

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST

B E T W E E N: -

HRH THE DUCHESS OF SUSSEX

Claimant

- and -

ASSOCIATED NEWSPAPERS LIMITED

Defendant

CLAIMANT'S SKELETON ARGUMENT
for the Hearing on 24 April 2020

References to the hearing bundle are in the following form: [Tab#/Page#]

Reading list:

Pre-Reading time: 3hrs

Defendant's Application Notice dated 14 January 2020 [1/5-7]
Defendant's Draft Order [2/8-9]
Particulars of Claim [4/13-27]
Claimant's Response to D's Request for Further Info [5/28-41]
Claimant's Response to D's Second Request for Further Info [6/135-139]
Defence [7/140-216]
Reply [8/217-249]
Articles complained of [9-13/250-301]

INTRODUCTION

1. This is the Defendant's application to strike out four passages from the Claimant's Particulars of Claim (and related parts of her Responses to Requests for Further Information) in her action for misuse of private information, breach of data protection rights and infringement of copyright over the publication of a series of different articles in the *Mail on Sunday* and *Mail Online* on 10 February 2019 in which it disclosed¹ the detailed contents of "a deeply personal handwritten" letter in which the Claimant "pours out her heart" to her father ("the Letter") to millions of readers.
2. This Application, which relates solely to part of the Claimant's misuse of private information claim (and not the other two claims), was made at the same time as the Defendant's service of its Defence. Since that date, the Claimant has served her Reply, rebutting the Defence root and branch. There is no date set for trial as yet.

¹ As the Defendant itself described the Letter the very next day, 11th February 2019, in an article entitled "You watched me suffer as my sister spread lies", published in the *Daily Mail*.

3. In essence, the Defendant objects to the reference by the Claimant in her claim to (a) the fact that its deliberate omission of passages of the Letter (despite having falsely claimed in the Articles that it was publishing the “full content”²) was “dishonest”; (b) the fact that it deliberately omitted these passages because to include them would have been unfavourable to the Defendant as being “one of the tabloid newspapers which had deliberately seeking to dig or stir up issues between her and her father”; (c) the fact that the inclusion of a so-called ‘expert handwriting analysis’ of her Letter, rubbishing the Claimant’s personality, was evidence of ‘malicious intent’ in publishing its contents, and (d) a pattern of additional intrusive and offensive articles published about her by the Defendant with which the Articles complained of were consistent, a pattern that caused her further injury to her feelings.
4. However, the Application is not just misconceived but also confused and inconsistent. For example, whilst the Defendant seeks to strike out the allegation [under limb (a) above] that it edited the Letter in a *dishonest* manner, it does not object, however, to the allegation that it did so in “a highly misleading” manner (see paragraph 9(8) [4/17]), or that it “deliberately sought to mislead the public by selectively editing the contents of the Letter so as to suppress or omits parts of it” (see paragraph 7 [4/15]), or that its reference to the Letter was “completely untrue, and highly misleading, as Defendant knew full well, since large sections were deliberately omitted or suppressed and the meaning thereby intentionally distorted or manipulated” (see paragraph 9(10) [4/17]). The distinction (if any) is at best extremely fine, and certainly not one which could possibly justify the Court exercising such a draconian power.
5. Similarly, whilst the Defendant’s objection [under limb (b) above] to the allegation that it omitted unfavourable parts of the Letter to avoid revealing that it had been “deliberately seeking to dig or stir up issues between her and her father” seems to have been that the Claimant has not provided particulars of this, it now appears that the Defendant is seeking to strike out the passages in the Reply where the factual basis for this allegation has been made abundantly clear (and the spurious objection thus met), namely that the Defendant deliberately generated or stirred up issues (or the so-called “dispute” which it claims to have been ‘legitimately reporting on’) between the Claimant and her father through a series of activities as follows³:

² See paragraphs 9(10) and 19.4 of the Particulars of Claim [4/17; 4/21]

³ See, for example, paragraph 3.6 of the Reply [8/219]

"It was absurd to suggest that...in revealing the detailed contents of this letter, the UK media publisher was simply seeking to 'set the record straight' on behalf of the author's father as to a "dispute" which had arisen as to the correct version of events surrounding their relationship (as opposed to self-serving commercial interest), when in fact it was the same publisher which had first harassed and humiliated the author's father (despite him trying to avoid the limelight), had then exposed him to the world as a "Royal scammer" for staging 'fake' paparazzo photographs (in order, he claimed, to counteract the humiliation of him in the UK press) and had finally manipulated this vulnerable man into giving interviews, which he later described as "lies and bullshit", thereby causing the very "dispute" which they claim justified the publication of this letter, as well substantial damage to his relationship with his daughter."

The Claimant's allegation could not be clearer, nor the facts on which her allegation is based. It is effectively the *"curiosity of the newspaper's readership regarding the private life of the Claimant"* which the publication of the Letter was intended to *"satisfy"*, as alleged in paragraph 9(7) of the Particulars of Claim – a passage also not objected to – *"a curiosity deliberately generated by the Defendant"*, as the paragraph continues, without apparent objection. See paragraph 9(7), [4/17].

6. Further, the objection to the allegation of motive in the Particulars of Claim (which appears to be the premise of limb (c) above, as well as limb (a)) does not bear scrutiny. The Defendant's motive in publishing the Letter is plainly one of the factors relevant to the multi-factorial assessment of *"all the circumstances of the case"* which the Court is required to perform at trial as part of the well-established two-stage test in balancing the Article 8 rights of the Claimant (which have been blatantly infringed) with such Article 10 rights as the Court finds the Defendant was entitled to in relation to the disclosure of her private letter, as is the *"form and manner"* in which the information is published. The relevance of motive is clear from numerous authorities, for example the 'blackmail' line of misuse of private information cases (where it is taken into account as to the strength of the Article 10 right as well the nature of the relief). The fact that the Defendant has sought to object to *some* of the allegations as to its motives in the Particulars of Claim, but not others, only serves to highlight the artificiality, as well as the confused and incoherent nature, of the Application, as referred to above.
7. Finally, the Defendant's attempts to remove the additional articles which form part of the Claimant's case as to damages is equally misconceived. The fact that the Claimant has suffered further distress by the realisation that the Articles complained of form part of a pattern or agenda of intrusive and offensive articles published about her by the Defendant is unobjectionable, not least because it relates to her state of mind about the course of conduct (as opposed to introducing separate causes of

action). This is a privacy claim, not a libel action, where the pleading requirements are very different given the gist of the action. The gist of the Claimant's complaint here is that the Defendant should never have disclosed the detailed contents of her deeply personal letter to millions of people, and the fact that it deliberately did so without seeking her consent or telling her in advance demonstrated that it was well aware she would object and prevent its publication (as she would have done). That is a quintessential privacy claim.

8. In truth, the Defendant's Application is an attempt to remove factual elements of the claim (factual elements which the Court will need to take into account in its multi-factorial assessment at trial) which go to the heart of the Claimant's complaint about the disclosure of her private information and what is falsely claimed by the Defendant to have been its 'public interest' basis justifying this disclosure (as well as her distress at the fact that the Articles complained of form part of a pattern of intrusive and offensive coverage by the Defendant). It is trite law that there can be no public interest in misinforming or misleading the public, as the Claimant alleges in the parts objected to. The Court must be astute to prevent the Defendant from excising elements of that multi-factorial assessment which undermine its asserted right to publish under Article 10. These matters could not possibly be said to disclose no reasonable grounds for bringing the claim, let alone that they are an abuse of the process or likely to obstruct the just disposal of the proceedings.

