



Neutral Citation Number: [2021] EWHC 273 (Ch)

Case No: IL-2019-000110

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**BUSINESS AND PROPERTY COURTS**  
**INTELLECTUAL PROPERTY LIST**

Royal Courts of Justice  
Strand, London, WC2A 2LL

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date of hand-down is deemed to be as shown opposite:**

Date: 11 February 2021

**Before:**

**THE HON. MR JUSTICE WARBY**

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**Between:**

<b>HRH The Duchess of Sussex</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>Associated Newspapers Limited</b>	<b><u>Defendant</u></b>

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**Ian Mill QC, Justin Rushbrooke QC, Jane Phillips and Jessie Bowhill (instructed by Schillings International LLP) for the Claimant**  
**Antony White QC, Adrian Speck QC, Alexandra Marzec, Isabel Jamal and Gervase de Wilde (instructed by Reynolds Porter Chamberlain LLP) for the Defendant**

Hearing dates: 19-20 January 2021  
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**Approved Judgment**

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Mr Justice Warby:**

**The action and the application**

1. The claimant is well known as the actor, Meghan Markle, who played a leading role in the television series *Suits*. But she is also well known as the Duchess of Sussex, and wife of HRH Prince Henry of Wales, the Duke of Sussex (“Prince Harry”). The couple were married on 19 May 2018. The relationship between the claimant and her father, Thomas Markle, was difficult at the time. Three months after the wedding, on 27 August 2018, the claimant sent her father a five-page letter (“the Letter”). In September 2018, Mr Markle sent a letter in reply. This action arises from the later reproduction of large parts of the claimant’s Letter in articles published by the defendant in the *Mail on Sunday* and *MailOnline*.
2. The existence of the Letter first became public on 6 February 2019, when it was mentioned in an eight-page article that appeared in the US magazine *People* (“the People Article”) under the headline “*The Truth About Meghan – Her best friends break their silence*”. Mr Markle then provided the defendant with the Letter, or a copy of it. On 9 February 2019, the defendant published in hard copy and online the five articles of which the claimant complains (“the Mail Articles”). These articles quoted extensively from the Letter, under headlines the gist of which is conveyed by the one across pages 4 and 5 of the *Mail on Sunday*: “*Revealed: the letter showing true tragedy of Meghan’s rift with a father she says has ‘broken her heart into a million pieces’*”.
3. On 29 September 2019, the claimant began this action, complaining that the publication of the Mail Articles involved a misuse of her private information, a breach of the defendant’s duties under the data protection legislation, and an infringement of her copyright in the Letter. At this hearing I am concerned only with the claims in privacy and copyright.
4. The essentials of the claimant’s case can be summarised shortly. She says that the contents of the Letter were private; this was correspondence about her private and family life, not her public profile or her work; the Letter disclosed her intimate thoughts and feelings; these were personal matters, not matters of legitimate public interest; she enjoyed a reasonable expectation that the contents would remain private and not be published to the world at large by a national newspaper; the defendant’s conduct in publishing the contents of the letter was a misuse of her private information.
5. The claimant says, further, that the Letter is an original literary work in which copyright subsists; she is the author of that work, and of a draft she created on her phone (“the Electronic Draft”); and the Mail Articles infringed her copyright by reproducing in a material form, and issuing and communicating to the public, copies of a substantial part of the Electronic Draft and/or the Letter.
6. The defendant denies the claim. It maintains that the contents of the Letter were not private or confidential as alleged, and that the claimant had no reasonable expectation of privacy. Further or alternatively, any privacy interest she enjoyed was slight, and outweighed by the need to protect the rights of her father and the public at large. The defendant’s pleaded case is diffuse and hard to summarise. But prominent features are contentions that, even if the claimant might otherwise have had any privacy rights in respect of the Letter,

Approved Judgment

- (1) such rights were (a) limited, given the legitimate public interest in the activities of the Royal family and the claimant’s status as a “high-ranking member” of that family, and (b) destroyed, weakened or compromised by (i) her knowledge of her father’s propensity to speak to the media about their relationship, (ii) the fact that publication of the existence and contents of the Letter was lawful in the US, (iii) her own conduct in causing, authorising, or intending publicity about the Letter and/or her relationship with her father more generally, and/or (iv) the publication of information about the Letter;
  - (2) the People Article gave a misleading account of the father-daughter relationship, the Letter and Mr Markle’s letter in response, such that (in all the circumstances) public disclosure of the contents of the Letter in the Mail Articles was justified to protect the rights and interests of Mr Markle and the public at large.
7. The defendant’s case on the non-existence, destruction, compromise or weakening of the claimant’s rights of privacy relies, among other things, on allegations that she intended the Letter to be publicised, and to that end disclosed information about it to the “best friends” quoted in the People Article (“the Five Friends”), and/or to Omid Scobie and Caroline Durand (“the Authors”) for the purposes of their biography of the Duke and Duchess, published in mid-2020, under the title “*Finding Freedom - Harry and Meghan and the Making of a Modern Royal Family*” (“the Book”).
  8. As for the allegation of copyright infringement, the defendant takes issue with the claimant’s case on originality, on subsistence of copyright, on ownership, and on infringement; further and alternatively, it relies on defences of fair dealing and public interest, and contends that the Convention rights of others to impart and receive information outweigh any copyright to which the claimant can properly lay claim.
  9. The claimant now applies to strike out the defences to the claims in misuse of private information and/or for summary judgment on that claim and on the claim for copyright infringement.

**Strike out and summary judgment: principles**

10. The application relies on rules 3.4(2)(a) and 24.2 of the Civil Procedure Rules. There is no dispute about the effect of those rules, or as to the principles that govern the Court’s exercise of the powers they confer. Both are clear and well-established.
11. CPR 3.4(2)(a) allows the court to strike out a Defence, or part of one, “it if appears to the court ... that the statement of case discloses no reasonable grounds for ... defending the claim”. This may be the position if the Defence, or part, consists of a bare denial, or sets out no coherent statement of facts; or where the facts set out, while coherent, “could not even if true amount in law to a defence to the claim”: Practice Direction 3A 1.6. I summarised the core principles in my first judgment in this case, [2020] EWHC 1058 (Ch) [2020] EMLR 21 [33(2)]: an application under this sub-rule

“... calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should ‘grasp the nettle’... But it should not strike out under this sub-rule unless it is

Approved Judgment

‘certain’ that the statement of case, or the part under attack, discloses no reasonable [defence] ... Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment.”

12. CPR 24.2 allows the court to give summary judgment against a defendant on the whole of a claim, or on a particular issue, if it considers “(a)... that the defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.” In this context there is no assumption that what is asserted in the Defence is true; evidence to the contrary is admissible, and is commonly adduced by the applicant and by the respondent. But it is possible to seek summary judgment on the footing that the claim is plainly meritorious and the defence contentions, even if true, could not amount to an answer to the claim.
13. Both parties have referred me to Lewison J’s classic exposition of the right approach to summary judgment in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) [15] (approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098). The passage was about applications by defendants, but applies equally to applications such as the present, made by a claimant. Making adjustments to reflect that context, and omitting internal citations, the seven key principles are these:

“i) The court must consider whether the [defendant] has a “realistic” as opposed to a “fanciful” prospect of success;

ii) A “realistic” [defence] is one that carries some degree of conviction. This means a claim that is more than merely arguable ...

iii) In reaching its conclusion the court must not conduct a “mini-trial” ...

iv) This does not mean that the court must take at face value and without analysis everything that a [defendant] says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ...

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ...;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the

Approved Judgment

evidence available to a trial judge and so affect the outcome of the case ...;

vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of ... successfully defending the claim against him .... Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ...”

14. *Easyair* principles (vi) and (vii) contain echoes of the law’s traditional disapproval of a “a desire to investigate alleged obscurities and a hope that something will turn up ...”<sup>1</sup> as a basis for defending a summary judgment application; a case that is “all surmise and Micawberism” will not do: see *The Lady Anne Tennant v Associated Newspapers Ltd* [1979] FSR 298, 303 (Sir Robert Megarry V-C). The focus is not just on whether something more might emerge, but also – and crucially – on whether, if so, it might “affect the outcome of the case”; and the court’s task is to assess whether there are “reasonable grounds” for believing that both these things would occur: see *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661 [2007] FSR 63, [18] (Mummery LJ).
15. As Mummery LJ warned in the *Doncaster* case at [10], on applications for summary judgment the court must be alert to “the defendant, who seeks to avoid summary judgment by making a case look more complicated and difficult than it really is”. But as he also said at [11], the court should beware “the cocky claimant who ... confidently presents the factual and legal issues as simpler and easier than they really are and urges the court to be ‘efficient...’. Efficiency is not a ground for entering summary judgment. Judgment without a trial may sometimes result in huge savings of time and costs; that would have been so in the hugely expensive litigation in *Three Rivers District Council v Bank of England*. But neither Part 24, nor the overriding objective, permits the Court to enter judgment on the basis that the claimant has a strong case, the defence is not likely to succeed, and the time and costs involved in a trial are disproportionate to the potential gains.
16. The overriding objective of “deciding cases justly and at proportionate cost” does have a role to play if the Court concludes there is no realistic prospect of a successful defence,

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<sup>1</sup> Otherwise known as “the Micawber principle” after the character in Dickens’ *David Copperfield*

Approved Judgment

and the question arises whether there is “some other compelling reason” for a trial. At that point, the Court would be bound to have regard to considerations such as saving expense, proportionality, and the competing demands on the scarce resources (CPR 1.1(2)(b), (c) and (e)). It is rare for the Court to find a compelling reason for a trial, when it has concluded there is only one realistic outcome. The defendant has not suggested that this is such a case. My focus must be on whether it is realistic or fanciful to suppose the claims might fail at trial.

17. Mr White QC (who argued the defendant’s case on misuse of private information) invites me to bear in mind what he says is the rarity of summary judgments in the fields of law with which I am concerned. He and Mr Speck (who argued the case on copyright infringement) point to the need for an “intense focus” on the specifics of the competing rights in play, suggesting that it will usually be impossible to conduct this otherwise than at a trial. Mr Rushbrooke QC counters that summary judgment has been granted in several such cases, of which the most notable and the closest comparator is the decision of Blackburne J, affirmed on appeal in *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch) [2006] EWCA Civ 1776 [2008] Ch 57 (I would add, in the case of copyright, *The Lady Anne Tennant*, decided under the previous and more defendant-friendly procedures of the Rules of the Supreme Court). Mr Rushbrooke suggests, further, that many of these cases are resolved finally at or shortly after the interim injunction stage.
18. I do not gain much help from these broad propositions. There can be plain and obvious cases in privacy and copyright, as there are in other fields of law. So long as the lens is not obscured by fog or dust, it may be possible to see clearly that a case has only one plausible outcome, and a trial is superfluous. A recent example is the decision of Nicol J in *BVG v LAR* [2020] EWHC 931 (QB), to grant the claimant summary judgment on his claim in misuse of private information. The Judge did not find it necessary to resolve all the factual issues before concluding with “no hesitation” that the claimant’s privacy rights would “far outweigh” the free speech rights relied on by the defendant: [25(iv)]. The application before me must be decided by the application of the relevant legal principles to the particular facts and circumstances of this case.

### **Timing and evidence**

19. The application notice was filed on 30 November 2020, 14 months after the claim was issued. The applications have come on for hearing shortly before the second anniversary of the publications complained of, in what would have been the second week of the trial, which was adjourned for other reasons. That makes the applications unusual, as to timing. But it is not a procedural flaw. An application to strike out may be made at any time after the filing of the statement of case that is under attack, and may even be made at trial: see Civil Procedure 2020, n 3.4.1 and cases there cited. An application for summary judgment may be made at any time after the defendant has filed an acknowledgment of service or a defence (CPR 24.4), and may also be made at trial (as in *Alexander v Arts Council of Wales* [2001] EWCA Civ 514 [2001] 1 WLR 1840). The lateness of the present applications has been explained: new advice from new Counsel. The delay could have costs implications, but casts no light on the substantive merits and is therefore not significant as a factor in the disposal of the application.

Approved Judgment

20. One consequence of the relative lateness of the application is that the parties' cases have been pleaded out in great detail. The claimant's case is now contained in Re-Amended Particulars of Claim dated 29 October 2020, with two Appendices. The defendant's case is set out in a Re-Re-Amended Defence, to which the claimant has responded in a Re-Amended Reply. The claimant has served three Responses to Part 18 Requests for Further Information, and two Supplemental Responses. The defendant has served two Responses to Requests by the claimant for Further Information about its draft Re-Amended Defence. A further Part 18 Request by the defendant remains outstanding.
21. It was the re-amendments to the Defence that added the case that I have briefly summarised above, about the Book. The re-amendments were hotly contested at a hearing before Master Kaye in September 2020, at which the claimant resisted the application to amend on the grounds, among others, that the amendments advanced a new case which had no real prospect of success. On 29 September 2020, the Master rejected those submission, and gave permission to amend. On 29 October 2020, I refused the claimant's application for permission to appeal against that decision.
22. The claimant's application notice states, as required by the Part 24 Practice Direction 2.3, that the summary judgment application is made because "the claimant believes that on the evidence the defendant has no real prospect of succeeding on its defences to the claims and knows of no other compelling reason why the case or issue should be disposed of at a trial"; in other words, that the conditions specified in rule 24.2 are satisfied. This is verified by the claimant's solicitor, Jenny Afia.
23. The application notice identifies the evidence relied on in support of that application as the fourth and seventh witness statements of Ms Afia, dated 23 October 2020 and 30 November 2020. Those statements deal mainly with procedural matters and the alleged deficiencies of the defendant's case. The fourth statement verifies Ms Afia's belief that the rule 24.2 conditions are met, but neither statement purports to verify the essential ingredients of the claims. As has become clear in the course of the application, the claimant relies for that purpose on her statements of case, also verified by statements of truth signed by Ms Afia.
24. This is permissible as a matter of principle. A legal representative may sign the statement of truth on Particulars of Claim, and other formal pleadings, provided that - as is the case here - what is verified is the belief of the claimant in the truth of what is stated: Part 22 Practice Direction 2.1, 3.1(2). Although the norm is that evidence at trials and other hearings is given by witness statement (CPR 32.2(1), 32.6(1)), at hearings other than a trial parties may rely on matters set out in a statement of case, if verified by a statement of truth (CPR 32.6(2)). The standard form of application notice reflects this. A tick box is available to identify statements of case as matters relied on in support of the application. That was not done here, but the defendant has not raised a formal or procedural objection to this modification of the claimant's case on the application. Mr White does however invite me to attach weight to the fact that there is no evidence before the Court from the claimant herself, in circumstances where the key ingredients of her case are within her knowledge, she is the person best-placed to deal with those facts, and (as he submits) her case has shifted in certain respects.
25. The defendant relies on witness statements from three witnesses: Mr Markle (his first statement), Edward Verity, the editor of the Mail on Sunday, (first statement), and Keith

Approved Judgment

Mathieson, partner at the defendant's solicitors Reynolds Porter Chamberlain LLP (sixth statement). Mr Markle and Mr Verity are in a position to, and do, give direct evidence of fact, and evidence of their states of mind at material times. Mr Mathieson sets out to explain how the defendant can substantiate its assertion that "further relevant evidence will be available" if there is a trial. An aspect of this concerns "four members of the royal household" (sic, referred to in argument as "the Palace Four") who, it is said, "are likely to have information relating to issues in the case". In that connection, Mr Verity also gives hearsay evidence of what he has been told, since this claim was brought, by "a senior member of the royal household" (sic) about the Letter, and about dealings with the Authors.

26. Also in the papers before the court, though not identified as evidence relied on in support of the applications, are the Confidential Witness Statement of Friend B (one of the Five Friends), and the first witness statement of Omid Scobie. In addition, there are two letters addressed to the solicitors for both parties: one dated 21 December 2020, from solicitors Addleshaw Goddard on behalf of the Palace Four, and one dated 24 December 2020 from Omid Scobie. I shall have to address the status, significance, and weight to be given to this additional material.
27. The applications have come on for hearing before completion of the process of disclosure and inspection of documents, a matter relied on in the defendant's arguments on the summary judgment application. But the process of disclosure under PD51U is fairly well advanced. The claimant's case is mainly based on the proposition that the pleaded case provides no answer to the claim, but it is also her case that there is no reasonable basis for supposing that disclosure could yield anything capable of affecting the outcome of the claim.

