the claimant and any of the named journalists from *The Sun* have been disclosed.

156. Thirdly, Ms Harris has given evidence that all relevant communications between the respondent and journalists from *The Sun* have been disclosed. In particular, there are 'no communications between Ms Watt and journalists from *The Sun* in which she is passing private information about the Defendant to them'. Mr Tomlinson QC submitted, and I agree, that whereas there is a pleaded issue regarding the claimant's relationship with *The Sun*, there is no such issue in relation to the respondent having such a relationship, as she of course does as part of her job.

157. In my judgement, it is not necessary or proportionate to make the order sought in paragraph 1.3 of the defendant's amended draft order.

Paragraphs 1.6 and 1.7 of the defendant's amended draft order

158. By paragraphs 1.6 and 1.7 of the amended draft order the defendant seeks:

> "All documents dated during the Relevant Period, including but not limited to invoices, remittance advice and bank statements, in relation to payments made to the Claimant or for work undertaken by the Claimant or relating to the supply of services to The Sun during the Relevant Period from:
>
> (a) News Group Newspapers Limited;
>
> (b) News UK & Ireland Limited;
>
> (c) The Front Row Partnership Limited; and
>
> (d) any other entity or person in relation to work or services undertaken for The Sun.
>
> 1.7 All documents containing the financial statements of Front Row Partnership between 2016 and 2019."

159. The defendant contends that as it is part of her pleaded case that the claimant obtained benefits from *The Sun* in exchange for leaking stories, any payments made to her by *The Sun* during the relevant period, and also all financial statements of FRP are relevant and should be disclosed.

160. In my judgement, the defendant's approach is unjustified. There is no dispute that the claimant has received payments from *The Sun* for photoshoots and interviews. There is no pleaded case that such payments were over the odds because they incorporated an additional fee in respect of disclosure of the defendant's or any other person's private information. In my view, such payments do not fall within the standard disclosure test and an order for specific disclosure would not be necessary or proportionate. The claimant accepts that any payments from *The Sun* in respect of the provision of private information about others would be disclosable, albeit both parties recognise such payments would be unlikely to be identified in such a way. More significantly, the claimant also accepts that any unexplained payments from *The Sun* should be disclosed, and she has in fact disclosed a communication regarding a payment in circumstances where, on its face, it is unexplained (albeit Ms Harris states it related to expenses following a photoshoot).

161. Accordingly, I refuse to make the order sought in paragraphs 1.6 and 1.7.

Paragraph 1.10 of the defendant's draft amended order

162. By paragraph 1.10 of the defendant's draft amended order she seeks:

> "All documents including but not limited to emails, letters, WhatsApp messages, iMessages, texts, attachments and notes passing between the Claimant and/or Caroline Watt and:
>
> (a) Danny Hayward; and
>
> (b) Nicola McLean;
>
> during the Relevant Period."

163. Ms Harris states in her fourth statement:

> "Mr Lunt correctly states that Danny Hayward was a director of FRP when they represented the Claimant (Mr Lunt's Statement, para 48). However, Mr Hayward did not, at any stage, have access to the Claimant's Instagram account. The Claimant has no knowledge of Mr Hayward's dealings with The Sun. The Claimant has had no communications with Mr Hayward concerning the Defendant's Private Instagram Account or information deriving from it. I have conducted a search for all communications between the Claimant and Mr Hayward and can confirm that there are no relevant communications in this category.
>
> 57. It is correct that Nicola McLean is a friend of the Claimant and a client of FRP and subsequently of Ms Watt. The Claimant believes that the reason that Ms McLean said that she knew for a 'fact' that the Claimant had not leaked stories about the Defendant is because she had been present at events when journalists had asked the Claimant about the Defendant and the Claimant had refused to provide any information. Aside from this, the Claimant has no knowledge as to the basis on which Ms McLean made statements to Dan Wootton. The Claimant did not take screenshots of the Defendant's Private Instagram Account to send to Ms McLean. The Claimant has had no communications with Ms McLean concerning the Defendant's Private Instagram Account or information deriving from it. I have conducted a search for all communications between the Claimant and Ms McLean and can confirm that there are no relevant communications in this category."