BACKGROUND TO THE CLAIM

9. In 2016, the Claimant began her relationship with the Duke of Sussex. At the time she was an American actress, as well as a women's right activist and businesswoman. The two became engaged and their wedding was set for May 2018.
10. Despite the enormous press attention which started from the moment their relationship was revealed, the Claimant sought to protect her privacy, as well as that of her family, including "*repeated requests to the media to leave her father alone*": see paragraph 9 of the Reply **[8/223]**. The Claimant has deliberately not courted publicity in relation to the details of her relationship with her father: see paragraph 9(5) of the Particulars of Claim **[4/16]**.
11. Notwithstanding this, and in particular the requests to respect his privacy (especially as he was a "*vulnerable man*"), the Defendant sought to dig or stir up issues between the Claimant and her father. For example:

- 11.1 In its article of 1 December 2017 entitled “*So why IS Meghan's dad determined to hide from the world? How Thomas Markle, 73, has changed his phone number and concealed his address to avoid being traced*”, the Defendant introduced Mr Markle and revealed the lengths which he had gone to in order to avoid press intrusion, as well as hinting at there being an issue between the Claimant and her father because he had not yet met her husband-to-be. This was repeated in an article published by the Defendant the next day, 2 December 2017, under the headline: “*PICTURE EXCLUSIVE: Meet the father in law, Harry! The most recent picture of Meghan's 'total recluse' dad who the Prince has yet to meet*”.
- 11.2 On 4 December 2017, the Defendant published an article under the headline “*We aren't on the best of terms': Teenage Meghan Markle confides in her best friend about difficult relationship with her father in unseen home video*”, describing their relationship as “difficult” and stating that her father “hated the attention” her engagement to the Duke of Sussex had brought. The same day, in an article entitled “*EXCLUSIVE: 'Do you know Meghan Markle? I'm her dad!' Thomas Markle, 73, lives in a very un-royal beachfront hideaway in a Mexican resort where he boasts to friends about being the father of Prince Harry's fiancée*”, the Defendant tracked Mr Markle down to the home in Mexico where he had sought privacy, publishing pictures of him, and discussing his relationship with the Claimant in terms that “*whatever happened in later years, [she] has been publicly supportive of her father, although he has yet to meet [her husband-to-be]*”.
- 11.3 Further similar articles appeared, one for example being published on 29 December 2017, under the headline “*Meghan Markle's father is 'extremely hurt' by Prince Harry's claim the royals are 'the family she never had'*”, apparently quoting that Mr Markle “*has been left extremely hurt*” after the Duke of Sussex had said that his family was like ‘the family she never had’, and reporting comments from Mr Markle’s daughter and son from a previous relationship attacking the Claimant.
- 11.4 As repeatedly reported on by the Defendant in the lead-up to the wedding on 19 May 2018, Mr Markle was due to fly to London to attend the ceremony and

had been asked by the Claimant to walk her down the aisle. As stated in paragraph 14.2(a) of the Reply **[8/232]**

It is admitted that Mr Markle planned and intended to attend the Claimant's wedding, and that he and the Claimant exchanged messages about the arrangements for the wedding. The Claimant took great steps to ensure his attendance, as she did to protect him from the media intrusion he was suffering.

11.5 However, on 12th May 2018, the Defendant published a worldwide exclusive story sensationally revealing that photographs of Mr Markle's preparations for the wedding had been deliberately staged by him with a pap photographer and he had been paid a substantial sum of money for these faked shots. The article was entitled: *"Royal Wedding scammers! Meghan Markle's father STAGED photos with paparazzi that were shared around the world and sold for up to £100,000 – just days before he walks her down the aisle"*. Describing his behaviour as a betrayal of his daughter, the Defendant published extensive details of how Mr Markle had *"been co-operating with a paparazzo behind the back of his daughter"*. It is to be noted that whilst it publicly boasted of its achievements in revealing this 'scam' at the time, the Defendant is now unusually bashful about its world exclusive in the Defence, entirely avoiding any reference to the fact that it was its own newspaper which so publicly shamed Mr Markle, as stated in the Reply (see paragraph 12.10 **[8/230-231]**).

11.6 Following this public shaming by the Defendant, Mr Markle suffered cardiac problems on 14 May, an event which the Claimant only discovered because her father issued a public statement to that effect through the American tabloid website. This was covered extensively by the British press, including the Defendant who chose to report that her father had not sought medical attention on the day of the "heart attack" (the use of the speech marks being the Defendant's), and *"revealed that.. he was instead inside his clifftop home in Rosario the entire day.. two days later he was seen grabbing two Happy Meals and a frosted beverages at a McDonald's drive-thru...."*.

11.7 As a result of this frenzied reporting, Kensington Palace issued a public statement on the Claimant's behalf on 15 May, confirming that Mr Markle would not be attending the wedding for health reasons but asking for *"space for him to focus on his health"* (without giving any details of it). This was done,

as explained in the Reply, in order to limit and control the amount of press intrusion: see, for example, paragraph 14.2 [8/241-242].

11.8 Despite this, the Defendant continued to publish a series of stories about his failure to attend the wedding and the “heart attack” he claimed to have suffered, according to its articles. The Defendant published 16 further articles in May about her father, including one on 16 May under the headline: “*The bishop uncle, an outspoken half-sister and a cannabis farmer nephew: How Meghan Markle’s estranged family have turned the royal wedding into a VERY colourful affair*” in which it reported that the Claimant’s “estranged” family, including Mr Markle, have “*done their best to steal the spotlight...using their new found fame to exploit the family name*”.

11.9 Even after the wedding, and her father’s failure to attend as a result of his shaming, the Defendant continued to publish further articles, stirring up issues between the Claimant and her father. For example, on 15 July 2018, it published one entitled: “*Thomas Markle begs daughter Meghan to get in touch with him saying ‘I could die soon’ as he reveals they last spoke just after the wedding*”, in which it contrasted their relationship at the time of the article with how it had been in the past. Another was published on 28 July 2018 under the heading: “*‘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*”.

12. Despite the suggestion in this last article, the Claimant had not changed her numbers, as stated in the Reply. Indeed, contrary to the deliberate impression given in the Defence, the Claimant (and her husband) had repeatedly telephoned, as well as messaged, her father in the immediate lead-up to the wedding but he had refused to answer the calls or to call them back: as is extensively set out in paragraphs 14.1 to 14.9 of the Reply [8/232-240]. Just by way of example in the few days before the wedding:

- a. On 14 May 2018, following a text message apologising and confirming he would not be attending the wedding, the Claimant made several calls to her father which went unanswered. Her husband then sent a message to Mr Markle from the Claimant’s telephone, which read:

"Tom, it's Harry and I'm going to call you right now. Please pick up, thank you" / "Tom, Harry again! Really need to speak to u. U do not need to apologize, we understand the circumstances but "going public" will only make the situation worse. If u love Meg and want to make it right please call me as there are two other options which don't involve u having to speak to the media, who incidentally created this whole situation. So please call me so I can explain. Meg and I are not angry, we just need to speak to u. Thanks" / "Oh any speaking to the press WILL backfire, trust me Tom. Only we can help u, as we have been trying from day 1".

b. Unfortunately, rather than call or pick up the phone to either the Claimant or her husband, Mr Markle then issued a public statement through TMZ that he had gone to hospital because he had suffered a heart attack, which is how the Claimant first learned about this, as explained above.

c. On 15 May 2018, the Claimant replied to a brief text message from her father as follows:

"I've been reaching out to you all weekend but you're not taking any of our calls or replying to any texts... Very concerned about your health and safety and have taken every measure to protect you but not sure what more we can do if you don't respond...Do you need help? Can we send the security team down again? I'm very sorry to hear you're in the hospital but need you to please get in touch with us... What hospital are you at?"

d. Approximately 10 minutes later, the Claimant again messaged, this time saying: *"Harry and I made a decision earlier today and are dispatching the same security guys you turned away this weekend to be a presence on the ground to make sure you're safe... they will be there at your disposal as soon as you need them. Please please call as soon as you can.. all of this is incredibly concerning but your health is most important"*. Mr Markle responded to this simply by saying he would be in hospital for a few days and was okay but refused the offer of security.

e. The Claimant's husband then sent a further message from the Claimant's phone in order to provide Mr Markle with the details of the security team, and asked Mr Markle to speak to him about letting the security guard who they had sent to help Mr Markle return to his house. The Claimant's husband pleaded with Mr Markle to let them help him. While Mr Markle responded later that evening to say that he appreciated the offer but did not feel in danger and would instead recover at a motel, the Claimant responded 10 minutes later to

make a further request for the hospital details so that she would know where he was.