### **Misuse of private information**

#### Essential legal principles

28. The Human Rights Act 1998 obliges the Court to interpret, apply and develop English law in conformity with the European Convention on Human Rights. Where an individual complains that her privacy has been violated by newspaper reports, the Court must ensure that its decision properly reconciles the competing Convention rights: those protected by Articles 8 and 10. Article 8(1), so far as relevant, requires the state to respect a person's "private and family life ... and [her] correspondence". Article 10(1) guarantees the right to transmit and receive information and ideas without state interference. Both rights are qualified. Interferences can be justified, but only if they are prescribed by law, and are necessary and proportionate in pursuit of one of the legitimate aims identified in Articles 8(2) and 10(2). Here, on each side of the equation, the legitimate aim for consideration is "the protection of the rights of others".
29. Domestic law gives effect to this framework through the tort of misuse of private information. Liability is determined by applying a two-stage test. The principles are explored in some detail in *ZXC v Bloomberg LP* [2020] EWCA Civ 611 [2020] 3 WLR 838 [40-48], [103-109] and in *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB) [2021] 4 WLR 3 [63-74], [111-119], [120-122]. For the purposes of this case, it is possible to summarise them as follows.

Approved Judgment

30. At stage one the question is whether the claimant enjoyed a reasonable expectation of privacy in respect of the information in question. One way the question has been put is to ask whether a reasonable person, placed in the same position as the claimant and faced with the same publicity, would feel substantial offence. There must be something of a private nature that is worthy of protection. In some cases, the answer will be obvious; but the methodology is to make a broad objective assessment of all the circumstances of the case. These include (1) the attributes of the claimant, (2) the nature of the activity in which the claimant was engaged, (3) the place at which it was happening, (4) the nature and purpose of the intrusion, (5) the absence of consent and whether it was known or could be inferred, (6) the effect on the claimant and (7) the circumstances in which and the purposes for which the information came into the hands of the publisher (“the *Murray* factors”<sup>2</sup>). If the information, or similar information about the claimant, is in the public domain, or is about to become available to the public, the Court must have regard to that. In such a case it is a matter of fact and degree as to whether the legitimate expectation of privacy has been lost. Privacy rights can survive a degree of publicity for the information or related information.
31. At stage two, the question is whether in all the circumstances the privacy rights of the claimant must yield to the imperatives of the freedom of expression enjoyed by publishers and their audiences. The competing rights are both qualified, and neither has precedence as such. The conflict is not to be resolved mechanically, on the basis of rival generalities. The Court must focus intensely on the comparative importance of the specific rights being claimed in the particular case; assess the justifications for interfering with each right; and balance them, applying a proportionality test. The Court must have regard to the extent to which it is or would be in the public interest for the material to be published. The decisive factor at this stage is an assessment of the contribution which the publication of the relevant information would make to a debate of general interest. Other factors to be weighed in the balance are the subject-matter, how well-known the claimant is, the claimant’s prior conduct, and editorial latitude. When examining the demands of free speech, the court should be slow to interfere in respect of matters of technique, form and detail; it should defer, to the extent appropriate on the facts, to the professional expertise and judgment of journalists and editors.
32. Where, as here, the defendant publisher is bound by the Editors’ Code of Conduct (“the Code”) enforced by the Independent Press Standards Organisation (“IPSO”) the Court is obliged to “have regard” to the Code. Clause 3 of the Code is in terms that mirror the relevant provisions of Article 8 of the Convention. The Code provides that interferences with privacy may be justified in the public interest; but editors are expected to demonstrate this, and to show and explain how they reasonably believed that publication would serve and be proportionate to the public interest. The public interest is defined non-exhaustively, but the matters specified include “(ii) preventing the public from being misled by an action or statement of an individual or organisation”. The Code also provides, in this context, that “the regulator will consider the extent to which material is already in the public domain or will become so”.

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<sup>2</sup> *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 [36].

Approved Judgment

The issues

33. The claimant's case is summarised in the application notice. She makes four main points, maintaining that each of them is "beyond any or any reasonable dispute":
- (1) The contents of the Letter are private and strongly engage the claimant's rights under Article 8 of the ECHR to respect for her "private and family life... and [her] correspondence".
  - (2) The defendant's acts in publishing, without the claimant's consent, to a readership of millions, substantial extracts from the Letter constituted an interference with the claimant's said rights.
  - (3) Neither the Letter nor any part of its contents had been brought into the public domain whether by the claimant or at all at the date of the defendant's acts of publication.
  - (4) The facts and matters relied upon by the defendant in its Re-Re-Amended Defence as reducing, extinguishing and/or outweighing (whether by reference to Article 10 ECHR or otherwise) the claimant's said rights do not disclose, and are not capable of as a matter of law disclosing, any defence to the claim for misuse of private information.
34. It is this fourth point that gives rise to the application to strike out. The claimant adds, for the avoidance of doubt, that it is her position that even if there may be circumstances in which a newspaper may, with impunity, publish the contents of private correspondence without the author's consent and knowledge, and/or prior to her bringing them into the public domain herself, the alleged facts of this case do not come close to such circumstances as a matter of law.
35. The case has been put a little differently in argument. Mr Rushbrooke submits that the central issue in the case is this: does the writer of a letter that is self-evidently private and sensitive have the right to decide whether, when, how and to what extent to publish its contents? Or does a newspaper have the right to publish those contents, without the prior consent or even knowledge of the writer? The overall submission is that the answer is obviously the former, and that "a proper analysis compels" the following conclusions: "(i) at the time of its publication, the claimant had a reasonable expectation of privacy in respect of the contents of the Letter, and (ii) this being the case, and applying the requisite balancing exercise, the defendant has failed to discharge the burden which rests upon it to advance a viable justification for interfering with that right."
36. This way of putting it reflects more closely than the Application Notice the well-established two-stage approach in domestic law. The differences are, I think, more semantic than substantive. The two-stage analysis is however a fair and convenient one to adopt. This is the framework that has been adopted by the defendant in its approach to the issues.

Approved Judgment

Some essential facts

37. There is much about the relevant facts that is undisputed, or clear beyond realistic dispute.

**The father-daughter relationship at and after the time of the wedding**

38. Mr Markle did not attend the wedding on 19 May 2018, having been admitted to hospital days beforehand for emergency heart surgery. But in the weeks leading up to the wedding, Mr Markle behaved in ways which caused his daughter great concern because of the publicity they were likely to and did cause, and the impact on her, Prince Harry, and her father. The contents of text exchanges between father and daughter, and between Prince Harry and Mr Markle, as set out in a Schedule to the Re-Amended Reply, make this much plain.
39. I have been taken through what the claimant maintains is the precise sequence of events. The Defence presents (in particular at paragraph 15.6.4) a somewhat different take on what took place. It is, in my judgment, unnecessary to make detailed findings about this, or about the rights and wrongs of what went on at this time. It is enough to say the following, which is in the papers before me and either common ground or clear.
40. The run-up to the wedding was fractious, revealing substantial differences of approach to dealing with the media.
- (1) On 6 May 2018, having arranged for her father’s wedding clothes to be custom made by a tailor in Canada, and having told him so, the claimant learned that there were photos of her father being measured at a tailor’s in Mexico, where he was living. There is no doubt or dispute that he did this. The claimant wrote to warn him against the risks of intrusive publicity resulting from such behaviour. The texts that followed make plain that the claimant and her husband were concerned to ensure that arrangements for the wedding remained confidential and that Mr Markle did not engage with the media at all.
  - (2) On 8, 9 and 11 May 2018 Mr Markle texted to say he was “laying low” and to report that he was being followed and observed by “paparazzi”. He was sent texts by the claimant and Prince Harry asking to speak to him urgently. Although he sent texts to them, he did not respond to the content of the texts they wrote to him.
  - (3) On or about Saturday 12 May 2018, Mr Markle, the claimant and Prince Harry had a telephone conversation about a story that was about to come out in the press, to the effect that Mr Markle had agreed to stage some paparazzi photographs with someone called Jeff Rayner.
  - (4) The Mail on Sunday has reported, and the parties are agreed, that this is something Mr Markle had indeed done. On Sunday 13 May 2018, the story about Mr Markle’s dealings with the paparazzi was published. It was the front-page story in the Mail on Sunday, headed “MEGHAN’S DAD STAGED PHOTOS WITH THE PAPARAZZI”. Evidently, the story was accompanied by CCTV footage to corroborate what was reported.

Approved Judgment

- (5) The defendant’s account of what was going on at the time, as published in the Mail Articles, is that Mr Markle was “colluding with the paparazzi to stage a series of lucrative photo opportunities”.
  - (6) On Monday 14 May 2018, Mr Markle sent an apologetic text, maintaining that he had not “done this for money” but so people would see he was human, against assurances that “it would be very private.” He offered to make a public apology. He suggested he would not attend the wedding, in order to spare the couple further embarrassment.
  - (7) Further media coverage appeared on the celebrity website TMZ.com, quoting Mr Markle, on 14 and 15 May 2018, giving details about his health and his intentions with regard to attending the wedding.
  - (8) On 17 May 2018, Prince Harry texted Mr Markle urging him to take time to reflect on what was going on, and asking him to “stop talking to the press for your sake and hers”. Prince Harry expressed concern that (as he said) Mr Markle had not “returned any of our 20+ calls since we all spoke on Saturday morning”. Aggrieved messages were sent from Mr Markle’s phone in response which said he knew nothing about receiving 20 phone calls, and suggested that he had been ignored. He wrote, among other things, “I’m sorry my heart attack is there any inconvenience for you” and “If only I had died then you then guys you guys could pretend to be sad” (sic). The messages did not address the request to stop speaking to the press.
41. Plainly, Mr Markle was well aware that his daughter and her husband wanted him to avoid engaging with the media, and that they considered his behaviour very unwise. It is clear that he did engage with the media and, plainly, there was something about his media dealings for which he felt the need to apologise to the claimant and Prince Harry. All of the correspondence to which I have referred – including the telephone call - was personal and private in character. There is no basis on which to suppose that any of it was created, crafted, or curated by the claimant or Prince Harry for the purposes of public consumption. The defendant makes no such suggestion.
42. Thereafter, Mr Markle continued to have dealings with the media in which he spoke for publication about his relationship with the claimant and Prince Harry.
- (1) He gave an interview to Piers Morgan on ‘Good Morning Britain’ in June 2018 in which (so the defendant reported, and the claimant agrees), he revealed private conversations with Prince Harry about Brexit and President Trump because (as Mr Markle later explained in a text): “you guys don’t respond back to me.”
  - (2) Mr Markle gave an interview to the defendant which resulted in a MailOnline article dated 28 July 2018, headed “Perhaps it’d be easier if I was dead: Heartbroken Thomas Markle says his daughter is ignoring him and has changed all her numbers since marrying Harry ... but he WON’T let the Palace silence him”. The article reported several criticisms or complaints Mr Markle was said to have made about the claimant. These included a claim that she had “cruelly excised him from her life.” It appears that Mr Markle is unhappy with at least some aspects of this article, which he does not consider a fair reflection of the interview.

Approved Judgment

43. The account of Mr Markle's conduct which the defendant published in the Mail Articles includes reference to "a series of damaging interviews" given by him. The claimant adopts that description.

**The Letter**

44. On 27 August 2018, the claimant sent the Letter to her father. She used the FedEx service, as a result of which it was delivered personally. It is necessary, for the purposes of this judgment, to set out not only the parts of the Letter which the defendant published in the Mail Articles, but also some other parts of the Letter. Some of these have been relied on at this hearing. Others have not yet been made public, but I consider it directly relevant and necessary in order to show the words selected by the defendant in their context, and to explain my conclusions. I have sought to safeguard the privacy of those concerned by omitting parts of the Letter that do not need to be included here.
45. In the text below, the bold underlining identifies words that were published by the defendant. Where I have omitted some passages, I have inserted explanatory wording, to summarise what has been left out. I have broken the text into numbered paragraphs, for ease of reference later.

**"Daddy,**

**[1] It is with a heavy heart that I write this, not understanding why you have chosen to take this path, turning a blind eye to the pain you're causing.** The last time we spoke was 7 days before our wedding when Harry and I called you. This was followed by a turbulent and confusing week where we called you multiple times a day to try to understand what was happening.

**[2] From my phone alone, I called you over 20 times and you ignored my calls, opting instead to solely speak to tabloids - leaving me in the days before our wedding worried, confused, shocked, and absolutely blindsided.**

**[3] Post wedding you then made a choice to begin an onslaught of media interviews, which are still ongoing. Your actions have broken my heart into a million pieces - not simply because you have manufactured such unnecessary and unwarranted pain, but by making the choice to not tell the truth as you are puppeteered in this. Something I will never understand.**

**[4] You've told the press that you called me to say you weren't coming to the wedding - that didn't happen because you never called. You've said I've never helped you financially and you've never asked me for help which is also untrue; you sent me an email last October that said, "if I've depended too much on you for financial help then I'm sorry but please if you could help me more, not as a bargaining chip for my loyalty.** You already have that whether you realize it or not."

Approved Judgment

[5] And while I still refuse to read any press, it was shared with me what you said about ... [*Here, the claimant complained that her father had been unjust in what he wrote about a relative, and the claimant's behaviour towards that relative. She provided a detailed rebuttal.*].

[6] **I have only ever loved, protected, and defended you, offering whatever financial support I could, worrying about your health** be it your ... [*Here, the claimant referred to a number of health problems encountered by her father.*] ..., **and always asking how I could help.**

[7] **So the week of the wedding to hear about you having a heart attack through a tabloid was horrifying. I called and texted** you and desperately tried to find out about the medical treatment you would need and where you would be. **I begged you to accept help - we sent someone to your home,** tried to have them drive you to the hospital, to get the best care and protection for you, **and instead of speaking to me to accept this or any help, you stopped answering your phone and chose to only speak to tabloids.** I will never understand why especially with you knowing I have always looked out for your health. ... [*Here, the claimant wrote about the nature and content of conversations with her father over the past 10 years*]

[8] ... in the last two years your obsession with tabloid media only exacerbated my worry for you, which is why **I pleaded with you to stop reading the tabloids. On a daily basis you fixated and clicked on the lies they were writing about me, especially those manufactured by your other daughter, who I barely know.** ...

[9] [*The claimant wrote about her upbringing, her half-sister and their relationship*]... Though you feel you did your best to stop her while **you watched me silently suffer at the hand of her vicious lies, I crumbled inside.** ... [*... The claimant described her feelings about her father's health ...*] ...

[10] I ... urged you day after day to stop reading the tabloids. But you couldn't - and your fascination grew into paranoia (and then rage) of how you were being portrayed. You know how much anguish tabloid press has caused – lies simply for click bait. So to suffer through this media circus created by you is all the more devastating. You continue to be manipulated by the press, who are likely promising you the world to keep churning out these fictitious stories, yet still ridiculing you. The lies you have been paid to share about me, about our help for you, ... [*Reference was made to support the claimant says her father received*] ... - is staggering and confusing. [*... Reference was made to the contents of correspondence sent by Mr Markle ...*]

[11] **We all rallied around to support and protect you from day one and this you know. So to hear about the attacks**

**you've made at Harry in press, who was nothing but patient, kind, and understanding with you is perhaps the most painful of all.** I will truly never understand it.

**[12] For some reason you choose to continue fabricating these stories, manufacturing this fictitious narrative, and entrenching yourself deeper into this web you've spun. The only thing that helps me sleep at night is the faith and knowing that a lie can't live forever.**

[13] My hope is that you can take a moment to reflect on this. To remember our conversation seven days before the wedding when we asked you if the claims of you working with the paparazzi and press were true and told you if we tried to protect you from the story running (something we've never attempted to do for anyone - ourselves included) that we wouldn't be able to use that strength to protect our own children one day. Even knowing that, you said it wasn't true.