164. In her fifth statement at paragraph 21, Ms Harris adds:

> "Searches were carried out for documents relating to Mr Hayward and Ms McLean, as both of these individuals were

> covered by the agreed keywords search terms. There was no relevant disclosure."

165. The defendant submits, shortly, that this order should be made because the claimant has misapplied the standard disclosure test. Although I have found that the claimant's representatives misapplied the test in relation to the redactions to which I have referred above, in my judgement that is not a sufficient basis to justify making the order sought pursuant to paragraph 1.10. It is clear that searches have been undertaken and there is no reason to believe that in relation to this category of documents the reason nothing of any relevance has been found is due to taking a narrow view of CPR 31.6. Moreover, as I have said, the disclosure duty is continuing and it would be incumbent on the claimant's legal team, if they are aware of documents which they withheld taking a narrow view of the test, to revisit those assessments in light of this judgment.

Other orders sought

166. The defendant's draft order includes a proviso at the end of paragraph 1 which, in my view, is unnecessary and likely to increase costs and cause delay.

167. By paragraph 2 the defendant seeks unredacted versions of the WhatsApp exchanges between the claimant and the respondent on 6 February 2019 and 23 January 2019 i.e. the exchanges that were provided in redacted form, but in respect of which due to a software failure the defendant has in fact seen the redacted material. For the reasons I have given above, the redacted material should have been disclosed. Although the defendant already has the material, I consider it is appropriate for the unredacted documents to be duly disclosed. The parties did not address paragraph 2 at the hearing. It may be that it is unnecessary to make an order, but if the claimant has not voluntarily complied, I will do so.

168. Paragraphs 3 and 4 of the defendant's draft order seek service of a supplemental list, including a disclosure statement and also a witness statement. It seems to me that these paragraphs are duplicative. In accordance with PD31A paragraphs 3.3 and 4.1, a supplemental list, including a disclosure statement, should be served if any further documents are disclosed. If as a result of the order that I will make in relation to paragraph 1.2 any supplemental disclosure is made, a supplemental list and a disclosure statement will be required to be served. In those circumstances, no witness statement would be needed. However, if the further search were to result in no supplemental disclosure, I consider that a witness statement on behalf of the claimant confirming the searches undertaken and the result should be given.

169. Paragraph 1.9 of the amended draft order relates to 3.64 gigabytes of data downloaded from the claimant's Instagram account. An order for disclosure of that material is not, in fact, sought. Plainly, much of that material will be irrelevant to the claim. However, there is an issue as to whether the whole of that data should be provided to the defendant's expert, subject to confidentiality obligations. No order has been sought in this regard and it is unclear that any is needed. There is no evidence before me that the defendant's expert needs the entire data download for technical reasons. The claimant's reluctance to hand over the entirety of this private material unless it is needed is readily understandable. On the other hand, if there are technical reasons why the whole of the data is required by the experts, as I understand it the claimant would be prepared to provide it to the defendant's expert, subject to the requisite confidentiality undertakings.

H. The claimant's disclosure application

170. The claimant seeks an order for search and disclosure in relation to six identified 'custodians' and the defendant herself in these terms:

> "1. By 4pm on [DATE] the Defendant shall, by her solicitors, carry out a full and proper search of the electronic documents of the custodians listed at (a) to (f) below in accordance with agreed date ranges and key words and shall disclose all relevant documents to the Claimant:
>
> (a) Paul Stretford
>
> (b) Claire Rooney
>
> (c) Ian Monk
>
> (d) Rachel Monk
>
> (e) Colin Massie
>
> (f) Joe McLoughlin
>
> 2. The search in paragraph 1 above must include, but not be limited to, any and all relevant emails, letters, WhatsApp messages, iMessages, texts, voice notes, images, Twitter direct messages and Instagram direct ("Documents) of each of the Custodians that:
>
> 2.1 contain information relating to any of the content of the Posts/Stories listed in Annex A to this Order ("Annex A").
>
> 2.2 contain information relating to the content of the articles that are listed in Annex B to this Order ("Annex B").
>
> 2.3 contain information about, or in any way relating to, the Defendant's 'careful investigation' from January 2019 to 9 October 2019;
>
> 2.4 contain information relating to the timing of publication of and/or contents of and/or any drafting of and/or any drafts of the Post (or any similar notification) by the Defendant dated 9 October 2019 which is complained of in this action and any communications in relation to the same.
>
> 2.5 relate to the contact between each of the Custodians and any journalists at The Sun newspaper, including but not limited to Andy Halls, Amy Brookbanks, Simon Boyle, Ellie Henman, Jane Atkinson and Victoria Newton, for the period from 1 January 2017 to date. This includes, but is not limited to the request for any comment, or giving notification of a