- f. Following his surgery, on 16 May, the Claimant called Mr Markle a further four times within 5 minutes of receiving an unpleasant message from him, but he declined to pick up. Her husband even texted Mr Markle from the Claimant's phone to say "*Tom, it's Harry, please answer your phone. I need to know this is actually you because it doesn't sound like you at all*". No response was received. Other than a missed call to her phone in the early hours of the morning of her wedding, the Claimant heard nothing more from her father.

13. Given the repeated calls by the Claimant to her father, which sadly went unanswered, a private letter was the only form of communication that the Claimant believed might work, as stated in the Reply: see paragraph 13 [4/231-232]. The Letter was drafted in electronic form, and then written out in her typically neat longhand and sent in August 2018 to his address. In this letter, she set out her intimate thoughts and feelings about her father's health and her relationship with him at that time. Its contents were not for public consumption. As the Defendant itself stated⁴, the Claimant "*pours out her heart in moving letter to estranged father*", "*in a deeply personal handwritten note*" the Claimant says that her father had "*simply watched while she 'silently suffered' at the hands of her [half-sister's] 'vicious lies'*".

14. In particular, she raised concern that he had consistently allowed himself to be manipulated by the tabloid media (especially the Defendant), despite her trying to persuade him to not to speak to them for his own good, and rightly so: see paragraph 12.8 of the Reply [4/226-228].

15. Mr Markle responded in September 2018. At no stage did he say he would make her Letter public, nor even hint at it. As is mentioned in his response (a copy of which he gave to the Defendant and from which quotes are referred to in the Articles), and is cited in paragraph 12.8(h) of the Reply [4/228-229], Mr Markle refers to the behaviour of the Defendant's journalists, and in particular, Peter Sheridan who manipulated him into speaking to the Mail Online, a conversation which was then presented in an article on 28 July 2018 as an interview of "*almost nine hours*" and as a full-scale attack upon the Claimant. As Mr Markle states:

⁴ Article entitled "*You watched me suffer as my sister spread lies*", published in the Daily Mail on 11 February 2019

"The next day [Peter Sheridan] announced and bragged that he got a 9 hour interview. He said a few things I said in confidence, but 85% were lies and bullshit! I called him and told him he was a thief, a liar and a coward and I would GET EVEN!

"I didn't want or intend to give him an interview and I certainly would not do 9 hours for free!....

"When I was asked if I tried to borrow money from you, three days before the wedding? I said, "no I did not, but I know she would have helped me if I would have asked." I made a comment about Tom Jr not paying me back, "not one red cent", and they changed it to Meghan's dad complaining that his kids won't pay him back one red cent!! That comment came from Peter Sheridan's 9 hour interview....

"I never said anything about your grandma, never!! I know you took care of her, I don't know where that comes from? I appreciate that you have always been concerned for my health and you were trying to get me help".

(parts of this passage of the letter, relating to the Defendant's journalists, have been deliberately omitted to protect Mr Markle's reputation)

16. Nothing more passed between the Claimant and her father.
17. In early 2019 (several months later), a group of close friends of the Claimant, who were concerned and distressed by the media coverage about her and the impact which it was having upon her, spoke to People magazine, a US publication whose editor was a close friend of one of them. An anonymous interview was then given by several of them to the magazine, and in the course of a lengthy piece published in the 6 February 2019 edition, a brief and passing reference was made by one of the Claimant's friends to her Letter, as well as to her father's response.
18. The Claimant did not know that this interview had taken place with People magazine, nor, critically, that reference had been made in the interview to the Letter. Had she known (or procured it, as the Defendant suggests) (a) she would never have consented to such a reference and (b) the reference would at least have been correct (which it was not). These facts, which fatally undermine the Defendant's entire case, are repeatedly stated in the Reply: see for example paragraph 3.5 [8/219], 5 [8/220] 12.8 [8/226-9], 12.11 [8/231].14.8 [8/237-8] 17.3 [8/244] 19.5 [8/246].
19. On 10 February 2019, the Defendant published the Articles complained of [9-13/250-301] revealing the detailed contents of the Letter. No consent was even sought from the Claimant in advance. This was a deliberate decision taken by the

Defendant to avoid risk of her seeking to prevent publication and also secure the enormous 'scoop' which the Defendant wished to achieve with such a highly sensational story: see paragraph 6 of the Particulars of Claim [4/15].

20. As explained, and set out in detail in paragraph 19.5 of the Particulars of Claim [4/21-23] and the Confidential Schedule of Deliberate Omissions attached to the Response to the Requests for Further Information (but not attached here for confidentiality reasons) [5/32], the Defendant did not publish the *full content* of the Letter but deliberately omitted or suppressed a number of important passages, passages which the Claimant alleges are unfavourable to the Defendant and/or undermine the negative manner in which the Defendant sought to publish this private information.

PROCEDURAL HISTORY

21. Following an unsatisfactory exchange of pre-action correspondence, the Claimant had no alternative but to issue proceedings by Claim Form dated 29 September 2019 [3/10-12]. Particulars of Claim were then served on 11 October 2019 [4/13-27].

22. Rather than serve its Defence, the Defendant served a Part 18 Request for Further Information, which the Claimant responded to on 11 November 2019 [5/13-41]. A second Request was served and responded to on 9 December 2019 [6/135-139]. A Defence was finally served on 14 January 2020 [7/140-216], together with this application notice. As outlined below, the Defendant disputes liability on every basis, for misuse of private information, infringement of copyright and breach of data protection rights, as well any claim for damages or other remedies.

23. The Claimant served her Reply on 17 April 2020 [8/217-249]. In the Reply, she has set out a detailed rebuttal of the arguments advanced by the Defendant, both as a matter of fact and law.

LAW OF MISUSE OF PRIVATE INFORMATION

24. As already stated above, the assessment which the Court is required to perform in a misuse of private information claim is a multi-factorial one, based on "all the circumstances of the case". It is a fact-sensitive exercise *par excellence*.

25. The two stage test, as the methodology is generally described, involves first a determination of whether there is a reasonable expectation of privacy in relation to

the information complained of such as to engage Article 8 and then, if so, the Court will proceed to perform the task of balancing the competing Convention rights applying the test of proportionality to each, and an intense focus to the precise nature and strength of these rights as engaged in the particular publication.

26. As to the threshold test, or stage one, the factors which the Court should consider when assessing whether the Claimant has a reasonable expectation that the information would remain private were set out by the Court of Appeal in ***Murray v Express Newspapers* [2008] EWCA Civ 446** at [35]-[36]:

"[35] ... so far as the relevant principles to be derived from Campbell are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in Campbell. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said at [99]:

'The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity'.

We do not detect any difference between Lord Hope's opinion in this regard and the opinions expressed by the other members of the appellate committee.

[36] As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the absence of consent, and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

27. Once that first stage is established, then the Court is considers all the circumstances of the case in performing the balancing act between competing Convention rights as engaged in the publication of the information complained of. As Strasbourg jurisprudence confirms relevant factors or criteria include⁵:

(1) *The contribution made by the publication to a debate of general interest.*

This is a very important criterion. For example, the rumoured marital difficulties of a president of the republic or the financial difficulties of a famous singer were not deemed to be matters of general interest.

(2) *How well-known is the person concerned and what is the subject of the publication.* The role or function of the press and the nature of the activities which are the subject of the publication constitute another

⁵ See, for example, *Von Hannover v Germany* (No2) 2012 55 EHRR 15 [108]-[113] and other Strasbourg cases.

important criterion. A fundamental distinction has to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting of the private life of an individual, however well known, who does not exercise such functions. The significance of this distinction was specifically referred to by the Strasbourg Court in **Mosley v UK [2011] ECHR 774**, where it strongly emphasized at [114] that in contrast to its function as a public watchdog, this latter role merited little protection for the press:

“The Court also reiterates that there is a distinction to be drawn between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual’s private life. In respect of the former, the pre- eminent role of the press in a democracy and its duty to act as a “public watchdog” are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person’s strictly private life... Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation... While confirming the Article 10 right of members of the public to have access to a wide range of publications covering a variety of fields, the Court stresses that in assessing in the context of a particular publication whether there is a public interest which justifies an interference with the right to respect for private life, the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it.