**[14] I believed you, trusted you, and told you I loved you. The next morning the CCTV footage came out. You haven't reached out to me since the week of our wedding, and while you claim you have no way of contacting me, my number has remained the same. This you know. No texts, no missed calls, no outreach from you – just more global interviews you're being paid to do to say harmful and hurtful things that are untrue.**

**[15] If you, love me, as you tell the press you do, please stop. Please allow us to live our lives in peace. Please stop lying, please stop creating so much pain, please stop exploiting my relationship with my husband, and please stop taking the bait from the press. I realize you are so far down this rabbit hole that you feel (or may feel) there is no way out, but if you take a moment to pause I think you'll see that being able to live with a clear conscience is more valuable than any payment in the world.** I ask for nothing other than peace, and I wish the same for you.

Meg”

### **Mr Markle's reply**

46. In September 2018, Mr Markle sent a letter in reply. This is not in evidence, but some passages are public as they were contained in the Mail Articles, evidently with Mr Markle's consent. These reported (and the claimant agrees) that Mr Markle's letter ended as follows:

“I wish we could get together and take a photo for the whole world to see. If you and Harry don't like it? Fake it for one photo and maybe some of the press will shut up.”

### **The People Article: “The Truth about Meghan”**

47. The article was published in a print edition of the magazine that bore the date 18 February 2019, but (as often is the case with magazines) it was published some time earlier. The hard copy was first published on 6 February 2019, and the same or substantially the same material appeared in three online articles on the People website during the morning of that day.
48. In the hard copy version, the article was the cover story, and there was a photo of the claimant that occupied most of the Contents page. There was then a full-page photograph, and a title page to the inside story, followed by a further 6 pages of content comprising photographs and some 27 lengthy paragraphs of text, interspersed with “rag-out” quotes.
49. I have quoted the main headlines at [2] above. There was a further sub-headline to the inside story:

“AFTER STAYING QUIET FOR NEARLY 2 YEARS, THOSE WHO KNOW MEGHAN BEST ARE SETTING THE RECORD STRAIGHT: 'WE WANT TO STAND UP AGAINST THE GLOBAL BULLYING WE ARE SEEING AND SPEAK THE TRUTH ABOUT OUR FRIEND'”.

As these headlines indicate, this was an article based on interviews with the Five Friends, each of whom spoke on condition of anonymity; and the stated purposes were to correct the record and defend the claimant against false and harmful publicity.

50. The sixth paragraph of the People Article contained a passage attributed to a “Longtime friend”, which gave an account of the events of 12-14 May, the Letter and Mr Markle’s reply. Again, I have broken the text into shorter paragraphs and given them letters, for ease of reference. The emphasis is mine.

#### **“Longtime friend:**

[A] The Saturday before the wedding, she and Harry were told that a story was going to come out the next day saying that Tom was staging pictures with the paparazzi. Their team told them that if the story was fake, they could file a complaint. So Meg calls Tom and asks him, and he's swearing up and down that it's not true. The next day the pictures came out. Even with all that, Meg and Harry were still so focused on getting him to London. At no point was there talk of "Now that we know he lied, he's in trouble." Tom wouldn't take her calls, wouldn't take Harry's calls.

[B] The next morning when the car got there [to take him to the airport], he wouldn't get in. [Later] Meg heard he had a heart attack and she's calling and texting, even up to the night before the wedding. It was like, "Please pick up. I love you, and I'm scared." It was endless.

[C] After the wedding she wrote him a letter. She's like, "Dad, I'm so heartbroken. *I love you. I have one father. Please stop*

Approved Judgment

*victimizing me through the media so we can repair our relationship.*" Because every time her team has to come to her and fact-check something [he has said], it's an arrow in the heart.

[D] He writes her a really long letter in return, and *he closes it by requesting a photo op with her.* And she feels like, "That's the opposite of what I'm saying. I'm telling you I don't want to communicate through the media. Did you hear anything I said?" It's almost like they're ships passing. ..."

51. It is an agreed fact, and I also agree, that the account of the Letter and the claimant's purpose in sending it is inaccurate: contrary to the words I have emphasised in paragraph [C], the claimant did not write "I have one father"; she did not state that her father had "victimised" her; and the Letter did not seek to repair the father-daughter relationship - it was not an "olive branch"; its main purposes were to reprimand Mr Markle or take him to task for his previous conduct, and to try to dissuade him from talking to the press in future. The defendant and Mr Markle have other criticisms of the People Article, including criticisms of the words I have emphasised in paragraph [D], about Mr Markle's letter in reply.

### **Mr Markle and the Mail on Sunday**

52. Mr Markle's evidence is that, having read the People Article, he was shocked by what it said about him. It "misrepresented the tone and content of [the Letter]" and he quickly decided that he "wanted to correct that misrepresentation". He also states that the People Article misrepresented his reply, as it "implied that I wanted a photo for publicity reasons". Having never intended to talk publicly about the Letter, he decided that he had to defend himself publicly against these misrepresentations, and against other aspects of the People Article containing what he describes as vilification of him "by making out that I was dishonest, manipulative, publicity-seeking, uncaring and cold-hearted, leaving a loyal and dutiful daughter devastated." He therefore decided to "reach out" to Caroline Graham of the Mail on Sunday. The paper "respected my wish to publish extracts from [the Letter]". He chose the extracts, with the sole purpose of defending himself "by countering the impression given of me and of the letters between Meg and me" by the People Article.
53. Mr Verity's statement summarises the People Article, saying (among other things) that "it included a description of the contents of [the Letter] ... and of the letter he had written to her in response, and the claimant's reaction to that response." He refers to the People Article as a major news event reported in news media all over the world, including MailOnline. Mr Verity gives hearsay evidence of the dealings between Mr Markle and Caroline Graham, "the defendant's Los Angeles-based reporter". Mr Verity's account is that Ms Graham "was in touch with the claimant's father (whom she already knew)" and discussed what had been published. It then "emerged" that "he considered" that "the events described including their correspondence after the wedding, had been very seriously misrepresented", and that his own letter, and the events leading up to the wedding had been described in a way that was unfair to him. Mr Markle "wanted to show people that what they might have read in People magazine was inaccurate and unfair to him". So, he gave Ms Graham a copy of the Letter and provided her with information as to "the various ways in which [the People Article and the Letter] in his view contained false information."

Approved Judgment

54. Mr Verity gives an account of his own editorial assessment that there were “good reasons to publish the story that Caroline produced”. In summary, he says it seemed clear that the tone and contents of the Letter had been misrepresented, in a way that was unfair to Mr Markle. It seemed that “what Tom was saying was credible and that he was entitled to correct the record”. There were other good reasons to report the story. Mr Markle’s information “called into question” the conduct and behaviour of the claimant as a “prominent member of the Royal family”. It appeared that she had “used” People magazine to promote a particular positive image as part of what the defendant called “Meghan’s media fightback” and there were “serious questions around the appropriateness” of that fightback. He was clear in his mind that it was “absolutely vital” to quote from the Letter, for the purposes of ensuring credibility. This was particularly important since “the point ... was not just to convey what was in the Letter but rather to correct a misleading description in a previous report”; but they were selective in what they used. The evidence does not reveal how the defendant came by Mr Markle’s letter of reply, but I infer that it was provided in the course of these exchanges.

**The Mail on Sunday and the claimant**

55. At no stage prior to publication of the Mail Articles did the defendant make any contact with the claimant in relation to their proposed content.

**The Mail Articles: Sunday 10 February 2019**

56. The defendant’s coverage was spread across five articles in the print edition of the Mail on Sunday and MailOnline. As Mr Verity says, the story was covered in different ways in these different media. In the hard copy there was a prominent front-page trailer, with a photograph of the claimant and her father under the heading “WORLD EXCLUSIVE” and an invitation to go to pages 4-7 to read about “Meghan’s shattering letter to her father”. Pages 4-7 contained two 2-page spreads. All of the wording I have highlighted above appeared over these five pages, and each passage appeared repeatedly. The minimum number of repetitions was one and the maximum was 12. Taken together, the articles contained 88 separate instances of quotation from the Letter.

*The ‘True Tragedy’ Articles*

57. The first of the 2-page spreads was on pp4-5 with the headline that I have quoted at [2] above (“Revealed: the letter showing true tragedy ...”). A corresponding piece appeared online under the same headline. I shall call these “the True Tragedy Articles”. It is unnecessary to set them out in full, but I need to identify some of the main features.

- (1) Both versions began as follows:

“THE full content of a sensational letter written by the Duchess of Sussex to her estranged father shortly after her wedding can be revealed for the first time today.”

- (2) Both versions referred to what had been said by the Five Friends to People and contained indirect quotations from Mr Markle to the effect that the Letter “is far from conciliatory and has left him feeling devastated”. He was further reported as saying that it was “unfair” for the friends to “spin a line” while he was being

Approved Judgment

“criticised for ‘giving a handful of interviews to the press’”. The article reported that Mr Markle had described the claimant’s reading of his own letter as a “tragic misunderstanding” he wished he could put straight.

- (3) There was a story-within-a-story (on page 4 of the print edition) headed “HOW MEGHAN’S MEDIA FIGHTBACK LED HER DAD TO REVEAL LETTER HE WANTED TO KEEP SECRET”, containing the following:

“THE Duchess’s father told no one about her letter and planned to ‘keep it totally private out of respect for her’ – until her friends launched their ‘attack’ on him last week.

...

Meghan is said to have authorised five of her closest friends to speak to US People magazine to correct the falsehoods.

The article painted Meghan in a glowing light, while insisting the negative stories about her were lies. But Mr Markle says Meghan’s decision to reveal the private letter in the pages of the magazine left him with no choice but to go public: ‘The letter was presented in a way that vilified me and wasn’t true,’ he said last night. ‘It was presented as her reaching out and writing a loving letter in the hope of healing the rift, but the letter isn’t like that at all. Meghan can’t have it both ways. She can’t use the press to get her message across but hang me out to dry. I have the right to defend myself.’”

- (4) About half the True Tragedy Articles (nearly all of page 5 of the print edition) was taken up with a section headed “MEGHAN’S BOMBSHELL LETTER”. This featured a photograph of the opening paragraph of the handwritten letter, a transcript of that paragraph, and some description of and commentary on that paragraph: “Meghan’s sad opening message to ‘Daddy’ as she sits down to pour out her heart to her estranged father over five handwritten pages”. Six further passages were extracted and transcribed. Each was presented under its own headline, with a summary or commentary and Mr Markle’s response in a “blob” beneath. Using the paragraph numbering at [45] above, the presentation was as follows:

“YOU ARE BEING ‘PUPPETEERED’

[3] (“Your actions have broken my heart into a million pieces ...”)

- The Duchess claims Mr Markle causes her pain by being manipulated in the media but he insists ‘I love her with all my heart’.

YOU NEVER CALLED ME

[4] (“You’ve told the press that you called me ...”)

- Mr Markle insists: ‘I sent Meg and Harry a text telling them I wasn’t coming. It was too dangerous after my heart attacks.’

I HELPED YOU FINANCIALLY

[5] (“You’ve said I’ve never helped you financially ...”)

- Mr Markle says he only asked for help to move house and that any ‘modest’ financial gifts from Meghan were ‘greatly appreciated’.

I BEGGED TO HELP YOU

[6] & [7] (“I have only ever loved, protected and defended you ...”)

- Her father says: ‘I didn’t stop answering my phone. I was in hospital with a heart attack! Meg and Harry know what was going on.’

YOU WATCHED ME SUFFER

[8] (“I pleaded with you to stop reading the tabloids...”)

- Meghan complains Thomas sided with her half-sister Samantha in criticising her, but he insists: ‘I never wanted Meg to suffer.’

COME OUT OF ‘RABBIT HOLE’

[15] (“If you love me, as you tell the press you do ...”)

- Mr Markle comments: ‘I have no idea what this means. This is pure Harry. Americans don’t use the “rabbit hole” expression.’”

*The Harry Articles*

58. The second two-page spread in the print edition, on pp6-7, was headed “Meghan: Stop painful attacks on Harry; Her dad: I like him ... I’ll always love you”. Similar content appeared on MailOnline, under a similar headline. I shall call these “the Harry Articles”. Again, it is appropriate to identify some key features.

(1) The articles ran to 48 paragraphs of text, wrapped around a box headed “MEGHAN’S LETTER (PART 2)” with the sub-headline “I believed you ... until I saw those CCTV images”.

(2) The body of the Articles opened as follows:

“FOR months, the letter has stayed concealed in his battered black leather briefcase inside a simple FedEx envelope. Five pages, written in his daughter’s distinctive, elegant script – he shared it with no one because, he says: ‘It was just too painful.’

‘When I opened the letter I was hoping it was the olive branch I’d hoped for,’ he said last night. ‘I was expecting something that would be a pathway to reconciliation. Instead, it was deeply hurtful. I was so devastated I couldn’t show it to anyone and never would have had it not been for the events of last week.’

Indeed, the existence of the letter – in which his daughter chastises her father time and again – was revealed by anonymous friends of the Duchess in a magazine article published in the US

Approved Judgment

on Wednesday. It was portrayed as a loving missive from a heartbroken daughter anxious to heal the rift with her father.

Except it wasn't.

'There was no loving message in there, nothing asking about my health, nothing from her saying, "Let's get together and heal our differences,' Mr Markle, 74, said last night."

- (3) Half the content of the box (the section on page 6 of the print edition) followed the format adopted in the True Tragedy Articles: an excerpt from the Letter, headlined, and accompanied by commentary and response. The presentation, using the paragraph numbering at [45] above, was as follows:

“WE RALLIED AROUND YOU

[11] (“We all rallied around to support and protect you from day 1 ...”)

- Thomas Markle says: ‘I’ve never attacked Harry. I asked him to man up.’

YOU MADE UP STORIES

[12] (“For some reason you choose to continue fabricating these stories ...”)

- He insists the Duchess is mistaken: ‘I have only ever spoken out in response to fake narratives and lies.’

I TRUSTED YOU

[14] (“I believed you, trusted you and told you I loved you ...”).

- The Duchess refers to the MoS paparazzi photos story, he insists he continued to reach out”

Next to this last blob was a photograph of the Mail on Sunday’s front page article about the staged photos.

- (4) The Harry Articles also included the following (at paragraphs 21-24):

“.....– to portray this as a loving letter is ridiculous.

‘Love isn’t mentioned once in the entire thing. Meg wrote me tons of letters and cards over the years. She always signed off with “Love” or “Love you”.

‘This letter is cold. When she signs off it’s “Meg”. You read the way it ends and it felt like a final farewell to me. It doesn’t even start out with “Dear”. It’s just “Daddy”.’ He continues: ‘Meg accuses me in the letter of cashing in but I’ve only accepted a few payments. I worked it out and if I’d taken all the offers I’ve had. I could have made \$600,000. I haven’t done that.’

He insists he *did* try to heal the rift in ‘multiple’ text messages, calls and in a heartfelt four-page letter he sent to Meghan after receiving hers.”

Approved Judgment

- (5) On page 7 of the print edition, the other half of the box contained three excerpts from Mr Markle’s reply, presented in the same format as the extracts from the Letter, as follows:

“MY HEART ATTACK

The last time we talked was about three days before the wedding because I was in a hospital bed and had just had my procedure... When you sent all the help to my home, I was in hospital with my second heart attack!

- The Duchess insisted she phoned him, but he had no missed calls

I DIDN’T ATTACK HARRY

When did I attack Harry? The only thing I said is if we had a disagreement, ‘get over it’. We had disagreements and he was protecting you from, me, but I didn’t feel I was attacking him??

- Mr Markle says he never attacked Harry, but feels he should have met him before the wedding

YOU CAN HATE ME IF YOU WANT

You can hate me if you want. I can’t force you. I made a big mistake... I’m human and I’m sorry! How much longer must I say it?? I wish we could get together and take a photo for the whole world to see. If you and Harry don’t like it? Fake it for one photo.

- Mr Markle insists his bid to reduce press intrusion was ‘completely misinterpreted’”

- (6) The body of the Articles continued on page 7, and included this (at paragraphs 30-31, 37-38 and 44-45):

“The Duchess’s letter accuses him of asking for money ...

Mr Markle responds that the Duchess – worth a reported \$4million before she married – never supported him financially ... She would send money at Christmas, birthdays. It was a couple of grand here or there.

...

The Duchess’s letter talks of her hurt when her father denied cooperating with the paparazzi pictures only for this newspaper to publish CCTV footage of him colluding with a photographer: ‘I believed you, trusted you and told you I loved you. The next morning the CCTV footage came out.’