> publication or possible publication by any journalist at The Sun in relation to:
>
> > (i) the content of any of the Posts/Stories listed in Annex A.
> >
> > (ii) any of the Articles listed in Annex B.
> >
> > (iii) each of the articles set out in the Annex to the Amended Reply.
>
> 3. The Defendant shall by 4pm on [DATE] carry out a full and proper search of all Documents of which she is the custodian that contain information in the categories set out at paragraphs 2.1 to 2.5."

171. In support of her application for this order, the claimant relies on the principles set out in the judgment of Briggs J (as he then was) in *CMCS Common Market Commercial Services AVV v Taylor* [2011] EWHC 324 (Ch) at [36], citing Matthews and Malek on Disclosure, 3rd edition, §14.07:

> "14.07 The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client [Myers Elman [1940] A.C. 282, at 322, 325, 338.] The best way for the solicitor to fulfil his own duty and to ensure that his client's duty is fulfilled too is to take possession of all the original documents as early as possible. The client should not be allowed to decide relevant – or even potential relevance – for himself, so either the client must send all the files to the solicitor or the solicitor must visit the client to review the files or take the relevant documents into his possession. It is then for the solicitor to decide which documents are relevant and disclosable. …"

172. As regards paragraph 3 of the claimant's draft order, which concerns disclosure of the defendant's own documents, Mr Lunt's evidence is as follows:

> "The following searches have been carried out in connection with the defendant:
>
> > a. The Defendant conducted a search of all her available hard copy and electronic data (including WhatsApp, text/messages and email, although the Defendant rarely uses email) which was not limited to solely key words. She has provided a large volume of hard copy and electronic records to my firm, which we reviewed as part of the disclosure exercise.
> >
> > b. Instagram. The Defendant provided my firm with the password to her Instagram account and my firm has carried out a complete, unrestricted, search. All disclosable documents have been disclosed."

173. Mr Sherborne informed me that the defendant's role was to identify and provide to her solicitors the universe of data to be searched (in respect of (a)) and that search was then undertaken manually rather than by reference to keywords. Although I accept Mr Tomlinson QC's point that it is not made clear in Mr Lunt's statement that that was what was done, on the basis that Mr Sherborne tells me that was how the disclosure process was undertaken in respect of the defendant's documents, I am not persuaded that it would be necessary or proportionate to undertake further searches. It does not appear to be the case that there is any striking omission that would indicate the disclosure process has not been conducted properly.

174. The six individuals referred to in paragraph 1 of the claimant's draft order were identified by the defendant as 'custodians'. The claimant submits that must means that they have documents that are within the defendant's control. The claimant draws attention to the Electronic Documents Questionnaire, contained in the Schedule to Practice Direction 31B – Disclosure of Electronic Documents, which states in paragraph 1:

> "Identify the custodians or creators of your Electronic Documents whose repositories of documents you consider should be searched."

A footnote to that sentence states:

> "Include names of all those who may have or have had custody of disclosable documents, including secretaries, personal assistants, former employees and/or former participants. It may be helpful to identify different dates for particular custodians."

175. On the basis that it follows from the defendant's identification of them as custodians that they have documents within the defendant's control, the claimant submits that the disclosure exercise was wholly inadequate because in breach of the principles referred to in paragraph 171 above each of these individuals (save Claire Rooney) searched their documents themselves. The defendant's solicitor did not take possession of their documents and he has left them to determine relevance.

176. Mr Sherborne contends, relying on Mr Lunt's evidence, that the defendant did not have control of any of the documents of six individuals. In those circumstances, proportionate searches have been undertaken.