- (3) *Prior conduct of the person concerned.* It should be noted that the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving a party of all protection against publication of articles and photographs.
- (4) *Content, form and consequences of the publication.* The way in which the information is published and the manner in which the person concerned is represented may also be factors to be taken into consideration. The extent to which the information has been disseminated may also be an important factor.
- (5) *Circumstances in which the information was obtained and published.* Regard must be had to whether the person gave their consent to the obtaining of the information and its publication or whether this was done

without their knowledge or by subterfuge or other illicit means. Regard must also be had to the nature or seriousness of the intrusion and the consequences of publication of the information for the person concerned.

28. These are the criteria which the Court will need to apply based on an intense focus on the factual circumstances which underlie this case and the extent to which it is claimed (and if so, rightly claimed) that Convention rights apply, namely Article 8 and Article 10.

29. Importantly, for the purposes of the Application, whilst there are *some* overlaps between the law of privacy and defamation in practical terms, they are critically different torts as a matter of legal analysis. Misuse of private information is simply not the same cause of action as libel, and requires the application of entirely different legal principles. The gist of a defamation claim is damage to reputation which is presumed from the proof of 3 elements (a) the statement complained of is defamatory; (b) the statement is published to a third party and (c) the statement identifies the claimant. The fundamental principle of privacy is intrusion, and the test is a multi-factorial one, not a linear one. As a result, it is crucial that the pleading requirements of one tort should not be imported into another, simply because both causes of action commonly arise in relation to media publications.

THE PARTIES' RESPECTIVE CLAIMS

30. The Claimant's position is clear and straightforward. The publication of the detailed contents of the Letter is an infringement of her Article 8 "*right to respect for her private life, family, home and correspondence*" (emphasis added), as well as an infringement of the copyright which she holds in the Letter and her data protection rights as its data subject. The fact that the Letter contained her most personal thoughts (as the Defendant itself reported⁶) only serves to strengthen this. No consent was sought or obtained by the Defendant before its contents were revealed to millions of its readers. There was no public interest served by the publication, which was neither presented as nor capable of contributing to a debate in democratic society relating to matters of legitimate public interest. Rather, it was disclosed with the sole and entirely gratuitous purpose of satisfying the curiosity of the Defendant's readership about the Claimant's private life of the Claimant, a curiosity deliberately

⁶ See footnotes 1 and 4 above.

generated by the Defendant: see paragraphs 9(6) and 9(7) of the Particulars of Claim [4/16-17].

31. By contrast, the Defendant's case is both wide-ranging and novel. In relation to the misuse of private information claim alone, it denies amongst other things that the letter was private (because its contents are now said not to be private and simply being recorded in a private form of communication is irrelevant); that the Claimant is not entitled to any reasonable expectation of privacy as she is a member of the Royal family and was at the time publicly funded, as well as that there was a justification for publishing the contents of the Letter because the Claimant had procured or authorised her friends to refer to it in the interview they gave to People magazine (which is untrue), and because the Defendant was reporting fairly and accurately on the public dispute and estrangement between the Claimant and her father.
32. As stated in the Reply, the same or similar arguments were advanced by the Defendant in relation to the heir to the throne who had recorded his thoughts on politics in his personal diaries, and dismissed by the Court in *HRH Prince of Wales v Associated Newspapers Limited* [2006] EWHC 522, as affirmed by the Court of Appeal in its decision [2006] EWCA Civ 1776.
33. In particular, it is clear from the terms of its Defence that the Defendant intends to put in issue as part of its case that the Claimant had no reasonable expectation of privacy and/or there was a public interest which justified publication of the contents of the Letter, the following factual matters:
- a. The (truth or falsity of the) Claimant's status and the fact that she is publicly funded, including living in Frogmore Cottage and the money which is spent by taxpayers – see for example, paragraph 3 and 6 of the Defence [7/141, 142].
 - b. The (truth or falsity of the) nature and content of the communications between the Claimant and her father – see for example, paragraph 15 of the Defence [7/154-159].
 - c. The (truth or falsity of the) nature of and circumstances surrounding the 'dispute' between the Claimant and her father - see for example, paragraphs 15 [7/154-159] and 16.6 of the Defence [7/161],

- d. The nature, extent and accuracy of the Defendant's selection of the contents of the Letter for reproduction in the Articles, and its reasoning for this - see for example, paragraph 17 of the Defence [7/163-170]

34. In the circumstances, there is plainly a substantial interaction and overlap between a number of the factual issues which the Court will need to determine at trial.

DEFENDANT'S' APPLICATION TO STRIKE OUT

35. The Defendant's application to strike out concerns four passages from the Claimant's Particulars of Claim (and related parts of her Responses to Requests for Further Information). They are as follows:

(1) *Paragraph 9(8) of the Particulars of Claim: ("the Allegation of Dishonest Editing")*

*"In further support of the contention that there was simply no public interest or legitimate reason to publish the Letter, the Claimant will refer to the fact that the Defendant chose to deliberately omit or suppress parts of the Letter in a highly misleading **and dishonest manner**, including even cutting out words in the middle of a sentence or whole sentences out of a paragraph."* (emphasis added for the relevant part sought to be struck out)

(2) *Paragraph 9(9) of the Particulars of Claim: ("the Allegation of Stirring up Issues")*

*"and/or been generally unfavourable to the Defendant as one of those **tabloid newspapers which had been deliberately seeking to dig or stir up issues between her and her father**"* (emphasis added for the relevant part)

(3) *Paragraph 9(12) of the Particulars of Claim: ("the Allegation of Malicious Intent")*

*"The Defendant also published an article (as referred to in paragraph 4(5) above) which sought through so-called 'expert handwriting' analyses to further detail the Claimant's private thoughts and feelings about her father. The "analysis" was used to make derogatory allegations about the Claimant's character in order to lend support to the Defendant's pre-conceived narrative for the Articles and the attack upon the Claimant. For example, the Defendant labelled the Claimant as a "showman and a narcissist" based solely on her handwriting style. **Such actions evidence the Defendant's clear malicious intent in publishing the letter.**"* (emphasis added for the relevant part)

(4) *Paragraph 19.8: ("the Aggravation Articles")*

*"However, as the Claimant is also distressed to realise, **this is wholly consistent with the Defendant's obvious agenda of publishing intrusive or offensive stories about the Claimant intended to portray her in a false and damaging light.** The Claimant will refer to the following articles published by the Defendant by way of example of this:*

(1) *"Harry's girl is (almost) straight outta Compton: Gang-scarred home of her mother revealed – so will he be dropping by for tea" published on MailOnline on 20 November 2016;*

(2) *"Kitchen supported by Meghan's cookbook is housed inside mosque 'which has links to 19 terror suspects including Jihadi John' published on MailOnline on 24 November 2018;*

(3) *"How Meghan Markle's Australian aide Samantha 'the Panther' Cohen rose from a Brisbane home to Buckingham Palace – before becoming the second aide to walk out on the 'difficult Duchess' published on MailOnline on 10 December 2018*

(4) “How Meghan’s favourite avocado snack – beloved of all millennials – is fuelling human rights abuses, drought and murder” published by the Daily Mail on 22 January 2019;

(5) “Doria Ragland spotted alone in LA while daughter Meghan Markle parties with famous friends at her \$300k baby shower” published on Dailymail.com on 20 February 2019.

(emphasis added for the relevant part)

36. The Application is framed under CPR Part 3.4(2)(a) and/or (b) [1/5-6]. Part 3.4(2)(a) requires the applicant party to demonstrate “*that the statement of case discloses no reasonable grounds for bringing or defending the claim*”; Part 3.4(2)(b) requires the applicant to establish that “*the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings*”.

37. There also appears to be a reference to “*the inherent jurisdiction of the Court*” but it is not obvious what is sought to be added by this bare reference, nor is any explanation given in the Application Notice.

38. Whilst they may already be familiar, it is important for the Court to bear in mind the legal principles which apply to an application to strike out, in view of the frequent warnings which Appellate Courts have given about the delicate nature of this exercise. This is especially so in an area where the law is developing (as is stated in **White Book 2019**, §3.4.2 p82), as it is in relation to the misuse of private information.