He says: ‘I’ve apologised for that a hundred times. I made a mistake, I shouldn’t have done it but how many times do I need to say “I’m sorry?” I did the pictures because I was tired of being portrayed as a slob. They were calling my home a shack.’

...

Approved Judgment

In People magazine, the Duchess’s friend dismissed her father’s letter, saying he used it to ask for a ‘photo op’. In fact, Mr Markle wrote: ‘I wish we could get together and take a photo for the whole world to see. If you and Harry don’t like it? Fake it for one photo and maybe some of the press will shut up!’

He says: ‘That request was totally misinterpreted. When Doria was photographed with Meghan and Harry for the first time it took the heat off Doria. It showed she was part of the family. I don’t want a picture for any other reason than if we show harmony then the press will back off.’”

*The Handwriting Article*

59. The online material included a further section that did not appear in hard copy. It reported the opinions of two handwriting experts who had analysed the Letter “to reveal the insights it gives into her character”, and was headed “Secrets of Meghan’s letter revealed: Note to her father saying her heart has been ‘broken into a million pieces’ reveals she is a ‘narcissistic showman whose self-control is wavering.’” I shall call this “the Handwriting Article”.
60. The Handwriting Article ran to over 30 paragraphs. It quoted “the UK’s leading handwriting expert”, Emma Bache, as claiming the “highly stylised” letter suggested the claimant was “ultra-cautious” but also “a showman and a narcissist”. A number of further characteristics were identified. It was said, among other things, that she is “self-aware” and “self-orientated” but “suffers from anxiety” and has “some wavering of self-control.” She is “stubborn, but ... ambitious, very hard-working and driven”. According to another expert, Tracey Trussell, the letter was said to show “high emotional responsiveness”, that “this matter is clearly affecting Meghan deeply”, and “how much Meghan cares”. The article was illustrated with a diagram containing a picture of paragraph [1] of the Letter in its handwritten form, with arrows indicating various features such as (for instance) “narcissistic elaborate flourishes”.

**This action**

61. A letter of claim was sent on Thursday 14 February 2019, complaining of breach of the claimant’s privacy, her data protection rights and her copyright. Following protracted correspondence, the claim form was issued on 29 September 2019.
62. As I have mentioned, there have been several rounds of amendment. For present purposes, the most significant are the last two sets of amendment to the Defence, which arose mainly from the publication of the Book, in August 2020. In September 2020, and again in October 2020, the defendant amended its case to advance new allegations that the claimant and Prince Harry had provided information and photographs for, and co-operated with, the Authors in the writing and publication of the Book, which “sets out in detail information about their private and family lives.”

**The Book**

63. The defendant relies on the contents of the Book, in support of (i) its case on co-operation and its case that any expectation of privacy in the Letter has been “compromised” by her conduct in that she (ii) has permitted information about her own

Approved Judgment

private life and correspondence “to enter the public domain by means of the Book” and (iii) does not object to details of her own or others’ personal relationships and correspondence being publicly disclosed, provided the disclosure is favourable or flattering. A large number of passages is cited in the Defence. But the most relevant are those contained in 12 paragraphs over pages 232-233, which I need to set out. Again, the paragraph lettering has been added by me:-

“[i] Two days later, *The Sun* ran another interview with Thomas, who this time threatened that he might show up unannounced if he didn’t hear from Meghan. “I want to see my daughter. I’m thinking about it,” he said. “I don’t care whether she is pissed off at me.”

[ii] It’s sad that it’s got to this point,” he continued. “I’m sorry it’s come to this. Yes, some of it is my fault. But I’ve already made it clear that I’m paying for this for the rest of my life.”

[iii] Anyone else spreading falsehoods would have been easier to discredit. But this was Meghan’s father. Thomas had cut himself off from the Palace completely and was consulting only with Samantha by this point. Meanwhile, writers began penning editorials about the many ways in which the Palace had mismanaged the whole affair with the Markle family. Thomas put the Palace and Meghan in a no-win situation.

[iv] Unlike Harry, who often scoured the press and checked out some of the royal correspondents’ Twitter accounts, Meghan tried to avoid her press. Still, diligent communications staffers and friends contacted her when anything came out that was especially heated or litigious, so she was apprised of most of the hurtful commentary.

[v] One of her closest friends said a heartbroken Meghan “wanted to repair the relationship.” Despite the many humiliations she had suffered, as summer came to a close, Meghan made one final effort to communicate with her father in the form of a five-page letter.

[vi] “Daddy, it is with a heavy heart that I write this, not understanding why you have chosen to take this path, turning a blind eye to the pain you’re causing,” she wrote. “Your actions have broken my heart into a million pieces, not simply because you have manufactured such unnecessary and unwarranted pain, but by making the choice to not tell the truth as you are puppeteered in this. Something I will never understand.”

[vii] Meghan pleaded with her father in writing: “If you love me, as you tell the press you do, please stop. Please allow us to live our lives in peace. Please stop lying, please stop creating so much pain, please stop exploiting my relationship with my husband.”

Approved Judgment

[viii] Thomas carried his daughter’s handwritten letter in its FedEx envelope in his briefcase for months, not sharing it with the media because it showed the many discrepancies in his tabloid revelations. He replied with his own four-page letter, in which he suggested a path forward, toward a reconciliation.

[ix] The best way they were going to get past everything, he wrote in a reply letter, would be to stage a photo op for the press where himself, Meghan, and Harry are together and happy.

[x] Meghan couldn’t believe it. “I’m devastated,” she confessed to a friend. “My father’s clearly been fully corrupted.”

[xi] “It is so painful for her because she was so dutiful. Giving him money. Trying to give him whatever help he needed,” a confidant said. “She will always feel devastated by what he’s done. Always, but at the same time, she has a lot of sympathy for him. Because he never went knocking on the press’s door. He was silent for almost two years. Then they just sort of whittled him down. Bombarding him every day. Moving in next door to his house. He couldn’t escape it. So now, it’s just like he’s so far gone.”

[xii] She didn’t reach out again. Instead, Meghan put up what her father described in one of the many interviews he gave following their written exchange as a “wall of silence.””

Stage one: reasonable expectation of privacy

64. The issue between the parties is whether the claimant enjoyed “a reasonable expectation that the contents of the Letter were private and would remain so”; or whether she had no such reasonable expectation. This way of framing the issue reflects the language of the rival cases, as summarised in paragraph 8 of the Particulars of Claim and paragraph 13 of the Defence. It also reflects the legal position: at this stage of the analysis the issue is binary, the only available answers being yes or no. The claimant will fail on the issue, and the defendant will succeed, only if the court concludes that the information at issue and/or the surrounding circumstances were such that it would be unreasonable for the claimant to expect the defendant to treat the information as private and not for publication or – putting it another way - that the reasonable person of ordinary sensibilities placed in the position of the claimant would not feel substantial offence at the disclosure in question. Factors relied on as undermining the claimant’s case, but which fall short of defeating it altogether, may come into play at the second, balancing stage.
65. The question is not of course an abstract one. It is to be answered in relation to the particular disclosures complained of. This means that in a case like this, where complaint is made of continuing publication, there is a potential complication: in principle, the answer to this first question might differ, according to the time at which one is asking it. Developments in the factual matrix could result in a person’s privacy rights in respect of particular information being so impaired over time that she ceases

Approved Judgment

to enjoy any reasonable expectation that the information will remain private. I am however satisfied that this factor has no bearing on the answer in the present case.

66. There are two main questions for me. First, whether the Defence sets out any case which, assuming it to be true, would provide a reasonable basis for finding that there was, at any material time, no reasonable expectation of privacy. Secondly, whether the defendant has any realistic prospect of successfully defending this issue at trial. In my judgment, the answer to both questions is no. Nothing that the defendant has pleaded in answer to this part of the claimant's case provides any reasonable basis for defending the issue. I also consider that there is no real prospect of the Court concluding after a trial that, at the time the Mail Articles were published, or at any material time between then and now, the contents of the Letter were not private, or that the claimant did not enjoy a reasonable expectation that they would remain private.
67. The defendant's case is complex and multi-faceted. I accept that the Court must not be blind to its various subtleties, or to the fact-sensitive nature of the analysis required. But in reality, there is much that is plain and obvious.
68. First, it is clear that none of the detailed contents of the Letter had entered the public domain by the time of the publication complained of. This, indeed, was the very essence of the Mail Articles, which trumpeted that they "Revealed" the contents of the Letter "for the first time" over four pages of "World Exclusive" print coverage. The articles reported that the Letter's "*existence* emerged" in the People Article (my emphasis). All of this was accurate. The People Article had disclosed the existence of the Letter, and provided a broad description, but not its detailed contents. The defendant does not suggest otherwise. Its pleaded case is that the People Article "included details about the Claimant's relationship with her father, and *information about* the Letter and its contents" (emphasis added). The defendant could hardly go beyond this, for the reason already given and two further reasons. The first is that this is plainly all that the People Article did. The other is that the main basis on which the defendant seeks to justify its own exclusive publication is that the People Article *did not* reveal the contents of the Letter, but instead gave a misleading summary which called for or justified a response.
69. Secondly, there is no room for serious debate about some aspects of the *Murray* factors, objectively assessed. (1) The claimant was a prominent member of the Royal Family, and in that sense a public figure, who had a high public profile, and about whom much had been and continued to be written and published; this is an important feature of the background and the circumstances but (2) the nature of the "activity" in which she had engaged was not an aspect of her public role or functions; she was communicating to her father about his behaviour, its impact on her, her feelings about it, and her wishes for the future; and (3) she was doing this in a letter sent to him alone, privately, by means of a courier service. (4) The "intrusion" involved the publication of much if not most of the information in the Letter by way of sensational revelations over four pages of a popular newspaper and online, to a very large readership; and that, in broad terms, was the purpose of the "intrusion". (5) There was no consent, and it is beyond dispute that this was known to or could have been inferred by Mr Markle and the defendant. (6) The unwanted disclosure was likely to cause the claimant at least some distress, especially as it was done with the co-operation of her father, and in the context of a detailed and critical response by him to the content of the Letter. (7) The information was given to the defendant by the claimant's father.

Approved Judgment

70. All of these are conclusions that cannot realistically be gainsaid, and which would point firmly towards the conclusion that the claimant enjoyed a reasonable expectation that the contents of the Letter would not be published by the defendant. This is not, however, a comprehensive assessment of the circumstances of the case that are, or are alleged to be, relevant at this stage. The argument makes it necessary to consider in more detail six aspects of the case, to which I now turn.

**(1) The claimant's status and role (Factor (1))**

71. The defendant seeks to go beyond the propositions I have already set out. It is argued that the claimant's role as a public figure in receipt of public funds, carrying out duties on behalf of the Crown, meant that her "conduct, character, and familial relationships are and were at the time of publication subject to public scrutiny". It is said that "her relationship with her father and the circumstances in which he did not attend her wedding were matters of public interest" and that this is confirmed by the fact that the Palace issued a public statement about those matters. These are generalities, some of which have merit or arguable merit as far as they go. As I have said, she is indeed a public figure. She must accept a degree of intrusion that others would not have to bear. But it has long been established that a public figure does not, by joining that select group, give up her right to a private life, or open up every aspect of her private and family life or correspondence to examination in the press.
72. When examined more closely, the argument proves elusive in some ways and untenable in others. Does the assertion that the claimant's "familial relationships ... were ... subject to public scrutiny" amount to more than a claim that details of her relationships were in fact being publicised? Is it an assertion that everything about them was fair game for the press? I doubt it. It cannot be said without qualification that the claimant's "relationship with her father" was a matter of public interest. Even if it could, that would beg the question of whether it followed that she had no privacy rights in relation to the details of an anguished private letter pouring out her heart. The proposition that the public interest in the relationship is confirmed by the Palace making a statement about it is clearly fallacious. It is in my judgment impossible to say that the factors listed in the pleaded case or in submissions, assuming the facts were made out, could have such a significant bearing on the answer to the first question in this case as to lead the Court to conclude that, alone or in combination with the other circumstances, they deprived the claimant of any reasonable expectation of privacy in the contents of the Letter.

**(2) Were the Letter or its contents private in nature? (Factor (2))**

73. Plainly, the Letter falls within the scope of Article 8 as "correspondence" that contains matter relating to the "family life" of the claimant and her father. It is obvious that, to some extent at least, the document and its subject-matter are both private in nature, and relate in various ways to the "private life" of the claimant. In the jargon, Article 8 is "engaged". That is not conclusive of the question whether the claimant enjoyed a reasonable expectation of privacy: *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808 [2012] EMLR 2 [38]. But the claimant's case, that the Letter "contained [the claimant's] deepest and most private thoughts and feelings" bears close comparison with the descriptions given in the Mail Articles. According to these articles this was "Meghan's private letter" which reveals the "true tragedy of Meghan's rift with her father" as she "pours out her heart to her father". It was an "anguish[ed] letter in response to public attacks ... begging him to patch up their differences privately",

Approved Judgment

which Mr Markle “planned to keep ...totally private out of respect for her”. In an earlier judgment, I referred to an article which the defendant published the day after the Mail Articles, describing the Letter as “deeply personal”.

74. Nonetheless, the defendant’s legal argument takes issue with the claimant’s case that the Letter was “obviously private correspondence”. The pleaded case (at paragraph 13.2 of the Defence) is that “as a general principle, a recipient of a letter is not obliged to keep its existence or contents private, unless there are special circumstances, such as a mutual understanding between sender and recipient that the contents of a letter should be kept private.” This way of putting it has not been pressed, and rightly so. It is at odds with a large body of authority, in this jurisdiction and in Strasbourg, which identifies a general rule in relation to personal correspondence of this kind which is to the opposite effect. As Gray J put it in *Maccaba v Liechtenstein* [2004] EWHC 1579 (QB), [2005] EMLR 6 [4], “as a general rule correspondence between A and B on private matters such as their feelings for one another would be a prime candidate for protection.” See also *Toulson and Phipps on Confidentiality (4<sup>th</sup> Ed.)* at [1.004], [1.012] and [1.045]. The law is aptly summarised in *Gatley on Libel and Slander 12<sup>th</sup> ed* (para 22.5 n 41): “One’s correspondence with others .... is presumptively private in nature”.
75. In argument, however, Counsel contend that the claimant’s case in this action is inadequately particularised, and unexplained, citing *Holyoake v Candy* [2017] EWHC 373 (QB) [47]. They also put forward a more subtle account of the relevant legal principles. They argue, first, that the question of whether a letter is private must depend on the nature of the letter; a complaint letter to a doctor might reasonably be viewed as private and confidential whilst a complaint letter to a local councillor might not be. Secondly, it is submitted that it is also necessary to focus on the detail of the particular information in issue, and the extent to which this relates or “belongs” to the claimant and is private in character. Where two people have shared experience, the rights of each must be taken into account, and each has a right to speak about their own life story. Cases cited in support of these arguments include *Theakston v MGN* [2002] EWHC 137 (QB), [2002] EMLR 22 [64] (Ouseley J), *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EWCA Civ 295, [2008] QB 10332, *Hutcheson v News Group* (above), *OPO v Rhodes* [2015] UKSC 32 [2016] AC 219 [75] (asserting the right of the defendant in that case to tell “his story to the world at large in the way in which he wishes to tell it”).
76. The complaint of lack of particularity has some merit; the claimant’s case could certainly have been presented in a more detailed way in the Particulars of Claim. But now the matter has been fully argued, the point is of no importance. The other submissions I have summarised can be accepted, if stated in these very broad and general terms. But in my judgment, none of them is capable of leading to or supporting the conclusion that, on the facts of this case, the claimant had no right to expect that the contents of her Letter would be treated as private and would not be published by the defendant.
- (1) This was not a business letter, or one advancing a complaint to a politician about their public conduct or functions. It was a communication between family members with a single addressee. Precautions were taken to ensure that it was delivered only to him. It was, in short, a personal and private letter. The majority of what was published was about the claimant’s own behaviour, her feelings of anguish about her father’s behaviour – as she saw it - and the resulting rift

Approved Judgment

between them: see, in particular, paragraphs [1], [3], [6], [7], [9]. These are inherently private and personal matters. The language of the Mail Articles appropriately reflected these features of the Letter in the headline to the first spread, and some of the language I have picked out already. If (which I rather doubt) it is appropriate to speak of information that “belongs” to a person, this information was the claimant’s not her father’s.