177. Mr Lunt states (Lunt 4, §16):

> "I have spoken with each of the Custodians listed below. Based on those discussions, the relationship between the Defendant and each Custodian is described as follows:
>
> a. Paul Stretford. Mr Stretford is a Director of Triple S Group. The Defendant's husband, Wayne Rooney, is a client of Triple S Group. The Defendant is not a retained client of Triple S Group (and was not during the relevant period of this litigation) and does not have a contract in place with them. Mr Stretford and Triple S' involvement with the Defendant arises only on an ad

> hoc, sporadic, basis primarily arising out of, and incidental to the fact that they look after Mr Rooney.
>
> b. Claire Rooney. Claire Rooney is the Defendant's cousin-in-law (i.e. the cousin of Mr Wayne Rooney).
>
> c. Ian Monk. Ian Monk is a Director of a PR company called Monk PR. The Defendant is not a retained client of Monk PR and was not so at all relevant times. The Defendant stepped back from active work many years ago. The Defendant and Ian Monk believe that it has been at least some 3 or 4 years since they last spoke to one another. Ian Monk and Monk PR's involvement with the Defendant arises only on an ad hoc, sporadic, basis primarily arising out of, and incidental to the fact that they look after Mr Rooney.
>
> d. Rachel Monk. Rachel Monk left Monk PR in around February 2020 to set up her own business. The Defendant is not a retained client of Rachel Monk or any business of hers. Any interaction between Rachel Monk and the Defendant is sporadic, generally instigated by a newspaper or media outlet contacting Rachel Monk. Mr Monk has advised that the Monk PR email account for Rachel Monk was deleted shortly after her departure.
>
> e. Colin Massie. Colin Massie is a solicitor (qualified in Scotland) and provides in-house Counsel services to Triple S Group. He has confirmed that he had no dealings or knowledge of the subject matter of the Defendant's Post or the present claim until after the Defendant's Post in October 2019.
>
> f. Joe McLoughlin. Joe McLoughlin is Head of Digital at Triple S Group. He is the Defendant's brother and has access to her Public Facebook account and her Public Instagram Account."

178. In relation to Claire Rooney and Colin Massey, Mr Lunt states:

> "Claire Rooney provided my firm with the password to her Instagram account and my firm has carried out a complete, unrestricted, search of the entire Instagram account. All relevant documents produced have already been disclosed."
>
> "Mr Massie has advised that prior to the Defendant's Post he did not have (and therefore he cannot search) any relevant communications with the Defendant."

179. Mr Lunt has also addressed points 2.1-2.5 of the claimant's draft order in relation to Claire Rooney and Colin Massie at paragraph 23(b) and (d) of Lunt 4. In light of that evidence, I am not persuaded any further searches of their documents are required and I accept Mr Sherborne's submission that although they have been identified as custodians, it is plain that their documents are not in fact ones over which the defendant has (or has had) control.

180. In relation to Mr Stretford, Mr Lunt states:

> "Mr Stretford advises that he doesn't use Instagram or post/message on Twitter. His main (if not sole) electronic means of sending and receiving written messages are email, WhatsApp and text/imessage. Mr Stretford advises me that he has searched each of his text/imessage, WhatsApp and email exchanges with each of the Defendant and Ian Monk over the period 1st January 2017 to 9th October 2019 (inclusive) using a list of key words as follows:
>
> Crash
> Rebekah
> Leak
> Flood
> RV
> Vardy
> Gender
> Selection
> Basement
> Flood
> TV
> Pyjamas
> Mexico
> Secret
> Wag
> Wayne
> Monk
>
> From those searches, Mr Stretford has identified as potentially relevant (i) email/iMessage/WhatsApp messages sent to him by Ian Monk on 25th January, 27th January, 27th September, 29th September and 9th October 2019; and (ii) emails sent to Mr Stretford by Rachel Monk on 11th December 2018 and 25th January 2019…"

181. Although this is not in evidence, Mr Sherborne stated on instructions that Mr Lunt was present in Mr Stretford's office when these searches were undertaken.

182. In relation to Ian Monk, Mr Lunt states:

> "Ian Monk has carried out the same search of his text, WhatsApp and email exchanges with Paul Stretford using the same key words as used by Mr Stretford as above. This did not produce any documents beyond those disclosable documents identified above from Mr Stretford's searches."