LEGAL PRINCIPLES OF STRIKE OUT APPLICATION

The appropriate test under CPR r.3.4(2)(a)

39. Under CPR r3.4(2)(a), the Court may only strike out particulars if it is satisfied that they “*disclose no reasonable grounds for bringing the claim*”. The threshold test is therefore an extremely high one.

40. The exercise which the Court is asked to perform is a technical inquiry, which requires examination of the statement of case that the applicant seeks to strike out, and consideration of evidence (see the **White Book 2019**, §3.4.2 (pp. 83-4)).

41. The types of pleadings where a Court may conclude that particulars fail to disclose no reasonable grounds are given in **Practice Direction 3A** para 1.4. They are:

- (1) Those which set out no facts, indicating what the claim is about, for example “Money owed £5,000”,

- (2) Those which are incoherent and make no sense,
- (3) Those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.

Clearly, none of the paragraphs under attack by the Defendant come anywhere close to these examples.

42. The **White Book 2019** commentary at §3.4.2 (p.82) refers to the clear guidance of the Court of Appeal in **Richards (t/a Colin Richards & Co) v Hughes [2004] PNLR 35**:

The correct approach is not in doubt: the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out.

43. The bar for the Defendant to overcome before such paragraphs may be struck out is undoubtedly very high. The **White Book 2019** commentary also makes clear that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence. Further, where a statement of case is found to be defective, the Court should consider whether that defect may be cured by amendment and, if it might be, should refrain from striking out and give the party an opportunity to amend.

The appropriate test under CPR r.3.4(2)(b)

44. The threshold for holding that a claim should be struck out under CPR r.3.4.2(b) as an abuse of process or obstructing a just disposal of the proceedings is equally high. Guidance on the test can be found in the **White Book 2019, §3.4.3 (p.83)**.
45. The term “abuse of process” has been described as using the Court’s process for a purpose or in a way significantly different from its ordinary and proper use. There are a number of categories of abuse of process which have been recognised by the Court (set out in the relevant section of the **White Book 2019, §3.4.3**), including where proceedings are vexatious, attempts to re-litigate issues from previous proceedings, collateral purpose or attacks on earlier decisions, delay, *Jameel*-type abuse and others.

SUBMISSIONS

The Allegation of Dishonest Editing: Para 9(8) Particulars of Claim; Response 8 & 9

46. The first passage objected to relates to the Claimant's allegation that the Defendant "dishonestly" edited the letter. This allegation is set out in paragraph 9(8) of the Particulars of Claim, the relevant part of which reads as follows:

*"In further support of the contention that there was simply no public interest or legitimate reason to publish the Letter, the Claimant will refer to the fact that the Defendant chose to deliberately omit or suppress parts of the Letter in a highly misleading and **dishonest manner**, including even cutting out words in the middle of a sentence or whole sentences out of a paragraph."*

(emphasis added for the relevant part)

47. It is further particularised in two Responses to the Request for Further Information served by the Defendant in relation to paragraph 9(8) of the Particulars:

Response 8 (insofar as it contains an allegation of dishonesty)

Request

Please state on what basis it is alleged that such omission or suppression was dishonest. (Re. 9(8) of the Particulars of Claim)

Response

"The omitted or suppressed parts of the Letter amount to almost half of the actual contents of the Letter, despite the Defendant claiming to its readers that it was publishing the Letter in full. The omitted parts demonstrate the Claimant's care for her father and others, as well as her concern about the UK tabloid media exploiting her father, and the fact that she addresses untruths previously published by the Defendant. Those elements did not fit the Defendant's narrative within the Articles. In such circumstances, the pronouncement by the Defendant that it was revealing the "full content" of the "five-page Letter" was intentionally misleading and dishonest."

Response 9 (insofar as it contains an allegation of dishonesty)

Request

Please state whether it is the Claimant's case that, if the Letter was to be published, the Defendant ought to have published the omitted parts of the Letter.

Response

"As already clearly pleaded, the Defendant should not have published the Letter at all, whether in full or in part, without the Claimant's consent. The fact that it chose to publish parts of the Letter, whilst dishonestly claiming that it was publishing its "full contents", and deliberately omitted or suppressed other parts in order to portray a false picture, is relevant not only as a factor relating to the content, form and manner in which the information was published, but also a seriously aggravating feature of the Defendant's unlawful conduct in publishing any of its contents."

48. The Claimant's case is that the justification which the Defendant claims for publishing the Letter is spurious because it has deliberately misled the public (ie. its readership) by presenting a false picture of the Letter, omitting parts of it which demonstrate the

Claimant's care for her father and others, as well as her concern about the UK tabloid media exploiting her father, and the fact that she addresses untruths previously published by the Defendant. This picture would have painted a proper picture of the Claimant's concerns and the cause for the "dispute" with her father, namely the Defendant's conduct.

49. The Defendant does not object to this allegation, nor can it. The Confidential Schedule of Deliberate Omissions, which was attached to the Response, demonstrates this with a number of examples of parts of the Letter that were suppressed. There is no other plausible explanation for why such parts were selectively removed (as opposed to others), especially given that the Defendant portrayed the Articles as revealing the "full content" to its readers⁷.

50. It is important to see the context for this allegation in paragraph 9(8). This is to be found in the preceding sub-paragraphs, namely 9(6) and 9(7) which state that "*the publication was neither presented as nor capable of contributing to a debate in democratic society relating to matters of legitimate public interest. Rather, it was disclosed with the sole and entirely gratuitous purpose of satisfying the curiosity of the newspaper's readership regarding the private life of the Claimant, a curiosity deliberately generated by the Defendant*".

51. The Claimant's case is that the Defendant deliberately misinformed its readers as to the Letter and that there is no public interest in the public being misinformed. This is one of the reasons why the public interest justification which the Defendant advances for a blatant infringement of the Claimant's Article 8 rights should fail.

52. The Defendant cannot *and does not* object to this allegation. It seems to object to the fact it is alleged that this was done '*dishonestly*'. When analysed properly, the artificiality of the Defendant's position becomes strikingly clear. For example, whilst it seeks to strike out the allegation that it edited the Letter in a *dishonest* manner, it does not object, however, to the allegation that it did so in "*a highly misleading*" manner (see paragraph 9(8) [4/17]), or that it "*deliberately sought to mislead the public by selectively editing the contents of the Letter so as to suppress or omit parts*

⁷ See, for example, Article A [9/250], which starts with the words "*the full content of a sensational letter written by the Duchess of Sussex to her estranged father can be revealed today for the first time*

of it” (see paragraph 7 [4/15]), or that its reference to the Letter was “*completely untrue, and highly misleading, as Defendant knew full well, since large sections were deliberately omitted or suppressed and the meaning thereby intentionally distorted or manipulated*” (see paragraph 9(10) [4/17]). The distinction (if any) is at best extremely fine, and certainly not one which could possibly justify the Court exercising such a draconian power.

53. As already explained, the form, content and *manner* in which the information is published is one of the factors which the Court will consider when performing the balancing exercise at trial between the Claimant’s Article 8 rights as engaged in the fact-sensitive circumstances of this case on the one hand, and the Article 10 rights which the Defendant claims on the other. It cannot be said that the Defendant’s dishonest editing and presentation of the Letter (ie. the manner in which it published the information) is irrelevant or discloses no reasonable grounds for bringing this claim.

54. A helpful application of this is to be found in the case of ***EC v Sunday Newspapers Limited* [2017] NIQB 117**, where the Defendant had published private information relating to a spent conviction for manslaughter from the Claimant’s youth to convey an inaccurate and misleading story. In deciding that the balance came down in favour of protecting Article 8 rights on the specific facts, Colton J held as follows at [131] – [135]:

“[131] In my view there was a “public interest” story to be written in the context of this case. Such a story could have legitimately criticised the plaintiff for opening the business and promoting it in the way he did having regard to his previous conviction. What the court must consider is the article that was actually published. The right to publish information in the public interest carries with it duties and responsibilities. Foremost amongst such duties and responsibilities is the obligation to provide reliable and accurate information. I agree with Mr Lockhart’s submission that an article contributing to the debate of general interest he envisages would make no sense without reporting on the plaintiff’s conviction and on the facts underpinning that conviction. In doing so there is an obligation to ensure that that conviction and the facts underpinning it are presented fairly and accurately. It is the court’s conclusion that in fact the conviction and the circumstances giving rise to it have been presented in a misleading, selective and inaccurate way so as to cause the maximum damage to the reputation of the plaintiff. In my view the article clearly conveys the impression that the killing in question was intentional.”