- (2) The Letter did contain information that related to Mr Markle (and some that related to others), but it was not information that related to him alone. In essence, the purpose of the Letter was to explain how the claimant saw her father’s behaviour and its impact on her, and to express her feelings about that and her wishes for the future. What it said about Mr Markle was an integral part of that form of expression. It was the claimant’s own account of aspects of his conduct. It was in many respects very broad and general in nature, consisting largely of descriptions or characterisations not specifics and detail: see for instance paragraphs [1], [3], [8], [9], [12]. It is, moreover, not an account that he accepts. In many respects, he disputes it. That is just one reason why it cannot realistically be separated out and categorised as information that “belongs” to him and not to her.
- (3) Nor can it be said that Mr Markle’s undoubted right to tell his own life story is unqualified, or that it defeats or overrides the claimant’s presumptive right to keep the contents of her Letter private. Respect for that right of the claimant does not significantly impinge on Mr Markle’s entitlement to give his own account of events in his own life. It only restricts his right to use the contents of the unpublished Letter as a means of doing so. The right identified in *OPO v Rhodes* cannot be asserted here. That was not a case of shared experience, but one about an autobiography which contained no information at all about the child claimant. More pertinent is *McKennitt v Ash*, where the Court had to address a defence that the offending disclosures relating to the claimant were not actionable because they were part of the defendant’s own life story. The Court of Appeal was unimpressed by the notion that “the ... claimant’s article 8 rights, if any, were to be subordinated to the article 10 rights of the ... defendant”: [2006] EWCA Civ 1714 [2008] QB 73 [50] (Buxton LJ). The legal principle was explained by Eady J at first instance [2005] EWHC 3003 (QB) [2006] EMLR 10 [77]:

“... in broad terms, ... if a person wishes to reveal publicly information about aspects of his or her relations with other people, which would attract the prima facie protection of privacy rights, any such revelation should be crafted, so far as possible, to protect the other person’s privacy.... It does not follow, because one can reveal one’s own private life, that one can also expose confidential matters in respect of which others are entitled to protection if their consent is not forthcoming”.

- (4) In this case, as in *McKennitt*, a close examination of the information at issue compels the conclusion that there is relatively little that Mr Markle could claim is shared experience, engaging his privacy rights. Some illustrative examples will suffice. Paragraph [1] is entirely about the claimant’s feelings, containing no substantive information about Mr Markle’s conduct. The only assertion about his conduct in paragraph [2] is “you ignored my calls”. Paragraph [3] characterises his

Approved Judgment

behaviour in the most general of terms; the focus is on the impact his “actions” have had on the claimant’s thoughts and feelings. Paragraph [6] is entirely about the claimant’s actions, thoughts and feelings – including her feelings of love - towards her father, containing nothing else that relates to him. These are but examples.

- (5) Paragraphs [13] and [14] of the Letter do contain detailed information relating to Mr Markle, but it would be untenable to maintain that the claimant has no privacy rights in respect of this information, because it relates to her father. In those paragraphs, the claimant criticises her father for lying to her and Prince Harry in a conversation 7 days before the wedding, by denying that he was working with the paparazzi. She makes the point that the CCTV footage, stills from which were published by the defendant the following day, proved this to be a lie. Although there is no formal admission of the truth of this criticism, this is the picture presented by the defendant’s publications, Mr Markle has not disputed it in his evidence, and the confessional and apologetic extracts from his letter that are quoted on page 7 of the Mail Articles appear to bear it out.

**(3) The character and location of the recipient (Factors (2) and (3))**

77. The defendant has pleaded that the claimant’s expectations of privacy in the Letter’s contents were undermined by the fact that (a) as she knew, or believed, her father was likely to disclose the contents to third parties or the media and “bound to” do so if the existence and/or contents of the Letter were referred to in the public domain, and (b) under US Law “the publication of the existence and contents of the Letter was at all times lawful”.
78. Point (a) is about the propensity or disposition of the addressee, Mr Markle, to make unwanted disclosure, and the extent to which this was or should have been known to the claimant. The pleaded case is denied, and it is certainly debatable, not least because it appears to be contradicted by Mr Markle’s own position prior to the People Article, as reported by the defendant in the Mail Articles, and hard to reconcile with the specific reasons given by him for making the disclosure in the event. But even assuming the facts to be as pleaded, they are not capable of defeating the claimant’s case that, objectively speaking, she had a right to expect her father to keep the contents of the Letter private. A person’s rights against another are not defeated by the prospect that those rights may be ignored or violated. A high level of risk-taking might be capable of affecting the assessment of damages, but does not excuse an intrusion into privacy: see *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) [2008] EMLR 20 [225-226] (Eady J).
79. Point (b) is not admitted, but it is not contradicted. It is supported by evidence. Permission has been granted to adduce expert evidence on this issue at the trial, and a letter from a New York attorney, Mr David Korzenik, is exhibited by Mr Mathieson stating that “there is no law in any state of the US or under any federal law that would render the publication of the Letter or any of its content unlawful.” In my judgment, however, the fact - if it be so - that Mr Markle or someone else might lawfully have published in the USA does not assist the defendant.
80. The issue before me is whether the claimant had a legitimate expectation that the defendant would not publish in this jurisdiction. That is a matter of English law. In our law a person does not lose their right to object to a specific disclosure by A on the

**Approved Judgment**

grounds that B could lawfully make it. An argument to that effect was rejected as “wholly misconceived” in 1988: *Stephens v Avery* [1988] 1 Ch 449, 454-5 (Browne-Wilkinson V-C) and see also cases cited in *The Law of Privacy and the Media* 3<sup>rd</sup> ed (OUP, 2016) para 11.47 and n 129. Similarly, the rights which the claimant and Mr Markle might or might not enjoy under foreign law in respect of some different hypothetical disclosure in a foreign jurisdiction appear to me irrelevant: see the interim and final decisions in *Douglas v Hello!* (a claim in respect of the publication in England and Wales of photographs taken by a paparazzo in New York): *Douglas v Hello! Ltd (No 2)* [2003] EWCA Civ 139, [2003] EMLR 28 [41] (Rix LJ) and *Douglas v Hello! Ltd (No 6)* [2003] EWHC 786 (Ch) [2003] 3 All ER 996 [211], [277] (Lindsay J) affirmed *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595 [2006] QB 125 [100-101].

**(4) Public domain**

81. Any actual disclosure of the information at issue will require consideration at stage one, especially if it places information in the public domain to a relevant audience and to a substantial extent. But the defendant’s pleaded case (in paragraph 13.8) that the claimant caused or permitted “information about the existence of the Letter and a description of its contents to enter the public domain” clearly falls short of asserting any prior disclosure of the contents of the Letter. Indeed, on a proper analysis, the defendant does not plead, nor is there any evidence, nor any real prospect of any evidence, that any of that information actually entered the public domain otherwise than via the Mail Articles – at least at any time before August 2020, when the Book was published.
82. The particulars relied on to support the paragraph of the Defence that I have quoted rely on the People Article, containing (so the defendant says again) “information about the *existence* of the Letter and a *description* of its contents” and about the father’s letter in response (the emphasis here is mine). The defendant has an elaborate factual case about how the People Article came to be published, attributing this to conversations between the claimant and her friends, and decisions about her public profile made by, or on behalf of, the claimant. The defendant relies, among other things, on the tired and illegitimate argument that the claimant must have authorised or acquiesced in the disclosure of the fact and nature of the Letter, because she did not deny this assertion when it was made in correspondence. But none of this bears on the issue under discussion here, namely public domain. The short point is that disclosure of information about the existence of the Letter and a description of its contents is not at all the same thing as disclosure of the detailed content. The distinction between fact and detail is an obvious and well-established feature of this branch of the law, vividly illustrated by this case.
83. The defendant relies on the Book, but this did not appear until August 2020. When it did, it did not contain any words from the Letter that had not already been published by the defendant. And it contained only some of those words. A comparison of the extracts in paragraphs [45] and [63] above shows that paragraphs [vi] and [vii] of the Book extract reproduced some but not all of the words which the defendant had taken from paragraphs [1], [3] and [15] of the Letter. There was nothing from paragraphs [2], [4-9], [11-12] or [14].

Approved Judgment

84. Mr Scobie’s witness statement says the words the Authors used were taken from the Mail Articles, which is consistent with the above analysis, and plausible. The defendant’s pleaded case that the information about Thomas Markle and the Letter, contained in the Book, “could only have come” from the claimant (Further Information Answer 33) is manifestly untenable. Mr Verity’s evidence that the Authors were given a copy of the Letter goes beyond the pleading, is double hearsay, and is angrily denied in Mr Scobie’s Christmas Eve letter to the Court. But I would accept there is a triable factual issue here. For the purposes of the public domain issue, however, it is one that is of no consequence. It does not matter how the quotations got into the Book. All that matters is the timing and extent of publication, which was plainly not enough to defeat the claimant’s rights against the defendant, even from the date of publication of the Book.

**(5) Other disclosures or alleged disclosures by the claimant**

85. Sometimes, public domain disclosures of similar or related information may weaken or undermine a claimant’s reasonable expectations of privacy. Here, the defendant seeks to rely on the disclosure of the existence and a description of the Letter, and other disclosures about other aspects of the claimant’s life and relationship with her father, all or some of which she is said to have authorised.
86. At one time it was thought that disclosures in a given “zone” of a person’s private life could defeat or at least greatly reduce the weight of any claim for privacy in respect of other information in the same “zone”. That theory has been discredited. In the modern law, it is recognised that the respect for individual autonomy that lies at the heart of Article 8 means that the starting point is a person has the right to exercise close control over particular information about her private life: to decide whether to disclose anything about a given aspect of that life and, if so, what to disclose, when, to whom: see *Re Angela Roddy (A Minor)* [2003] EWHC 2927 (Fam) [2004] EMLR 8 [36] (Munby P), *Campbell v MGN Ltd* [2004] 2 AC 457 [51] (Lord Hoffmann), *McKennitt v Ash* [2008] QB 73 at [55] (Buxton LJ), and *R (Wood) v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [2010] 1 WLR 123 [21] (Laws LJ). It is in my judgment fanciful to suppose that a Court might find, after a trial, that any of the other disclosures or alleged disclosures, alone or in combination with the other factors relied on, placed so much relevant information about these matters in the public domain that the claimant lost any right to privacy in the contents of the Letter.

**(6) The claimant’s intentions**

87. A separate line of argument, which came to the fore in the submissions of Counsel, involves reliance on the claimant’s alleged *intention* to publicise the Letter. The pleaded case is that the Court should infer that the Letter was “written and sent with a view to it being read by third parties and/or disclosed to the public, alternatively knowing that the same was very likely.” I have dealt with the allegation that Mr Markle was likely to disclose it. I now focus on the allegation of intention. The factual side of this argument is elaborate. I note, to begin with, that it has two separate aspects: an alleged intention that the Letter be read “by third parties” or that it be “disclosed to the public”. These would be very different things, if they came to pass. The factual case has several strands. It is said that the Letter was very carefully handwritten, and that the claimant kept a copy. An inferential case is advanced that the claimant was “considering using the Letter as part of a media strategy to improve or enhance her image.” The basis

Approved Judgment

for this inference is that the claimant disclosed the contents of the Letter to the communications team at Kensington Palace and discussed it with them prior to it being sent.

88. It is fair to say that this inferential case is not very precise or clear, and it does not appear very compelling, or even likely, on its face. It is public knowledge, reported by the defendant itself, that the claimant is trained and expert in calligraphy. There is nothing very unusual in keeping a copy of an important letter. The defendant's case, that the "only good" reason for sharing and discussing the Letter with the communications team before it was sent would be to use it to enhance the claimant's image, is not easy to accept. A desire to receive public relations guidance and/or to guard against the risk of adverse publicity, if Mr Markle disclosed the letter, seem at least as plausible as explanations. And the claimant was prompted to complain when the defendant published the contents of the Letter. She demanded its removal from the defendant's website. But the defendant counters, with supporting detail, that the claimant is happy to have such information put out publicly so long as that is done in a favourable way. It is not possible to conclude with certainty that the disputed factual contentions could not be made good at a trial, or to say that the inferences relied on are unimaginable. But nor is it necessary for these disputes of fact to be resolved, because I am satisfied that this line of defence has no sound basis in law.
89. At the hearing, Mr White developed this line of defence in a way that I had not foreseen on reading the statements of case. He pointed to the fact that the Particulars of Claim assert, in support of the claimant's case, that she "intended the detailed contents of the Letter to be private". He submitted that an intention to keep information private is an essential element of the cause of action for misuse of private information, without which there can be no reasonable expectation of privacy. Hence, ran the argument, the claimant must give evidence to prove her pleaded case and this is an issue for trial.
90. This was a skilful line of argument, but, in my judgment, it is misplaced. Consent to the disclosure complained of, or the absence of such consent, is one of the *Murray* factors. But *Murray* makes no mention of an intention to publish, and there is no authority that an intention to publish all or some of that information at some future date is fatal to a claim, still less that the absence of any such intention is a threshold issue on which the claimant bears the burden of proof.
91. Once, in the course of an urgent interim injunction application nearly 40 years ago, it was doubted that a claim for confidentiality could be maintained in respect of unauthorised disclosure of information that was shortly to be published with the claimant's consent.<sup>3</sup> But *Toulson & Phipps* (above) at [4-027]-[4-035] states the modern position in the law of confidentiality: "It is ... now settled that an intention to publish is not inconsistent with maintaining a right of confidentiality until the intended publication takes place." See also *The Law of Privacy and the Media* at 11.50 – 11.52. The tort of misuse of private information has grown out of the wrong of breach of confidence, and the argument for maintaining the privacy right even if future publication is in view cannot be weaker. Indeed, it seems to me it can only be stronger

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<sup>3</sup> *Times Newspapers Ltd v Mirror Group Newspapers Ltd* [1993] EMLR 443, 446-7, a commercial contest between two newspaper groups over the memoirs of Mrs Thatcher, authorised publication of which was imminent.

Approved Judgment

when the information is personal and private, and the law's objective is to protect the individual's Convention right to respect for her autonomy.

92. Mr White's reliance on passages from the judgment of Lord Phillips MR in *Douglas v Hello! Ltd (No 3)* [55], [83] and their repetition in later authorities, is admirably ingenious, but unconvincing. In the 15 years that have passed since that decision the law has matured. But in any event, the case does not support Mr White's line of argument. What Lord Phillips said was that "'private information' ... must include information that is personal to the person who possesses it and that he does not intend shall be imparted to the general public". But it is perfectly clear that these observations do not, and were not meant to, lay down any rule that a claimant must establish as an essential element of a claim in misuse of private information that she had no intention to disclose any of the information (or any related information) to the public, or to anyone, at any time.
93. One of the central features of *Douglas* was that authorised wedding photographs were due to appear shortly in OK! magazine. The claims of the celebrity couple were upheld at all stages, despite that fact. *Douglas* does indicate that an intention to publish may be "very relevant" to damages, but the Court held that "the fact that authorised photographs can be published will not provide a defence...": [107]. The decision is not authority for the proposition that a claim will fail if (as the defendant alleges here) the claimant has a contingent or provisional intention to "use" information in the media at some future time, or even that this follows if the claimant has a settled intention to that effect. It follows that if the Particulars of Claim, on a proper reading, are asserting anything more than a lack of consent to publication, they are to that extent superfluous.

**The amendment decisions**

94. I add that, contrary to one argument advanced on behalf of the defendant, none of the conclusions I have reached so far are precluded by the Master's grant of permission to amend and re-amend, or my decision to refuse permission to appeal against the second of those orders. The issue determined by the Master was not whether the various grounds on which the defendant disputed the reasonable expectation of privacy were tenable in law, but whether permission should be granted to add further factual allegations in support of the existing grounds, over the claimant's objection that the new factual case was untenable.

**Conclusions on the first stage**

95. For the reasons I have given, I conclude that the claimant would be bound to win at trial on this issue. It is fanciful to think otherwise. There is nothing in the Defence, beyond the points I have already covered, that could lead the Court to find for the defendant on this part of the case. The question of whether to strike out any part of the Defence, and the question of whether there is any other compelling reason to refrain from entering summary judgment on this issue are both best deferred until I have dealt with the second stage of the analysis.