183. In relation to Rachel Monk, Mr Lunt states:

> "In advance of finalising the Defendant's Disclosure Statement and list of documents, Ms Monk was asked to search all her records (electronic or otherwise) for any documents which might be relevant to the present claim. She advised that she had done so and that she had found only certain WhatsApp messages between her and the Defendant, which have been disclosed."

184. In his 5th statement, Mr Lunt states that Ms Monk has advised that she too has searched her phone, her Mac laptop and the computer that she used to use whilst working at Monk PR using the same list of key words as Mr Stretford.

185. In relation to Joe McLoughlin, Mr Lunt states:

> "Mr McLoughlin has been asked to search all his records (electronic or otherwise) for any documents which might be relevant to the present claim. He has advised that he has found no relevant records."

186. Mr Lunt has also addressed points 2.1-2.5 of the claimant's draft order in relation to Mr Stretford, Ian Monk, Rachel Monk and Joe McCloughlin at paragraph 23(a), (c) and (e) of Lunt 4 and paragraphs 11 of Lunt 5.

187. In my judgement, although the way in which the defendant's solicitors have gone about this disclosure exercise, in particular asking these individuals to search by reference to a much more limited number of search terms than those agreed with the claimant, and not overseeing the searches other than in the case of Mr Stretford, can fairly be criticised, I consider that the order sought by the claimant is unnecessary and disproportionate. Despite the label that has been applied, it is reasonably apparent that the defendant has not named these individuals as custodians on the basis that she has control over their documents, but rather because they are individuals from whom she considered it appropriate to seek disclosure of documents. Although I accept that there is room for criticism of the approach that has been taken, I am not persuaded that there is any merit in making the orders sought.

188. The claimant has also sought specific disclosure. So far as that is concerned, all of the matters have been addressed other than 6(b): "Documents which contain the names of all the users of the Defendant's Private Instagram account at the date of each of the Posts listed in Annex A". On the basis that that is not, in fact, information that the defendant holds, I will not make an order for it to be disclosed, but it seems to me that steps should be taken with the assistance of the experts to see if this information can be obtained.

I. The Instagram application

189. This application concerns the defendant's request for an order that:

> "The parties shall make a joint request to Instagram by [DATE], with the parties to agree the protocol for the examination of such data that is received from Instagram."

Background

190. The order of Master Eastman dated 4 August 2021 includes the following:

> "3. …
>
> a) By 4pm on Monday, 27 September 2021 the parties' experts shall seek to agree the forensic protocols and process, tools and techniques and confidentiality and privacy terms applicable to the search for and disclosure of relevant electronically stored data on relevant personal devices (including but not limited to, mobile phones, tablets and laptops) and in default of agreement the parties must apply to Court for further directions …
>
> 5 Expert evidence is directed as follows:
>
> a) The parties each have permission to rely on the written evidence of an expert in the use of Instagram and how it operates and an analysis of relevant Instagram data and relevant data on relevant personal devices.
>
> b) Expert reports shall be exchanged by no later than 4:30pm on Monday, 24 January 2022.
>
> c) By 4:30pm on Monday 7 February 2022 the parties may put written questions to the other party's expert.
>
> d) By Monday 21 February 2022 the experts will reply to the questions.
>
> e) A party seeking to call the expert to give oral evidence at trial must apply for permission to do so before pre-trial check lists are filed."

191. The claimant has instructed Ian Henderson as an expert witness and the defendant has instructed Grant Thornton UK LLP. Both specialise in digital forensics.

192. Mr Lunt has explained that following correspondence on 14, 22 and 24 September 2021 the parties agreed that the experts should liaise directly with one another in order to reach agreement on the forensic protocols, process, tools and techniques, as specified in paragraph 3(a) of Master Eastman's order.

193. For reasons that are hard to fathom, no progress has been made. The forensic protocols have not yet been agreed. The experts appear to have been speaking at cross-purposes.

194. The experts met on 1 October 2021. They agreed to seek comprehensive data sets directly from Instagram in respect of the accounts of the claimant and the defendant. Unfortunately, they have not agreed how to go about seeking this data from Instagram and so no approach to Instagram has yet been made.