[132] The court’s concern is focused on the way in which the conviction was reported. Notwithstanding the fact that Mr Sullivan accepted in his evidence that the killing was indeed accidental the wording of the article itself suggests otherwise. It is difficult to avoid the conclusion that the genuinely held view of the Hampsey family that the killing was not in fact an accident, as accepted by the

court in 1999, has found its way into the content of the article. It would have been open to the defendant if they were so minded to publish an article making that case if they felt it could be justified. That is not what the article does. ... That freedom to criticise that conduct would be something capable of protection under Article 10. As indicated the freedom to express that criticism carried with it an obligation to report the important element of the story namely the plaintiff's previous conviction in a fair and balanced way. The failure by the defendant to do so weighs heavily in favour of the plaintiff's Article 8 rights and against the defendant's Article 10 rights.

[133] In coming to my conclusion about the article that was actually written in this case I bear in mind that the court is not a newspaper editor. I fully recognise that "it is not for the court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. Article 10 protects not only the substance of the ideas and information but also the form in which they are conveyed." (See *News Verlags GmVH and Co. K G v Austria* [2000] 31 EHRR 246 at [39], cited with approval in *In Re Guardian News and Media Limited and Others* [2010] UKSC 1 at 35). The courts should not unduly restrict the discretion vested in editors as to how they present their stories... identifying individuals in the context of public interest stories. This issue was dealt with in the Supreme Court judgment in *Flood v Times Newspapers* [2012] UKSC 11..

[134] As Lord Brown put it at paragraph [137] of the judgment: "The courts therefore give weight to the judgment of journalists and editors not merely as to the nature and degree of the steps to be taken before publishing material, but also as to the content of the material to be published in the public interest. The courts must have the last word in setting the boundaries of what can properly be regarded as acceptable journalism, but within those boundaries the judgment of responsible journalists and editors merits respect..."

[135] "...Applying the principles referred to by Lord Brown in *Flood v Times Newspaper* case I would not condemn the defendant for breach of privacy or misuse of private information in respect of the two photographs. It comes within the "relevant boundaries". However the defendant's coverage of the commission of the offence of manslaughter by the plaintiff and the Crown Court proceedings against the plaintiff do not."

55. The relevance of the motive or state of mind of the Defendant in publishing private information is also to be found in 'blackmail' cases. For example in ***DFT v TFD* [2010] EWHC 2335 (QB)**, Sharp J (as she then was) held that the Article 10 expression rights of a defendant who was intending to blackmail the Claimant were "extremely weak (if engaged at all)" [23]. See also ***ASG v GSA* [2009] EWCA Civ 1574** at [6] – [8].
56. In any event, the Defendant's state of mind, namely dishonesty, is relevant to an award of compensatory damages for misuse of private information. See, for example, ***Gulati v MGN* [2015] EWHC 1982 (Ch)** [207] and [214]. Also, ***AXB v BXA* [2018] EWHC 588 (QB)** at [54] – [61].

The Allegation of Stirring Up Issues: Para 9(9) Particulars of Claim; Response 8 & 9

57. The second passage objected to relates to the Claimant's allegation that the Defendant deliberately stirred up issues between her father and her. This is set out in paragraph 9(9) of the Particulars of Claim, the relevant part of which reads as follows:

*"and/or been generally unfavourable to the Defendant as one of those tabloid newspapers which had been **deliberately seeking to dig or stir up issues between her and her father**" (emphasis added for the relevant part)*

58. The allegation is also set out in two Responses to the Request for Further Information served by the Defendant in relation to paragraph 9(8) of the Particulars:

"Response 16

Request

Give all facts and matters relied on in support of the allegation that the Defendant, and each other newspaper referred to, had been deliberately seeking to dig or stir up issues between the Claimant and her father

Response

"The Claimant will rely upon the Defendant's attempts and methods used to track down and interview her father, and to publish stories based on the same. Pending the provision of full disclosure by the Defendant, the Claimant relies on the previous coverage of this by the Defendant which has appeared in its newspapers. The Claimant contends that it is disproportionate at this stage to have to identify each such article, given that this is entirely within the possession of the Defendant and it is unnecessary to do so for the Defendant to know the general nature of the case it will be expected to meet at trial (which is the purpose of CPR Part 18). If the Defendant contends that it is necessary to do so, then it should provide copies of all articles published referring to its reports about the Claimant's father, as well as the disclosure of all relevant documents evidencing its attempts and methods used to track down and interview her father, and the Claimant will then respond further.

59. In its Application Notice [1/6], the Defendant complains that this allegation is a "bald assertion" and that it is "unsupported by any particulars", and that the information which has been provided does not "[give] rise to a prima facie case", and so there are "no or no reasonable grounds for making this allegation against the Defendant".

60. It is respectfully submitted that this is simply hopeless. The Defendant cannot satisfy the high hurdle which an application under 3.4.2(a) must overcome. In particular, it is not effectively said, nor could it be that the allegation of stirring up as set out in the Particulars and Response:

- (a) sets out no facts indicating what the claim is about.
- (b) is incoherent and make no sense,

(c) contains a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.

61. The Claimant's case that the Defendant stirred or dug up issues between the Claimant and her father is also referred to in the Reply at paragraph 3.6, in response to the Defence advanced by the Defendant [4/219]:

"It was absurd to suggest that...in revealing the detailed contents of this letter, the UK media publisher was simply seeking to 'set the record straight' on behalf of the author's father as to a "dispute" which had arisen as to the correct version of events surrounding their relationship (as opposed to self-serving commercial interest), when in fact it was the same publisher which had first harassed and humiliated the author's father (despite him trying to avoid the limelight), had then exposed him to the world as a "Royal scammer" for staging 'fake' paparazzo photographs (in order, he claimed, to counteract the humiliation of him in the UK press) and had finally manipulated this vulnerable man into giving interviews, which he later described as "lies and bullshit", thereby causing the very "dispute" which they claim justified the publication of this letter, as well substantial damage to his relationship with his daughter."

And also again at paragraph 12.10 in response to the purported justification for publishing the private contents of the Letter, as advanced by the Defendant in its Defence [4/230]

"For the avoidance of any doubt, as already stated above, the Claimant will refer to the fact that the Defendant deliberately manipulated and exploited a vulnerable and fragile individual (as it was well aware), having previously published highly damaging and distressing stories about Mr Markle, exposing him to the world at large as a 'Royal Wedding scammer' for having agreed to pose for 'fake' photographs and then suggesting in its reporting that his 'heart attack' was also fake (apparently contrary to the Defendant's position in this litigation), thereby creating the "dispute" which it (falsely) claims gave rise to the legitimate reason to publish the detailed contents of the Letter. It is noted that nowhere in the Defence does the Defendant admit that it was responsible for exposing the Claimant's father in this way, with the enormous impact that this had (particularly on Mr Markle and his relationship with his daughter), preferring instead to refer to it disingenuously in the Defence as simply a story which "came out in the press". The Claimant also repeats and relies upon the reference to Mr Markle's letter in paragraph 11.8(g) above.

62. Furthermore, the history of the Defendant digging up issues or stirring between the Claimant and her father up as referred to in paragraph above, and is largely a matter of analysing public domain articles. The Defendant even boasted itself in an article on 12 August 2018⁸ that it had *"led the way in reporting on the remarkable dramas surrounding the Markles"*, proceeding to describe how it had tracked down a number

⁸ Mail on Sunday article on 12 August 2018 at page 7 entitled *"ANOTHER STUNNING ROYAL EXCLUSIVE FROM THE MoS*

of members of the Claimant's family in the US ("*Meghan's nephew the CANNABIS farmer*", "*Meghan Wedding Snub to Uncles*" and "*Cold Meghan has cut me off*").