Stage two: the balancing exercise

96. The issue at this stage is twofold. Was the interference with the claimant's reasonable expectation of privacy involved in publishing the five pages of print coverage and the

Approved Judgment

corresponding online reporting complained of necessary and proportionate in pursuit of the legitimate aim of protecting the rights of others? Is the interference with freedom of expression that would be represented by a finding of liability necessary and proportionate in pursuit of the legitimate aim of protecting the rights of the claimant?

97. Naturally, the defendant relies on the factors I have already discussed as matters to be taken into account at this second stage. They are said to make the privacy interest “slight” or to have “compromised” any expectation of privacy she may have had. But in my judgment, taking the defendant’s case on each of those factors at its highest, there would be no real prospect of the Court striking the balance against the claimant and in favour of the defendant and its readers.
98. In some respects, the defendant’s case is legally untenable or flimsy at best, for reasons I have given already. US law, as I have explained, is irrelevant. If the claimant took a risk with her father’s propensity to go public, that cannot avail the defendant on the issue of liability. None of the contents of the Letter were in the public domain at the time of first publication. When the Book appeared some 18 months later, it contained only a fraction of what the Mail Articles had revealed. The prior publication of other information could only be a makeweight. As Lord Hoffmann put it in *Campbell v MGN Ltd* [2004] UKHL 22 [2004] 2 AC 457 [57], “A person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters.”
99. Appropriate importance must be attached to the claimant’s status as a public figure, but it is not possible to imagine a Court concluding that this consideration outweighs the claimant’s privacy interest in the contents of the Letter. That interest would - for the reasons given above - be bound to weigh heavily in the balance. Prior publication about its existence and nature could weaken that interest somewhat. So might an intention to make public the same information at some stage. But the most that is alleged in these respects is that the People Article was authorised by the claimant, and that she passed information about the contents of the Letter to friends and to the Authors. As I have noted, the defendant does not plead that the claimant provided the Authors with a copy of the Letter. The prospects of the defendant obtaining evidence to support the hearsay evidence of Mr Verity and contradict Mr Scobie’s witness statement on this issue seem to me to be remote, for all manner of reasons. I would class the notion as fanciful. But even if that were wrong, I cannot envisage a Court attaching any great significance to this factor at the second stage.
100. The same is true, in my judgment, of two further factors relied on in support of the defendant’s case on the balance to be struck: the fact and content of disclosures made to the Authors for the purposes of the Book, and what these are said to show about the claimant’s attitudes towards publicity for and about her private life and the private lives of others. The defendant invites the inference that the claimant is ready and willing to publicise details of her own private life and those of others, including correspondence, and that she does not object to publicity about her, so long as it is favourable. These are matters which are hotly contested. I cannot possibly resolve the factual disputes which arise. But nor do I consider that these matters could supply the element that is otherwise missing from the relevant factual matrix.
101. To some extent, this appears to be a version of the “zone of privacy” argument discussed already. It has echoes of the crude common law principle, enunciated long-ago, but

Approved Judgment

since discarded, that those who seek favourable publicity somehow waive their rights, and must accept adverse publicity (see, for instance, *Woodward v Hutchins* [1977] 1 WLR 760, 763-4 (Lord Denning MR), and other cases discussed in *The Law of Privacy and the Media* at 11.21-11.22). A person who actively seeks the limelight may have a correspondingly reduced expectation of privacy, but the analysis must be focused, not broad-brush. What is alleged here cannot be regarded, in my judgment, as a factual case capable of showing that the disclosures complained of contributed to a debate of general interest.

102. One principal theme of the defendant’s case in this respect is that the claimant was seeking or willing to manipulate her public image, to obtain the most favourable coverage. Implicitly, this is held out as an illegitimate process, or at least one that should diminish the weight of her rights. On this point, *Douglas (No 3)* is instructive. At [109], the Court agreed that the Douglasses were entitled to complain about the unauthorised photographs infringed their privacy “on the ground that these detracted from the favourable picture presented by the authorised photographs and caused consequent distress.” It is true that the unauthorised photographs did not convey exactly the same information as those the Douglasses had authorised, but the point remains valid. If (which she emphatically denies) the claimant provided the Letter or information about it to the Authors with a view to publication, or wrote it with a view to later publicity, she might have exposed herself to claims that she had libelled her father or infringed his other rights, but she would have been well within her rights, so far as her own privacy is concerned.
103. It is a firmly established principle of the Strasbourg jurisprudence, which this Court must take into account, that “Articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person’s private life, however well-known that person might be, cannot be deemed to contribute to any debate of general interest in society”: for a recent reiteration see *Dupate v Latvia* Application 18068/11 Judgment of 19 November 2020 [51], citing well-known earlier authorities. The factors discussed to date provide no foundation for a conclusion that the publication complained of served any purpose other than satisfying public curiosity about the claimant, or that it otherwise made, or was capable of making, any contribution to a debate of public or general interest.
104. The real issue on this part of the case is whether the publication complained of might be justifiable for the purposes of correcting the record or, to adopt the language of the Code, “preventing the public from being misled”. This is a line of justification in the public interest that – if it were established - plainly could, and in all probability would succeed, regardless of the weight attached to the other circumstances under consideration. If there is a real possibility that the publication complained of might be found justified on this basis after a trial, I ought not to strike out or grant summary judgment.

**Correcting the record: the law**

105. It is clear law that the disclosure of otherwise private and confidential information may be justified if the claimant has herself misled the public, and the disclosure is necessary for and proportionate to the purpose of putting things right. *Campbell v MGN Ltd* (above) is the highest authority and the clearest illustration of this. Naomi Campbell had become addicted to drugs and was attending Narcotics Anonymous. She had told

Approved Judgment

the public, through the press, that she did not take drugs. The publisher of the Daily Mirror found out the truth, and published an article illustrated with photographs of her arriving at and leaving the NA sessions, and giving details of the treatment. The publication was found to be justified, to the extent it set the record straight. But her claim succeeded before the House of Lords on the basis that publication of the photos and details was unnecessary and excessive.

106. The Court must take account of “editorial latitude”. The House of Lords’ conclusion in *Campbell* was arrived at after making due allowance for this factor, which has been analysed by the Court of Appeal in the recent case of *Ali v Channel 5 Broadcasting Ltd* [2019] EWCA Civ 677 [83], [92] and, very recently, by me in *Sicri v Associated Newspapers Ltd* (above) at [67(3)], [111-119]. I have in mind the precise terms of those passages. For the purposes of this judgment, however, the approach can largely be summarised. The Court will assess for itself (1) what weight should be given to the privacy rights asserted by the claimant, (2) whether there is a public interest purpose that might justify the disclosure complained, and (3) whether there is a logical or rational connection between that potential justification and the publication complained of. The Court will also be the judge of (4) whether the publication was necessary and proportionate in pursuit of the available justification, but at this stage it will be slow to interfere. As I put it in *Sicri* [113]:

“... in assessing whether, in the particular circumstances of the case, the imperatives of free speech are such that the privacy rights which the Court has identified must be overridden, the Court should show an appropriate degree of deference to the professional expertise and judgment of the publisher.”

107. I take the relevant provisions of the Code to be consistent with these principles, conferring freedoms and imposing demands that are no more and no less than those of the law. It is unnecessary to explore how and to what extent the Court should, in principle, take account of the Code requirement for publishers to “demonstrate” how the public interest was assessed at the time; in this case I have written evidence from Mr Verity which I must, and do, assume would be accepted in full if there were a trial.
108. In *Campbell* the claimant conceded, from the outset, that she had told lies to the public about her drug taking and addiction. The newspaper published of its own initiative, without any third-party prompting. No other person’s rights to privacy or reputation were engaged. This case provides a different factual matrix and some further elements for consideration.

### **The defendant’s case: analysis**

109. Mr Markle maintains that the People Article was misleading about the Letter and damaging to his reputation so that disclosure by him via the pages of the Mail on Sunday and online was justified on that account (in the words of the articles, “he had no choice”). That might be described as justification on the grounds of self-defence. As Mr White points out, a right to use confidential information for the purpose of vindicating reputation from false imputations was recognised as long ago as 1813: see *Lord and Lady Perceval v Phipps* 35 ER 225, (1813) 2 v & B 19. Mr Verity maintains that disclosure by the defendant was justified because the People Article was misleading about the Letter and/or because Mr Markle *maintained* that it and he had

Approved Judgment

been misrepresented, and the defendant was bound or entitled to give him a platform to put his side of the story. The second limb of this argument might be categorised as reportage.

110. Given the somewhat muddled nature of the evidential position, it is helpful to focus on, and analyse, the case set out in the Defence. The headline proposition in paragraph 15.3 is that “the account given by the Claimant’s friends to People magazine concerning the Claimant’s dealings with her father and the contents of the Letter and her father’s letter in response was a one-sided and/or a misleading picture of those matters.” That is a formulation that covers a number of distinct propositions, ranging from “the People Article gave a one-sided [but not misleading] account of the father-daughter relationship” to “The People Article was misleading about the Letter”. It does not go so far as to assert directly that any aspect of the People Article was false.
111. Paragraphs 15.4 to 15.7 assert that the People Article depicted Mr Markle as having acted unreasonably and unlovingly from the week before the wedding up to the date of that article, and that this is a portrayal which “Mr Markle believes and has informed the defendant” was wholly false. Details are given of why, “according to the Claimant’s father”, the account in the People Article was untrue. Clearly, the defendant has not adopted Mr Markle’s account; it is not the defendant’s case that this aspect of the People Article was false. The defendant has not even asserted a belief that Mr Markle’s complaint is justified. That is understandable, when the defendant published the “MEGHAN’s DAD STAGED PHOTOS ....” article, which Mr Markle evidently accepts was true. In the circumstances, these paragraphs of the Defence could only support a contention that the article was “one-sided.” Mr Verity’s evidence goes no further than the Defence.
112. This aspect of the Defence is in my judgment entirely hopeless. If a published article gives a one-sided account of a relationship, and that account is false or misleading and damaging to a person, that might provide some justification for him seeking to publish a proportionate reply in self-defence, to the same audience. But there is no authority to support the view that the mere fact that a person “believes” his portrayal is untrue is enough to justify a reply. That cannot be the law. It would legitimize replies which were in fact false and unwarranted, as might well be the position here, on the defendant’s case. Moreover, the notion that the use of the Letter is legitimate or even relevant to bolster such a reply is not just unexplained, it is unsustainable. It is fanciful to suppose that the Court would find the disclosure of the contents of the Letter necessary or proportionate on the basis set out here.
113. Paragraph 15.8 of the Defence takes a different line, asserting as a fact that it was untrue for the People Article to state that Mr Markle had refused to get in the car that arrived to take him to the airport for the wedding, and that the claimant knew this. This is contested, but assuming this to be true, it could not provide a rational or arguably proportionate reason for disclosure of any part of the Letter.
114. Paragraphs 15.10 and 15.11 of the Defence relate to Mr Markle’s letter in reply to that of the claimant. The pleaded case is that the People Article misrepresented Mr Markle’s intentions about the photo opportunity, as expressed in his letter, because he had made clear that he wanted such a photograph to give the impression of a harmonious relationship and take some of the media attention away from him. This goes beyond what Mr Markle himself has said, in his interview for the Mail Articles and in his

Approved Judgment

written evidence for this application. He has only said that his intentions were “misinterpreted.”

115. This is an issue that I can assess as well as a trial judge. It is unnecessary to determine what Mr Markle in fact intended. In my judgment, it is unreasonable to characterise the People Article as a misrepresentation in this respect. It accurately summarised what Mr Markle had said, and gave an account of the claimant’s response. The Article did not make any assertion about the intentions behind Mr Markle’s proposal. It reported the claimant’s (alleged) frustration at Mr Markle’s continued wish to engage with the media, which she thought would be unwise. In any event, the defendant has no need to justify its disclosure of Mr Markle’s reply. That is not the subject of complaint. The claim is for disclosure of the contents of the Letter. I am unable to detect in these paragraphs any logical or arguably sufficient basis for disclosing any part of the Letter.
116. Paragraph 15.12 of the Defence asserts that the People Article suggested that Mr Markle had publicly made false claims as to his dealings with his daughter, and that this was “one sided” and “misleading” and/or “untrue”. The only further allegation is that “Mr Markle has a very different recollection and view of the events leading up to the estrangement ... as set out above.” This way of putting the case in multiple alternative ways is confused and confusing. It leaves it unclear what is said to be false or misleading. If the case is simply that the article was one-sided and that Mr Markle disagrees, it is hopeless. No explanation is offered of the link between what is asserted and the publication of the contents of the Letter. To my mind this paragraph discloses nothing capable of affording a reasonable basis for justifying the disclosures complained of.
117. When all of this is stripped out of paragraph 15, one is left with the following propositions in paragraph 15.9 and 15.13:-

“15.9 The [People Article] also stated that after the wedding, the Claimant had written a letter to her father, and summarised the contents as *“Dad, I’m so heartbroken, I love you, I have one father. Please stop victimising me through the media so we can repair our relationship”*, thereby suggesting that, shortly after the wedding, she had written a loving letter aimed at repairing their relationship. This information was false ... The Claimant did not write the Letter until months after the wedding despite Mr Markle’s attempts to make contact with her. When she did write, her Letter was an attack on Mr Markle. Amongst other things, she accused him of breaking her heart, manufacturing pain, being paranoid, being ridiculed, fabricating stories, of attacking Prince Harry, and continually lying. Although the Claimant stated in the Letter that she had loved her father and cared for him in the past, the Claimant did not tell her father that she loved him now or ask how he was. By contrast, she set out at some length the many ways in which, by her own account, she had been a loving and caring daughter. She did not suggest that they try to repair their relationship. On the contrary, the final words of the Letter, *“I ask for nothing other than peace, and I wish the same for you”* suggested that their relationship was at

Approved Judgment

an end and Mr Markle correctly understood those words to signal the end the relationship.

...

15.13 In the light of the publication across the world's media of an account of the contents of the Letter that the Claimant asserts and admits was false in key respects, namely the Claimant's purpose in writing it, the effect of the Letter, and its wording, ... it was necessary, proper and in the public interest to publish the true and full story concerning the Letter and the response to it, including Mr Markle's account of events. This was necessary for the sake of truth, fairness, and Mr Markle's reputation, and so that the public should not be misled. ..."

118. I do not consider that this reasoning is capable of justifying the publication complained of. There is no real prospect that a Court would accept, after a trial, that this logic leads to the conclusion that judgment should be entered for the defendant.
119. There is no need for a trial to establish the relevant facts. I have the full text of the People Article, the Letter, and the Mail Articles before me. I can interpret the People Article and the Letter as well as I or another judge could do after a trial. And I am in as good a position as a trial judge to assess the extent to which the People Article misled the public about the Letter in a way that, making the fullest allowance for editorial judgment, made it relevant, necessary and proportionate to make the disclosures complained of. How Mr Markle understood the Letter appears to me to be of scant relevance, but I can assume that what is pleaded is true. Otherwise, the issue is one of assessment and balancing, which can be done as well if not better at this stage.
120. My central conclusions can be summarised in three sentences. The People Article did portray the Letter in a way that was inaccurate, and that would have justified some steps to ensure the true position was made known to those who had been misled. But it is obviously wrong for the defendant to suggest that the inaccuracies in the 25 words of the People Article which they quote in paragraph 15.9 of their Defence made it necessary and proportionate for it to publish the bulk of the contents of the Letter in the Mail on Sunday and MailOnline, for the purposes they identify (or any other purpose), without notice to the claimant. What was done was precipitate, largely irrelevant to any legitimate aim, and – making the fullest allowance for editorial judgment - wholly disproportionate.
121. The defendant has referred to the principles of reply to attack, and there is an obvious analogy here with the laws of self-defence in crime and in defamation, which have developed along similar, common-sense lines. A person who comes under attack may use reasonable force to defend himself and the way he does so is not to be judged too precisely; but if he goes completely over the top and uses force of a kind or degree which is out of all proportion to the attack he faces, then his actions will be unlawful. In defamation a person is justified in defaming another in reply to an attack on his reputation (but not in reply to an attack which is justified); his reply must be honest, have some relevance to the attack, and be in some sense proportionate. A third party can assist someone defending himself against a physical or verbal assault, but the same principles apply.