195. Matt Blackband of Grant Thornton has explained:

> "In light of the relevance of the intersection of activities between the two Instagram accounts of the respective parties, it made

> sense for the Claimant's and the Defendant's request to Instagram to be made jointly, or at the very least for the approach to be co-ordinated.
>
> …
>
> In light of the relevance of the intersection of activities between the two Instagram accounts of the respective parties, it made sense for the Claimant's and the Defendant's request to Instagram to be made jointly, or at the very least for the approach to be co-ordinated. The overlap between the Claimant's Instagram data, and the Defendant's Instagram data, is critical to identifying interactions between these parties. We also wanted to prevent any scope for Instagram to say that it was not prepared or able to release data relevant to the Claimant to the Defendant (and vice versa)."

196. On 17 November 2021, Mr Blackband sent Mr Henderson proposed wording for a joint or co-ordinated request to Instagram. The experts met again on 19 November 2021 and 17 December 2021, but a request to Instagram has not yet been agreed.

197. Mr Henderson states that at the meeting on 17 December 2021 the experts agreed that rather than making a joint request "we instead thought we should make a parallel request whereby the relevant [party's] information would be provided to the relevant party, rather than a single output from Instagram coming to both parties". In addition, Mr Henderson suggested a two stage process of first requesting the Unique Identification Numbers for all the relevant posts and then filtering the information down for a more detailed request which would reference those numbers.

198. The claimant's evidence suggests that further directions are not necessary as the expert are in agreement as to the next steps (Harris 4, §63). Plainly, that is not the case.

199. In my judgement, it is appropriate to order the parties to make a co-ordinated (joint and/or parallel) approach to Instagram for the data sets. I am not persuaded that it is necessary to first obtain Unique Identification Numbers for the posts. It seems likely, as Mr Blackband states, that if the request gives detailed information regarding each relevant post it should be sufficient to enable Instagram to identify the post being referred to. I note that the terms of the request proposed by Mr Blackband require amendment as references to the labels that the parties to this litigation have applied to the posts (such as, the 'Marriage Post') are likely to be of little assistance to Instagram in identifying the posts.

200. For the reasons Mr Blackband gives, I consider that a joint approach would be better. However, the possibility has been raised that Instagram may prefer individual requests. There is no evidence before me that they would not respond to a joint request. Nevertheless, the terms of the order should be broad enough to allow parallel requests to be made if Instagram indicates that it would prefer to receive individual requests.

201. I accept the claimant's other criticism of the proposed order, namely that the court cannot order the parties to agree, only to seek to agree, a protocol. Subject to that tweak,

I agree that such an order should be made, and a tight deadline imposed given the incomprehensible lack of progress in this area to date.

J. Summary of conclusions

202. In summary, for the reasons I have given:

i) The defendant's application for permission, under CPR 20.9(1)(a) to make an additional claim is refused;

ii) The defendant's application for an order that this claim and her proposed Part 7 claim against the respondent shall be tried on the same occasion and managed together is refused;

iii) The defendant's application for permission pursuant to CPR 31.22(1)(b) for the use of documents disclosed in this claim in her proposed Part 7 claim against the respondent is refused;

iv) The defendant's application to amend is refused, save to the extent that I grant permission to make the amendments referred to paragraph 106 above;

v) The claimant's application for further information is refused;

vi) With respect to the defendant's disclosure application:

a) A specific disclosure order, requiring a manual search and disclosure of material meeting the test in CPR 31.6, is granted in respect of the WhatsApp communications between the claimant and the respondent during the relevant period;

b) An order pursuant to paragraph 2 of the defendant's amended draft order is granted (if the documents have not yet been provided in unredacted form);

c) The claimant should provide a supplemental list, including a disclosure statement, in relation to the specific disclosure ordered, or if the search results in no supplemental disclosure, provide a witness statement confirming the search undertaken and the result;

d) Save as aforesaid, the defendant's application for disclosure is refused;

vii) The claimant's disclosure application is refused, however, steps should be taken with the assistance of the experts to seek to obtain the information referred to in paragraph 6(b) of the claimant's draft order.

viii) The defendant's application for an order to make a request to Instagram is granted (subject to some amendment of the terms of the proposed order (see paragraphs 200 to 201 above)).

203. I will hear Counsel on the precise terms of the order and revised directions.