63. Again, this is part of the Claimant's case on the balancing between Article 8 and 10, as is clear from the preceding sub-particulars, 9(6) and 9(7) of the Particulars of Claim, which state that "*the publication was neither presented as nor capable of contributing to a debate in democratic society relating to matters of legitimate public interest. Rather, it was disclosed with the sole and entirely gratuitous purpose of satisfying the curiosity of the newspaper's readership regarding the private life of the Claimant, a curiosity deliberately generated by the Defendant*" [4/17].

64. The same points apply to this objection, as above, namely that the Defendant's conduct is relevant to the multi-factorial assessment. It was this conduct which caused the very "dispute" which it claims it was entitled to report on, ie. the Defendant has effectively created its own purported justification for publishing the Letter. The fact that the Defendant seeks now to strike these parts out of the Reply, when they are so obviously a response to the Defence it has advanced only serves to highlight, once again, the artificial and misconceived nature of the objection.

65. The Claimant's allegation could not be clearer, nor the facts on which her allegation is based. It is effectively the "*curiosity of the newspaper's readership regarding the private life of the Claimant*" which the publication of the Letter was intended to "*satisfy*", as alleged in paragraph 9(7) of the Particulars of Claim – a passage also not objected to – "*a curiosity deliberately generated by the Defendant*", as the paragraph continues, without apparent objection.

The Allegation of Malicious Intent: Para 9(12) Particulars of Claim

66. The third passage objected to relates to the Claimant's allegation that the Defendant's inclusion in one of the Articles complained of on 10 February 2018 of a so-called 'expert handwriting' analysis to further detail her private thoughts and feelings about her father was to make further derogatory allegations about the Claimant. This is set out in paragraph 9(12) of the Particulars of Claim, the relevant part of which reads as follows:

*“The Defendant also published an article (as referred to in paragraph 4(5) above) which sought through so-called ‘expert handwriting’ analyses to further detail the Claimant’s private thoughts and feelings about her father. The “analysis” was used to make derogatory allegations about the Claimant’s character in order to lend support to the Defendant’s pre-conceived narrative for the Articles and the attack upon the Claimant. For example, the Defendant labelled the Claimant as a “showman and a narcissist” based solely on her handwriting style. **Such actions evidence the Defendant’s clear malicious intent in publishing the letter.**”*

(emphasis added for the relevant part)

67. The motive for inclusion of this ‘analysis’ is again relevant to the *form, content and manner* in which the information was published, one of the criteria that the Court will take into account in the assessment of the second stage of the test. The paragraphs above are repeated. Similarly, the Defendant’s state of mind is relevant to an award of compensatory damages for misuse of private information.

68. The fact that the Defendant has sought to object to the *some* of the allegations as to its motives in the Particulars of Claim, but not others, only serves to highlight the artificiality, as well as the confused and incoherent nature, of the Application, as already referred to above.

The Aggravation Articles: Para 19(8) Particulars of Claim

69. The fourth part of the Particulars of Claim objected to relates to the Claimant’s inclusion in its damages claim of a pattern of additional intrusive and offensive articles published about her by the Defendant with which the Articles complained of were consistent, a pattern that caused her further injury to her feelings.

70. This is set out in paragraph 19.8 of the Particulars of Claim [4/24], the relevant part of which reads as follows:

*“However, as the Claimant is also distressed to realise, **this is wholly consistent with the Defendant’s obvious agenda of publishing intrusive or offensive stories about the Claimant intended to portray her in a false and damaging light.** The Claimant will refer to the following articles published by the Defendant by way of example of this:*

(1) “Harry’s girl is (almost) straight outta Compton: Gang-scarred home of her mother revealed – so will he be dropping by for tea” published on MailOnline on 20 November 2016;

(2) “Kitchen supported by Meghan’s cookbook is housed inside mosque ‘which has links to 19 terror suspects including Jihadi John’ published on MailOnline on 24 November 2018;

(3) “How Meghan Markle’s Australian aide Samantha ‘the Panther’ Cohen rose from a Brisbane home to Buckingham Palace – before becoming the second aide to walk out on the ‘difficult Duchess’ published on MailOnline on 10 December 2018

(4) “How Meghan’s favourite avocado snack – beloved of all millennials – is fuelling human rights abuses, drought and murder” published by the Daily Mail on 22 January 2019;

(5) *"Doria Ragland spotted alone in LA while daughter Meghan Markle parties with famous friends at her \$300k baby shower" published on Dailymail.com on 20 February 2019.*

(emphasis added for the relevant part)

71. The allegation is also set out in Responses 26 and 27 to the Request for Further Information served by the Defendant in relation to this sub-paragraph of the damages claim:

Response 26

Request

On the basis that the Claimant is not entitled to rely on "examples" of articles complained about and the Defendant is entitled to know the case it has to meet, 10 3311783_7 identify each and every article published by the Defendant that is relied on in support of the allegation as to the Defendant's "obvious agenda of publishing intrusive or offensive articles... intended to convey her in a false and damaging light" (in addition to the list in paragraphs 19.8(1) to 19.8(5)).

Response

It is not accepted that the Claimant is not entitled to rely on examples of articles, given that this is part of her claim for damages and therefore the use of examples is a proportionate and reasonable method of supporting her case in this respect. The Claimant has already identified in her Particulars of Claim a series of articles which demonstrate that the Articles complained of are consistent with the Defendant's obvious agenda of publishing intrusive or offensive stories about the Claimant intended to convey her in a false and damaging light. This is the case which the Defendant is expected to meet.

Response 27

Request

In respect of each and every article relied on in support of the Defendant's alleged agenda, taking each article in turn:

27.1 Please identify the specific words in the article that are alleged "to convey [the Claimant] in a false and damaging light" (either by reproducing those words in a document or by supplying a copy of the article with those words underlined or indicated clearly in some other way).

27.2 In relation to the words in each article identified in response to Request 27.1 above, please (i) specify the meaning(s) the Claimant attributes to the particular words, and which she says is false, and (ii) give particulars of why the words identified are false and what is alleged to be the true position.

Response

The Defendant is again reminded of the true purpose of CPR Part 18 and its Practice Direction. This is part of the Claimant's claim for damages and therefore the use of examples is a proportionate and reasonable method of supporting her case in this respect. (b) Furthermore, this is not a claim for defamation and there is therefore no need to specify or attribute a meaning to the articles identified. (c) The Claimant's case in relation to each of the articles identified in subparagraphs 19.8(1) to 19.8(5) is as follows...

(1) *In relation to the article entitled "Harry's girl is (almost) straight outta Compton: Gang-scarred home of her mother revealed – so will he be dropping by for tea", the statement that the Claimant lived or grew up in Compton (or anywhere near to it) is false. The fact that the Defendant chose to stereotype this entire community as being "plagued by crime and riddled with street gangs" and thereby suggest (in the first few days of her relationship being revealed) that the Claimant came from a crime-ridden*

neighbourhood is completely untrue as well as intended to be divisive. The Claimant will also refer to the fact that the article cites her aunt as living in "gang-afflicted Inglewood" in order to bolster this negative and damaging impression of where this (black) side of her family is said to come from. In fact, Ava Burrow (said to be "the actress' aunt") is not her Aunt or any blood relation at all, a fact which if correctly stated would have undermined the narrative which the Defendant was intended to convey.