Approved Judgment

122. In this case, the relevant “attack” is the People Article. I am unable to identify any basis on which that article can be (or is said) to make it necessary in the public interest to depict the claimant’s handwriting in the pages of the Mail on Sunday, and to construct and publish a psychological profile, based on elaborate handwriting analysis. There is simply no rational connection between the “attack” and the Handwriting Article.
123. The inaccuracy of the People Article’s account of the Letter has been considerably overstated by Mr Markle and the defendant.
- (1) The article said the Letter was written “after the wedding.” So it was. The fact that it was written some months later does not make this a misrepresentation, and the point is of no real consequence when it comes to justifying the disclosure complained of.
- (2) The article summarised the Letter in four sentences.
- a) The first, “Dad, I’m so heartbroken” is accurate. It comes close to a direct quotation of paragraph [1].
- b) The second, “I love you”, is not a direct quotation but it reflects two assertions in the Letter: (“[6] I have only ever loved... you” [14] “I ... told you that I loved you.”). It is true that the tone and content of the Letter have something of a hectoring character. But Mr Markle’s account, as reported in the Mail Articles, that “love isn’t mentioned once in the whole thing” is plainly false. Disclosure of the contents of the Letter was not capable of making that point good. Indeed, because the Mail Articles quoted both those passages, they demonstrated the falsity of what Mr Markle was saying.
- c) The third sentence of the People Article’s description, “I have only one father”, is inaccurate; there was no such wording or statement in the letter. But this is not a falsehood, nor can it be said that it is a matter of significance when it comes to justification of the offending disclosures. The extracts from the Letter that were published did not serve to correct or respond to this proposition. They were incapable of serving that purpose.
- d) The fourth sentence then described the Letter as containing a plea to “stop victimizing me through the media so we can repair our relationship”. Repairing the relationship was not the purpose of the Letter. It sought an end to media engagement, and “peace” for both parties. But it was not inaccurate to summarise the claimant’s complaint about her father’s dealings with the media as a complaint that he was “victimizing” her.
124. It would in principle have been legitimate for Mr Markle to reply to the allegation of victimization. But there was no need for Mr Markle to deploy the Letter for that purpose; indeed, it would not be relevant, or in his interests, to do so, as in part at least it set out an accurate account of his dealings with the paparazzi, about which he had lied, been exposed, and apologised. The proof of this is that the Mail Articles do not use the Letter as evidence that Mr Markle was innocent of victimisation. Instead, they

Approved Judgment

set out the parts of the Letter that show this was an aspect of the claimant’s criticism of him, and seek to rebut it by quoting Mr Markle. An example can be taken from the Harry Articles. The box on page 6 sets out paragraph [12] of the Letter, with this bald assertion attributed to Mr Markle: “He insists the Duchess is mistaken: ‘I have only ever spoken out in response to fake narratives and lies.’”

125. I would accept that, in principle, it was legitimate for Mr Markle to seek to rebut the inaccurate suggestion that the Letter represented some form of “olive branch”. But this cannot take the defendant very far.
- (1) This was not an attack on Mr Markle. It was a misdescription of the claimant’s behaviour. So self-defence has little or nothing to do with this justification. The case is really one that sits in the broader zone of correcting the public record.
  - (2) I do not consider it was necessary, or proportionate, for Mr Markle and the defendant to pursue this legitimate objective in the way that they did, by publishing long and sensational articles revealing and commenting on extensive extracts from the Letter, without first approaching the claimant. It is clear that neither Mr Markle nor the defendant knew whether or not the People Article had the claimant’s blessing. For all they knew, this publication was (as the claimant says it was) an unauthorised step. At all events, adopting a proportionate approach, the logical first step should have been an attempt to establish the facts and to see whether the inaccuracy might be corrected by the people responsible for publishing it.
  - (3) If a rebuttal was necessary or appropriate the obvious place to go in the first instance would have been People magazine, which could be guaranteed to reach the relevant constituency: those who had been misled. But I accept that on the pleaded facts at least the People Article had received widespread publicity, and its contents were known to readers of the defendant’s publications.
  - (4) Still, the legitimate purpose could have been achieved proportionately by publishing a rebuttal consisting (like the report in the People Article) of a summary, without disclosing any of the actual contents of the Letter. The defendant clearly has a point, when it says that Mr Markle’s credibility with the public was in question. But the effect of the inaccuracy on Mr Markle’s reputation and private life was modest, and the options were not binary. An intermediate position would have been to show the Letter to a trusted third party whose word the defendant’s readers would accept, such as one of its journalists. Even so, making allowance for editorial judgment I conclude that it was legitimate for this purpose to disclose paragraph [15].
  - (5) It was neither necessary, nor proportionate, to disclose any of the rest of the information in the Letter for this purpose.
126. These conclusions are bolstered by analysis of the way the extracts from the Letter were used in the True Tragedy and Harry Articles. The body of the True Tragedy Articles contained quotations from Mr Markle which complain of misrepresentation of the Letter (see [57(3)] above), but the passages extracted in the section headed “MEGHAN’S BOMBSHELL LETTER” and the “blobs” beneath them are not relevant, or have only faint and tangential relevance, to this point. Some of them are also non-sequiturs.

Approved Judgment

127. For Mr Markle to insist “I love her with all my heart” is no rebuttal of the claimant’s assertion that he “causes her pain by being manipulated in the media”. Mr Markle’s reported claims that “he only asked for help to move house” and only received “modest” financial gifts do nothing to show that the Letter was not an attempt to repair their relationship (nor are they a refutation of the headline proposition that “I helped you financially”). Most strikingly, when it comes to paragraph [15] - the extract I have identified as most relevant to the legitimate purpose in question - it is not presented as evidence that the Letter was misrepresented in the People Article. Instead, in the blob paragraph Mr Markle is quoted as simply expressing bafflement at the expression “rabbit hole”. In substance and reality, the main use made of the Letter was simply to portray what the claimant had said, accompanied by various comments from Mr Markle, many of which were not even pertinent to the selected extract.

Conclusions

128. The claimant had a reasonable expectation that the contents of the Letter would remain private. The Mail Articles interfered with that reasonable expectation. The only tenable justification for any such interference was to correct some inaccuracies about the Letter contained in the People Article. On an objective review of the Articles in the light of the surrounding circumstances, the inescapable conclusion is that, save to the very limited extent I have identified, the disclosures made were not a necessary or proportionate means of serving that purpose. For the most part they did not serve that purpose at all. Taken as a whole the disclosures were manifestly excessive and hence unlawful. There is no prospect that a different judgment would be reached after a trial. The interference with freedom of expression which those conclusions represent is a necessary and proportionate means of pursuing the legitimate aim of protecting the claimant’s privacy.

Other compelling reason?

129. Having reached these conclusions, and set them out in detail, I see no useful purpose in striking out any of the Defence. There are parts of it that might be relevant to damages, and the work involved in filleting would be disproportionate to the gains. But I see no good reason not to enter summary judgment on liability, for damages and other remedies to be decided later. There are, indeed, compelling reasons not to allow this aspect of the case to go to trial. It has already consumed large amounts of resources, both private and public. The early resolution of liability often benefits both parties, making it easier to compromise what remains. The claim in privacy is sufficiently separate and distinct from the claim in copyright infringement that I should grant summary judgment, whatever my conclusions on the prospects of success for the copyright claim.

**Infringement of copyright**

Essential legal principles

130. Copyright is a statutory property right which subsists in “original literary works”, and certain other kinds of work, in accordance with Part I of the Copyright, Designs and Patents Act 1988 (“CDPA”). A “literary work” means, among other things, “any work ... which is written”. A work is not “original” if it is merely a copy of another work. But the requirement of originality does not call for a claimant to prove her work is one

Approved Judgment

of creative genius. How much, and what kind, of creative input is necessary to satisfy this requirement is an issue to which I shall come.

131. Copyright in an original literary work subsists from the time at which the work is recorded in writing, provided certain specified qualifying conditions for copyright protection are satisfied. Sections 9 and 11 of the CDPA provide that the author of a work, that is the person who created it, is the first owner of the copyright in the work, unless the author is an employee who made the work in the course of his employment and there is no agreement to the contrary.
132. The owner of the copyright in a work has certain exclusive rights, while the copyright subsists. These include the right to reproduce the work in a material form, to make copies, and to issue copies to the public. The owner is entitled to keep the work to herself, and to decide not to reproduce or copy the work or to issue any copy of any part of it to the public. Those who, without the consent of the copyright owner, reproduce, copy or issue to the public copies of the work or a “substantial part” of the work infringe the copyright, unless they can establish a defence.
133. The CDPA makes provision for a statutory defence of fair dealing for the purposes of reporting current events. It also provides that the statute is without prejudice to any public interest defence that would otherwise arise. In that context, the court must take account of the Convention rights. It must not enforce copyright if that would involve an unjustifiable interference with the right to freedom of expression. All three of these lines of defence are relied on by the defendant.
134. A work may be one of sole authorship, joint authorship, or it may have several authors, each of whom has a separate copyright. Where a work is made by an officer or servant of the Crown in the course of his or her duties Her Majesty is the first owner of any copyright in the work, which is known as Crown copyright.

The issues

135. The claimant’s case is that she is the sole author of the Electronic Draft, which was composed over a period of time using an app on her phone and then transcribed into the handwritten Letter. She asserts that she meets the qualifying conditions, that the Electronic Draft and Letter are both original literary works in which copyright subsists, that she is the sole owner of that copyright, and that the defendant’s publications infringed that copyright.
136. The defendant admits that the relevant qualifying conditions were met, so that “any literary work that was original and the claimant’s own intellectual creation would qualify for copyright protection in the United Kingdom and (if she were the sole author) she would be the first owner of such copyright.” There is no dispute that the Electronic Draft and the Letter were both literary works, which were recorded in writing in or before August 2018. Given that the Letter is entirely derivative of the Electronic Draft, there is an issue as to whether the requirement of originality is met. For the purposes of this application, however, the claimant limits her claim to infringement of copyright in the Electronic Draft.
137. The Mail Articles proceeded on the basis that the wording of the Letter was entirely the work of the claimant. The claimant’s case, verified by statement of truth, is that this is

Approved Judgment

indeed the position. The defendant has not pleaded any positive case that any of the creative work was done by someone else, or that the claimant made no creative contribution. It has not formally alleged that there was any other author – that any part of the work was composed by anyone else, or by the claimant jointly with anyone else. But the defendant denies the claimant’s case that she was sole author and sole owner. One reason for doubting this is put forward. The defendant advances a positive case that the claimant “involved” the Kensington Palace Communications Team, that is the “Palace Four”, in the writing of the Letter. The Palace Four are Jason Knauf of Royal Communications, Sara Latham, Samantha Cohen and Christian Jones.

138. Mr Speck does not suggest that any of the last three had any authorial role. He focuses on the role of Mr Knauf. He observes that on the evidence before the Court Mr Knauf was involved in some way in the process that was undertaken before the Letter was sent. Although the defendant cannot specify what Mr Knauf did, the submission is that his involvement may have been such as to make him an author, that his input may have generated a separate copyright, and that the office he held at the time may mean this is Crown copyright. So there are issues about authorship and, if sole authorship might not be established, about ownership. Those points are just some of the reasons put forward as to why this claim is unsuitable for summary judgment. They are issues to which I shall come later. First, I shall deal with the issues of originality and infringement, and then address the three defences relied on.

Originality

139. This is, by common consent, a key issue. In principle, the questions of whether, and to what extent, a work is original are relevant to the subsistence of copyright and to issues of infringement. Where more than one person takes part in the creation of the work, the degree of originality of different parts may have a bearing on the question of ownership. Again, the nature and degree of the originality involved in a work can affect the availability of defences such as fair dealing, public interest, and – if this is separate - freedom of expression.
140. The proposition that copyright protects form not ideas is trite but, as a general proposition, it is true. It is fair to say that, analytically, there is a continuum from one extreme to the other, and in some cases the distinction can be hard to draw: see the discussion by Judge Learned Hand in *Nichols v Universal Pictures Co 45 F 2nd 119* (2nd Cir. 1930) at p.121, cited by Laddie J in the artistic copyright case, *IPC Media v Highbury* [2004] EWHC 2985 (Ch) [14]. In many cases, however, the trite encapsulation of the nature of the right will be enough for practical purposes.
141. To satisfy the requirement of originality, a work need not be novel or ingenious. The work may use well-known ingredients and themes, and include relatively banal elements, as Laddie J explained in *IPC Media* at [9]

“...If an author puts sufficient relevant artistic effort into producing a drawing or other artistic work from known ingredients, it will be protected by copyright. Monet was, no doubt, not the first artist to paint water lilies, but his paintings of them were protected by copyright. They would also not have been deprived of copyright because they were very similar to earlier paintings by him dealing with the same subject matter.”

Approved Judgment

142. It is common ground on this application that I should apply the harmonised approach of European law, according to which copyright protection will apply only to “a subject-matter which is original in the sense that it is its author’s own intellectual creation”: *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [37]. The essence of the term “own intellectual creation” is that the person in question “has exercised expressive and creative choices in producing the work”: *SAS Institute Inc v World Programme Ltd* [2013] EWCA Civ 1482 [2015] ECDR 17 [31] (Lewison LJ, with whom the other members of the court agreed.) It is a raising of the hurdle to obtaining copyright protection: *ibid* [37].
143. As Advocate General Mengozzi explained in *Football Dataco Ltd v Yahoo! UK Ltd* Case C-604/10, [2013] FSR 1, this is a shift away from the common law tradition, reflected in the passage cited from *IPC Media*, by which the decisive criterion was the application of “labour, stills or effort”. At [37], the Advocate General explained
- “... as regards copyright protection, the Directive espouses a concept of originality which requires more than the mere "mechanical" effort needed to collect the data and enter them in the database. To be protected by the copyright, a database must—as art.3 of the Directive explicitly states—be the "intellectual creation" of the person who has set it up. That expression leaves no room for doubt, and echoes a formula which is typical of the continental copyright tradition.”
- The decision in that case, which was about database rights in football fixture lists, is illustrative of the distinction. The court held that no copyright subsisted in databases set up according to technical considerations, rules or constraints which left no room for creative freedom; but databases which involved free and creative choices resulting in a personal stamp were protected.
144. The defendant’s pleaded case denies that the works relied on in this case are original, asserting that the Electronic Draft and Letter are “primarily an admonishment” of Mr Markle by the claimant, and that they “purport to recite pre-existing facts both past and present including the claimant’s views of her father and his conduct”. The defendant asserts that these matters “as recited in words” are “neither the claimant’s own intellectual creation nor original.” As a broad summary of some of the content of the works relied on this is fair. But at first sight the legal propositions are startling. Mr Mill QC described them in argument as “utterly fanciful”. I agree.
145. It had not been easy to identify the precise nature of the argument, in advance of the hearing. Some carefully targeted requests for further information to explain the pleaded case yielded nothing of consequence. But the argument began to emerge more clearly in the skeleton argument which submitted that, “the author of text that is a recitation of pre-existing facts cannot claim a copyright where the recitation of facts [is] any part of the scope of its protection”. Thus, it was argued, an accurate court report would gain no protection insofar as it merely recited the incidents and events in court, whereas a fictitious court drama could do so. This seems a remarkable argument for a news publisher to want to advance. Mr Speck cited no authority to support it. So far as I have

Approved Judgment

been able to tell, there is none. I cannot accept that this is a consequence of the Directive or the existing authorities.

146. I would be inclined to agree that, in principle, statements about undisputed historic events may lack the necessary originality if cast in their most abbreviated and abstract form - “the First World War began in 1914” or “The Supreme Court building is in Parliament Square” – though even these short statements could be put in a variety of ways. But the argument cannot be taken far beyond examples of this kind. To do so would involve an unreal view of historical truth. It would substantially erode the distinction between form and idea, and lead to some paradoxical and unacceptable consequences, inconsistent with the legal framework.
147. There is of course no copyright in news, but copyright has been recognised as subsisting in the literary form of a news report. That is because there are many ways of using words to report the same facts. The defendant’s approach ignores this, starting from the twin premises that the ascertainment of historical fact is a straightforward task, and that the reporting of such fact is a purely mechanical exercise. This case provides a good illustration of some of the difficulties, both in principle and in practice. The defendant has not made clear how the supposed principle is meant to work. On whom does the burden lie? The defendant’s case is not that the works relied on did recite pre-existing facts. The defendant pleads that they “purported” to do so. In its pleading, it adopts an agnostic stance. If the burden of proof lies on the defendant, then its case must fail. I presume that the response would be that the claimant must prove originality. So, it seems, its case must be that unless the claimant proves that what she wrote was to some extent fiction her case must fail. Mr Speck conceded, in the course of argument, that a consequence of his submission would be that in some cases of factual narrative the Court might have to make findings of fact about the truth of the narrative before reaching a conclusion on the subsistence of copyright. In my judgment, this is unreal and untenable.
148. As for the proposition that a literary work cannot or does not enjoy protection in the law of copyright to the extent it is an “admonishment”, I have failed to grasp the underlying rationale. I cannot identify any arguable basis for supposing that a work should be treated as lacking originality because it is created for such a purpose. Brevity might be a reason for finding insufficient originality. A curt rebuke, using a couple of commonplace expletives, might not qualify for protection. But the vocabulary of reproof is wide and varied, and ever-changing. Human ingenuity being what it is, a reprimand of more than a few pithy words will normally involve some choice and intellectual creativity. There must be 50 ways to scold your father, and 100 more in which to explain why you have told him off. The Electronic Draft and Letter are much more than a short and banal insult. They comprise a long-form telling-off, selecting a variety of literary forms, interwoven with the narrative I have just discussed. The document reflects the exercise of expressive choice. The fact that the literary form was novel and interesting, with a personal stamp, appears to be reflected in the way the defendant chose to deploy it so extensively.
149. I therefore see no basis in law or fact for either limb of the pleaded case on originality. I see no prospect of the Court concluding that the Electronic Draft is to any extent a purely mechanical exercise in reciting bald historical facts. I am satisfied that the Electronic Draft is and would inevitably be held to be the product of intellectual

Approved Judgment

creativity sufficient to render it original in the relevant sense and to confer copyright on its author or authors.

Infringement

150. There is a small issue, which I cannot and do not determine on this application, about the claimant's case that the defendant has authorised others to make the Mail Articles available on the internet (see paragraph 33 of the Defence). Otherwise, the sole or only real issue is whether the Articles comprise a copy of "a substantial part" of the Electronic Draft or the Letter. This is not a question of whether the Mail Articles contained a large proportion of the wording, which self-evidently they did. (My calculation is that the letter as a whole ran to 1,250 words, of which the Mail Articles reproduced 585). As Blackburne J observed in *HRH Prince of Wales v Associated Newspapers Ltd* (above) [160] "It is trite law ... that substantiality in this context depends upon the quality of what is taken, not its quantity."
151. By that yardstick too, in my judgment, it is undeniable – and I do not understand it to be seriously denied - that the Mail Articles reproduced a substantial part of the content of the Electronic Draft and the Letter. The extracts selected for publication were the prominent parts. They represented the majority of what the claimant had to say about her relationship with her father, his conduct in around the time of the wedding, and her feelings about it. As paragraph [45] above, some material of that kind was omitted, as was information about correspondence sent by Mr Markle, his health, and his behaviour towards a relative. But the extracts reflected the main themes of the Letter and Electronic Draft, and used the most striking forms of expression.
152. The only real issue on this part of the case is (to quote again from the Defence) whether the Mail Articles comprised a copy of a substantial part of the Letter or Electronic Draft "in the sense with which copyright is concerned, namely the reproduction of a substantial part of *that which is the author's own intellectual creation*" (my emphasis). It follows from what I have said already on the question of originality that I consider that the only possible answer is yes. Subject to the issue of authorship, the Mail Articles reproduced the majority of the substance of the relevant intellectual creation.

Fair dealing

153. Again, my previous analysis leads ineluctably to the conclusion that this defence could not succeed. The defendant's case as to the current events in question is perhaps a little elusive. But on my analysis, the topics identified by the defendant are (a) the claimant's conduct towards, relationship with, and estrangement from her father; (b) the People Article, disclosing the existence of the Letter and giving a description of its contents; (c) Mr Markle's reaction to and view of the People Article; (d) his dispute with the version put into the public domain; and (e) his contradiction of and dispute with the version of her conduct towards him. I find it hard to accept that (a) can properly be described as "current events". I am prepared to accept that the other topics do arguably qualify. They are all things that had come to pass recently. The defence requires acknowledgment of the author, a requirement which is admittedly satisfied. But otherwise, the defence is unsustainable.
154. The concept of fair dealing is incapable of hard-and-fast definition. It is a matter of fact, degree and impression. But this does not mean the Court must always engage in a

Approved Judgment

detailed factual investigation of the kind that is only possible at a trial. Summary judgment dismissing fair dealing defences was entered in (for example) *Hyde Park Residence Ltd v Yelland* [2001] Ch 143, *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, and in the *Prince of Wales*' case (above). In this case, too, it is plain that the use made of the work in the Mail Articles cannot be characterised as "fair dealing". A useful source of guidance is to be found in *Ashdown* at [70] (approving an extract from Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*):-

".... by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked' information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing."

155. Here, the work was not (on the claimant's case at least) intended for commercial exploitation. But the defendant was dealing with what it knew to be an unpublished work. If the provision of the Letter to the defendant's US reporter was not unlawful there, its onward transmission to the defendant's representatives here may have been unlawful. The defendant copied a large and important proportion of the work's original literary content. The use involved an infringement of the claimant's privacy rights and was, with the modest exception I have identified, irrelevant to any legitimate reporting purpose and disproportionate to any such purpose. There is no real prospect that the court would reach any different conclusion after a trial.
156. In summary, it is only the defendant's reproduction of paragraph [15], or most of that paragraph, that can count as fair dealing for the purposes of reporting current events: Mr Markle's objection to the inaccurate summary of the Letter that was contained in the People Article. Otherwise, it is not seriously arguable that the reproduction of the work in the True Tragedy Articles and the Harry Articles was for any of the purposes relied on. It was, essentially, for the purpose of reporting the contents of the Letter, which was not a current event. And the use made was not fair. The purpose of the

Approved Judgment

Handwriting Article was to set out a personality profile based on a letter written many months earlier. It is not possible to regard it as fair dealing with the copyright work for the purposes of reporting current events.

Public interest and Article 10

157. Section 171(3) of the CDPA does not create a public interest defence. It preserves the common law defence, which is a manifestation of the Court's inherent jurisdiction to refuse to allow the use of its process for purposes that are contrary to the public interest: *Hyde Park* [43]. Although the public interest and the right to freedom of expression have been separately pleaded in this case, the protection of the latter is just one aspect of the former. Freedom of expression will prevail, in the public interest, in "those rare cases where this right trumps" those conferred by the CDPA: *Ashdown* [58]. Such cases will be few because (1) copyright, as a property right, is itself a Convention Right, protected by Article 1 of the First Protocol; the protection of that right is a legitimate aim well capable of justifying an interference with freedom of expression; the Court must strike a fair balance between the two rights. (2) "It will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches": *Ashdown* [59]. (3) The fair dealing defence "will normally afford the court all the scope that it needs properly to reflect the public interest in freedom of expression": *ibid*, [66].
158. In my judgment, this is not one of the rare cases referred to in *Ashdown*. There is no basis on which the court could conclude that, although the copying of the work was not fair dealing for news reporting purposes, the public interest requires the copyright to be overridden. The reasons for that conclusion are sufficiently explained by what I have said already, because the grounds relied on to justify the public interest argument are not materially different from those advanced in support of the fair dealing defence.

Ownership

159. This brings me back to the issue of ownership. In short, the defence case is that it might prove after a trial that on a proper analysis the works are works of "joint authorship" within the meaning of s 10 of the CDPA (a work "produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors") or that there are several, that is separate, copyrights with different ownership, Mr Knauf's role meaning that his authorial role generates Crown copyright in the element comprising his intellectual creation.
160. The state of the rival cases at the present time results from some probing of the claimant's case. Requests by the defendant for further information led to the revelation that the first work, and the source of the Letter, was the Electronic Draft, and that the process leading to the sending of the Letter "involved" the Kensington Palace team. Those revelations prompted amendments to the defendant's case, which now takes the form I have quoted above, adopting the term "involved". The defendant has not pleaded, because it does not know, exactly what was done by whom among the Palace Four. But Mr Speck submits that there is reason to believe that Mr Knauf "was involved in wording."
161. Mr Speck relies on the information provided by the claimant, and some evidence from Mr Verity and Mr Mathieson. Mr Verity gives evidence about a recent meeting with a source described as a "senior member of the royal household" ("the Source"). The

Approved Judgment

evidence is that the Source told Mr Verity (among other things) that “there were several drafts of the Letter”; that Mr Knauf “worked on those drafts with the claimant”; and that “a lot of the tweaking of the drafts was done by electronic means of communication”. Mr Mathieson states his belief that the Palace Four “will have evidence which will support the defendant’s case”. This is said to be based on Mr Verity’s information “and upon other information provided by the defendant’s sources”.

162. Mr Speck concedes that it is not possible to identify with precision the nature of the input provided by Mr Knauf. But he points out that a person can be an author of a literary work without wielding the pen, or working the keyboard. As Floyd LJ observed in *Kogan v Martin* [2019] EWCA Civ 1645, [2020] FSR 3 [35], [37]: “In deciding whether there is a collaboration, it can never be enough simply to ask who did the writing ... there is a ... distinction ... between the making of the work and its reduction to material form (or fixation)”. There is also a need to assess whether any contribution made is an “authorial” in nature, and involved a substantial element of intellectual creation by the putative copyright owner: *ibid* [42-43]. So cases where two or more people are “involved” in the process by which a literary work comes into being may require subtle and detailed factual investigation, for which purpose disclosure and witness evidence would be necessary. The defendant maintains that it is prepared not only to seek disclosure but also to summon Mr Knauf if necessary.
163. The defendant is now able to, and does, rely on the letter sent by Addleshaw Goddard shortly before Christmas 2020, and evidence that documentary and witness evidence might become available to support a case that Mr Knauf’s involvement went beyond mere advice and guidance, into the territory of creative authorial input:

“None of our clients welcomes his or her potential involvement in this litigation, which has arisen purely as a result of the performance of his or her duties in their respective jobs at the material time. This is particularly the case, given the sensitivity of, and therefore discretion required in, their particular roles in the Royal Household. As you will appreciate, all our clients are bound by obligations of confidentiality to their former and/or current employers.

Nor does any of our clients wish to take sides in the dispute between your respective clients. Our clients are all strictly neutral. They have no interest in assisting either party to the Proceedings. Their only interest is in ensuring a level playing field, insofar as any evidence they may be able to give is concerned.

We are, nonetheless, asked by our clients to make it clear to both parties and to the Court that they are willing to provide to the Court such assistance as they can. That would, if appropriate, include giving oral evidence at trial and/or providing to the parties any relevant documentary evidence.

On the basis of our analysis of the statements of case, our preliminary view is that one or more of our clients would be in a position to shed some light on the following issues:

Approved Judgment

- the creation of the Letter and the Electronic Draft;
- whether or not the claimant anticipated that the Letter might come into in the public domain;
- whether or not the claimant directly or indirectly provided private information (generally and in relation to the Letter specifically) to the authors of Finding Freedom.”

164. This is plainly a carefully worded letter, setting out a considered position. It is clearly designed to be accurate, to inform, and not to insinuate. It would be wrong to read it down, and inappropriate to read anything in. The letter contains no indication that Mr Knauf, who has the benefit of legal advice, maintains that he is in law an author of any part of the Electronic Draft or Letter, or that he or any other person wishes to lay claim to any share in any copyright that subsists in either work. The letter does say the Palace Four “would” be able to shed light on the creation of the works relied on. It says nothing about the nature of that light. It is less detailed than the account given by the Source. It does not, for instance, say that there were several drafts or that Mr Knauf worked on those drafts. It conspicuously does not say that the “light” that could be cast would make a difference to the outcome of the claim, or even that it would be favourable to the defendant.
165. The claimant’s case, as presented by Mr Mill, is that all of this is not only denied by the claimant, it is also entirely speculative and Micawberite, vague and general in content, and lacking any proper evidential support. Mr Verity’s evidence and that of Mr Mathieson contains hearsay from anonymous sources. There is no substance to the factual case, submits Mr Mill, and I should not be deterred from entering summary judgment. If I am against him on that submission, he argues that there is still no compelling reason for a trial, because it is fanciful to suppose that this is a case of successive creation, such as would yield separate copyrights. At worst, therefore, the claimant is a co-author of a work of joint authorship, and entitled to relief for infringement of her share in the copyright.
166. The defendant’s factual and legal case on this issue both seem to me to occupy the shadowland between improbability and unreality. The case is contingent, inferential and imprecise. It cannot be described as convincing, and seems improbable. It lacks any direct evidence to support it, and it is far from clear that any such evidence will become available. It is not possible to envisage a Court concluding that Mr Knauf’s contribution to the work as a whole was more than modest. The suggestion that his contribution generated a separate copyright, as opposed to a joint one is, in my judgment at the very outer margins of what is realistic.
167. If this case were concerned with a commercially valuable copyright of which Mr Knauf was asserting a substantial role in co-authorship and he or his principal were claiming copyright, a trial of these issues might have important consequences. But none of those things is the case. Whilst it might be interesting to some to explore the minutiae of the process, it is not easy to identify a useful litigious purpose in a trial of these issues, the substantive effect of which would be, at best, to whittle down the remedies available to the claimant. Such benefits as that might be thought to confer on the defendant would surely be far outweighed by the consumption of resources involved. But proportionality, as I remind myself, is not the criterion. I have concluded that the

Approved Judgment

defendant's case cannot be described as fanciful and, since the defendant so wishes, these issues must go forward to a trial.

168. I am not, however, persuaded that the need to try these issues carries with it the need for a trial of all the issues, notwithstanding the conclusions I have already expressed. That would not be consistent with the overriding objective. The trial will be the trial of limited issues within the copyright infringement claim, not a trial of the whole claim. The outcome could have consequences as to the extent to which the claimant can establish infringement of her copyright, and the remedies she can recover. But these in substance and reality are matters that go only to remedies, and are capable of resolution by case management. They are not a compelling reason for a trial of other issues on liability in this part of the claim. There is no room for doubt that the defendant's conduct involved an infringement of copyright in the Electronic Draft of which the claimant was the owner or, at worst, a co-owner.

Conclusion

169. The claimant is entitled to summary judgment on the issues of subsistence and infringement. She is bound to prove that she was the or an owner of the or a copyright in the literary form of the Electronic Draft which copyright was infringed by the defendant, and the defences advanced would be bound to fail. There remain for resolution by way of a trial the issues - of minor significance in the overall context - as to whether the claimant was the sole author or whether the involvement of Mr Knauf - whatever it proves to have been - made him a co-author; and if so, what consequences that has as on the extent of the infringement of which the claimant may complain, and on the remedies available.

**Disposal**

170. There will be summary judgment for the claimant on the claim for misuse of private information, and on the issues I have identified in the claim for copyright infringement. A hearing or hearings will need to be fixed for the determination of the remaining issues in the copyright claim and for the determination of what remedies should be granted. The directions needed for that purpose will be identified at a hearing which has been fixed for 2 March 2021 to deal with all matters consequential on this judgment, including costs.
171. One issue on which some time was spent at the hearing is the procedural consequences if I concluded that this might be a case of joint authorship. In my judgment, Mr Speck is right to submit that this is a case within the scope of CPR 19.3 (provisions applicable where two or more persons are jointly entitled to a remedy). Alternatively, if it is not, then in my judgment the appropriate case management approach is to give it similar treatment. I shall direct that the defendant promptly serve formal notice of its case as to ownership on each person it maintains is or might be entitled to copyright in the Electronic Draft, the Letter, or any part of either work, notifying that person that he or she is entitled to apply to be joined as a claimant or defendant to these proceedings, and setting a period of time within which they may do so. Any application for joinder will be determined on its merits. Absent any such application the claimant may proceed without joining any such person.