- (2) In relation to the article entitled "Kitchen supported by Meghan's cookbook is housed inside mosque 'which has links to 19 terror suspects including Jihadi John', the connection made between the Hubb Community Kitchen (in which the Claimant worked with those effected by the Grenfell tragedy as part of a cookbook project which became a New York Times best-selling book) and the Al Manaar Muslim Cultural Heritage Centre (supposedly "linked to 19 Islamic extremists") is at best a highly tenuous and deliberately inflammatory one. The characterisation of these victims as being linked to terrorism in the same way as the Claimant is said to be supporting or endorsing jihadi terrorists through her participation in a cookbook for victims of Grenfell, is as false as it is offensive.*
- (3) In relation to the article entitled "How Meghan Markle's Australian aide Samantha 'the Panther' Cohen rose from a Brisbane home to Buckingham Palace – before becoming the second aide to walk out on the 'difficult Duchess", the suggestion that Samantha Cohen (who was private secretary for both the Duke and Duchess of Sussex) walked out on the Claimant or that she did so because the Claimant was "difficult" to work for (a word used six times in this article) is untrue, as well as damaging. Ms Cohen, who was a highly respected and dedicated member of Her Majesty the Queen's staff for sixteen years, personally chose to come out of retirement in order to work for the Claimant. Far from walking out on her, Ms Cohen even extended the original year which she had intended to work for as she wanted to carry on helping the Duke and Duchess with their office. Further, the Claimant's "personal assistant" was in fact assistant to both the Duke and Duchess, and, contrary to what the Defendant stated in the article, she did not "quit".*
- (4) In relation to the article entitled "How Meghan's favourite avocado snack – beloved of all millennials – is fuelling human rights abuses, drought and murder", the connection made between the fact that the Claimant likes eating avocado and made avocado on toast for a friend who visited her with human rights abuses, murder and environmental devastation is another highly tenuous and deliberately inflammatory one. The suggestion that by liking avocados she is fuelling or supporting these extreme occurrences, and therefore is disingenuous about her "campaigning for racial equality and female empowerment", is again as absurd as it is offensive.*
- (5) In relation to the article entitled "Doria Ragland spotted alone in LA while daughter Meghan Markle parties with famous friends at her \$300k baby shower", the suggestion that the Claimant deliberately left out her mother from her baby shower and ditched her in favour of her famous friends is untrue and offensive to her. The Claimant's mother was of course invited, and the Claimant also offered to buy her airline tickets. However, her mother was unable to attend due to work commitments. It was also untrue and offensive to suggest, as the article does, that "not a single guest had known [the Claimant] for more than a decade". In fact, the true position was that the baby shower (which actually cost a tiny fraction of the \$300k falsely stated in the article) was organised and hosted by one of her best friends from university; the fifteen guests who attended the shower were close friends and included long-term friendships some of which had existed for over 20 years.*

The Claimant will also refer to the numerous articles (as exemplified below) which the Defendant chose to publish about the 'renovation' of Frogmore Cottage, the Claimant's official residence, in which it stated that the Claimant had:

(a) "splashed out £5,000" on a copper bathtub (which does not exist and is completely untrue);

(b) "forked out £500k" on soundproofing to block out the noise of planes (which does not exist and is completely untrue);

(c) variously installed a "yoga studio" (which does not exist and is completely untrue); an "orangery" (which does not exist and is completely untrue), a "tennis court" (which does not exist and is completely untrue) and a "guest wing" for her mother to stay in when she visited (which does not exist and is completely untrue).

The clear intention was to portray the Claimant in a damaging light by suggesting that she had indulged in this series of absurdly lavish renovations, which were in fact false (as the Defendant was informed at the time) and entirely made up. Furthermore, the Defendant sought to portray these renovations as being done at "the taxpayer's expense", costing "£2.4m of YOUR cash". This was also false and misleading. In fact, the Cottage is a grade 2-listed 17th century residence, which was already undergoing much needed renovation for safety, and its refurbishment back to its original state as a single family home was funded by Her Majesty the Queen, as part of her obligation and responsibility to maintain or refurbish the upkeep of buildings of historical significance through a portion of the sovereign grant, made in exchange for the revenue from her Crown Estate (which is several times the amount of the sovereign grant).

The Claimant will refer to the following articles in which these statements were published: (a) "Luxury on tap! Meghan Markle and Prince Harry splash out up to £5,000 on a hand made copper bath for Frogmore Cottage" published in the Mail on Sunday on 30th June 2019; (b) "Meghan and Harry (or rather, the public purse) has splashed out £5,000 on this top-of-the -range copper bath – but is it money down the drain" published in the Daily Mail on 5th July 2019; (c) "Meghan and Harry forked out 500k on soundproofing Frogmore Cottage" published in the Daily Mail on 30th June 2019, and (d) "They could've moved next door! Fury as it emerges Harry and Meghan spent £2.4million of YOUR cash on Frogmore Cottage to escape rift with Kate and William' – and final bill could hit £3m" published in the Mail Online on 25th June 2019.

72. The Defendant's opposition to these additional articles is based on four assertions:

- (1) The Claimant is not entitled to damages for the publication of articles that are not alleged to be unlawful.
- (2) The Claimant has not provided particulars of her case on falsity.
- (3) It is disproportionate to litigate the truth or falsity of articles not alleged to be unlawful.
- (4) None of the articles support the pleaded case, namely that the Defendant acted unlawfully in publishing the Letter and the remedies which flow from that unlawful publication.

73. Each of these assertions is incorrect or misconceived:

- (1) The Claimant is relying on these articles by way of aggravation, namely the increase of injury to her feelings as a result of the pattern of publication, not as separately giving rise to a claim for additional damages in relation to each individual article.
- (2) The Claimant has set out what is false in her Response 27, insofar as it is necessary to do so.
- (3) Given that the Claimant is not claiming additional damages for the publication of the actual articles but rather for the pattern of conduct and how this has affected her feelings, it is not proportionate to plead them as if a libel claim, nor is she obliged to do so.
- (4) The additional articles are not intended to support the pleaded case on *liability* ie. whether the Defendant acted unlawfully in publishing the Letter. However, the pattern and nature of them do support and aggravate the distress she suffered as a result of the Articles complained of.

74. One of the accepted bases upon which aggravated damages may be awarded is to compensate the Claimant for additional distress caused to her feelings because of the Defendant's conduct. There can be no objection to this, let alone any suggestion that this could be struck out as 'disclosing no reasonable grounds for bringing such a claim'. As this is a strike out under Part 3.4(2)(a), the facts asserted in the Particulars must be deemed to be true by the Court and an application has to proceed on that basis.

75. The Court has allowed reliance on additional articles (to the ones complained of) by way of aggravated damages in misuse of private information, for example in demonstrating distressing conduct or pattern of behaviour by the Defendant, which would justify an increased award.

76. See, for example, in ***Campbell v MGN Limited [2002] EWCA Civ 1373*** where the Court of Appeal upheld the decision of Morland J to award aggravated damages in respect of two additional subsequently-published articles and agreed that these additional articles "*trashed [the Claimant] as a person*". In his first instance decision

[2002] EWHC 499 (QB)), Morland J held at paragraph 136 that these articles caused the Claimant significant distress over and above the publications complained of, which invited the successful claim for aggravated damages.

77. In **Gulati v MGN Ltd**, Mann J identified a number of principles at [229] in respect of damages in breach of privacy cases, holding that whilst certain individual articles in their own right might not give rise to awards, a pattern of repeated intrusive articles could: *“The effect of repeated intrusions by publication can be cumulative. What starts out as irritation or embarrassment on the first disclosure can become a justified persistent feeling of distress or upset on repeated disclosures.”*

78. Also, in **Cliff Richard v BBC**, Mann J held that additional broadcasts by the Defendant was a factor in increasing the dissemination of the allegations, thereby causing distress (see [355]), and that the *“triggering”* of additional intrusive articles as evidence of distress in damages.

79. The additional articles are relevant to the Claimant’s feelings and to demonstrate a pattern of conduct by the Defendant which increases the injury to them. The suggestion that the Claimant should plead each additional article as if it was a separate libel claim is misconceived. The two cases which appear to be referred to by the Defendant (in correspondence), namely **ZXC v Bloomberg** and **NT1 v Google Inc** do not support this requirement since these relate to the articles actually complained of, as opposed to additional articles relied upon by way of a pattern causing distress to the Claimant.

80. This is a privacy claim, not a claim for libel. There is a fundamental difference between the two causes of action, as explained in paragraph 29 above.

CONCLUSION

81. The Defendant’s application to strike out these parts of the Particulars of Claim under CPR Part 3.4(2) raises a high threshold for them to overcome. On proper analysis, it cannot be said that there are simply no reasonable grounds for the allegations of motive being relevant to the Court’s determination of the two stage-test, let alone a claim for damages. Further, it cannot be said that there are simply no reasonable grounds for the claim that the Claimant suffered additional distress because the Articles complained of were not ‘one-offs’ but were consistent with the Defendant’s

obvious agenda of publishing intrusive and offensive stories about her. This also cannot be said to be an abuse of the process.

82. For these reasons, the Defendant's Application should be dismissed.

DAVID SHERBORNE
5RB

22 April 2020

