Claim No.IL-2019-0001100

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

INTELLECTUAL PROPERTY LIST

B E T W E E N:

HRH THE DUCHESS OF SUSSEX

Claimant

-and-

ASSOCIATED NEWSPAPERS LIMITED

Defendant

DEFENDANT'S SKELETON ARGUMENT

FOR HEARING 24 APRIL 2020

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*References below to **B/[ ]/[ ]** are to the tabs and pages of the Application Bundle, and to **AB/[ ]** to the tabs of the Authorities Bundle.*

If time permits the Court is invited to read in advance the following documents:-

(a) *AN and draft Order **B/1/5** and **B/2/8**.*
(b) *Claim Form and Particulars of Claim ("PoC") **B/3/10** and **B/4/13**.*
(c) *C's Responses to D's Requests for Further Information **B/5/28** (skim-read only the annexed Articles complained of) and **B/6/135**.*
(d) *The Defence and Reply **B/7/140** and **B/8/217** (skim-read only).*
(e) *RPC's letter dated 21/11/19 **B/23/354** and Schillings' substantive response dated 9/12/19 **B/23/367**.*

Introduction

1. This is the Defendant's skeleton argument for the hearing of its application dated 14/1/20 to strike out under CPR 3.4(2)(a) and/or (b) certain parts of the Particulars of Claim ("PoC") - Application Notice ("AN") at **B/1/5**.

2. The application broadly falls into two parts.

   2.1 First, some of the allegations of impropriety and bad faith (set out in paragraphs 1(a) to 1(c) of the AN) against the Defendant do not properly form part of the causes of action, are irrelevant, disproportionate and/or improperly or inadequately pleaded and disclose no reasonable case.

   2.2 Secondly, parts of the plea in support of damages and/or aggravated damages that rely on the publication of articles that are not complained about in the claim or said to be unlawful (set out in paragraph 1(d) of the AN) are irrelevant to the issues and/or inadmissible and/or should be struck out on the grounds of disproportionality.

3. The Defendant also seeks to strike out the parts of the Claimant's Responses to Requests for Further Information that relate to the allegations in the PoC. In addition, last Friday (17 April 2020), the Claimant served a Reply which included similar (but more serious) allegations of improper conduct to that contained in paragraph 9(9) of the PoC. These are objectionable for the same reasons.

Background to the application and the nature of the Claimant's complaint

4. In this action the Claimant complains of the publication by the Defendant of five articles on 10 February 2019, two in hard copy on the Mail on Sunday and three on the website Mailonline (paragraph 4 of the PoC) [**B/4/14]**. These are referred to below as "the Articles" (with the Article pleaded in paragraph 4(1) referred to as "Article 1", that in paragraph 4(2) as "Article 2", and so on). The Articles report the contents of correspondence between the Claimant and Mr Thomas Markle, her estranged father, during August 2018, and particularly the contents of a letter written by the Claimant to

Mr Markle ("the Letter") and Mr Markle's reaction to the Letter. The Claimant seeks remedies for alleged misuse of private information, breach of statutory duty pursuant to the GDPR and/or Data Protection Act 2018 and infringement of copyright.

5. The Claimant has not set out in her PoC the information said to be contained in the Articles in respect of which she claims to have a reasonable expectation of privacy, except to say vaguely that it is the "contents of the Letter" (paragraph 9 of the PoC [**B/4/16]**). In order to obtain some clarity on this key issue, the Defendant asked the Claimant to identify the words complained of in each of the Articles in respect of each cause of action. In response, the Claimant stated in Response 1 that her claim relates "*to the words in the Articles which report the contents of, or contain extracts from the Letter*" [**B/5/28]**, and served copies of the Articles identifying the words the publication of which is alleged to give rise to each cause of action. These were appended to the Claimant's Response to the Defendant's first RFI [**B/5/43-130**]. The Claimant produced two copies of each Article. The first copy had highlighted in blue the words complained of in respect of misuse of private information and breach of the GDPR, and the second copy had the words alleged to constitute breach of copyright marked in red.

6. It is difficult to discern the nature of the Claimant's case from the marked-up copies. For the most part, they indicate that the Claimant does not complain about the publication of the fact of the Letter, nor what Mr Markle says about it, but does complain about the publication of what was in it. For example, in Article 2, the Claimant does not complain about the description of the Letter as "*deeply hurtful*" (paragraph 2 of Article 2 [**B/5/47**]), or the statement that "*There was no loving message in [the Letter]"* (paragraph 4 of Article 2), but does complain about the report of the fact that in the Letter she "*chastises her father time and again*" (paragraph 3).

7. Although that appears to be the general scheme, this is not entirely clear; for example, the Claimant complains of the description of the container in which the Letter was held as a "*black leather briefcase*" (paragraph 1 of Article 2 [**B/5/47**]), which seems to be a complaint about the report of the physical existence of the Letter. The Claimant also complains about the publication of words giving opinions of her character based on handwriting analyses in Article 5, eg: "*Meghan shows a highly stylised and slow handwriting. She is ultra cautious, is well aware that the world has their eyes on her*

and that is just how she likes it" (page 2 of article [**B/5/104]**). It is not understood on what basis such comments are said to be unlawful – it is clearly not private information belonging to her - unless it be her case that the publication of any personal data about her that is unflattering is unlawful.

8. In paragraph 9 of the PoC, the Claimant sets out the facts and matters she relies on in support of her claim that the publication of these words was "*wrongful*" and constituted a misuse of her private information. It is not stated whether the particulars under paragraph 9 go to the issue of reasonable expectation of privacy or to the balancing of the Claimant's privacy rights against the Defendant's rights to freedom of expression, and they appear to be an amalgam of the Claimant's case on both issues. The sub-paragraphs contain various allegations of bad faith against the Defendant - allegations that the Defendant has been "*dishonest*" (9(8)), "*deliberately seeking to dig or stir up issues between [the Claimant] and her father*" (9(9)), and that it acted with "*malicious intent*" (9(12)) [**B/4/17-18**].

9. Further, although falsity of the words complained of is not an essential or even relevant element of misuse of private information, in support of her case on "wrongfulness" in paragraph 9(9) the Claimant relies on "*the falsity of the account given in the Articles about her contact with her father and her concern for his welfare*" [**B/4/17**]. Part of the Claimant's case on liability is, therefore, that the Articles contained false and "*negative*" information about her.

10. However, the Claimant's Further Information, in particular the marked-up Articles and Response 13 [**B/5/32-3**] setting out the allegedly false allegations, indicates that the allegedly false allegations are <u>not</u> made in or by the words complained of, but are contained in parts of the Articles that are not said to be unlawful. Further, in response to the question whether the Claimant is seeking damages for injury to reputation, the Claimant has expressly disavowed seeking any damages for vindication of, or compensation for injury to, reputation (Schillings' letter of 9 December 2019) [**B/23/370**]. It is therefore not at all clear what purpose is served in the claim by the complaint that the Articles contain false and negative (although lawful) information. It is a matter for the Court, possibly on a future occasion, as to the extent to which

proportionality will permit an extensive inquiry into the truth of words that are not complained about.

11. Importantly for present purposes, the Claimant's complaints as to the publication of allegedly false information are not limited to the Articles. In paragraph 19.8 of the PoC, in support of her damages plea, the Claimant refers to an alleged "*agenda of publishing intrusive or offensive stories about the Claimant intended to portray her in a false and damaging light*" [**B/4/24**]. She then makes reference to five different articles – published both before and after the Articles complained of - that are said to be "*examples*" of such stories. This again looks like a defamation complaint, but this time the complaint is not made in respect of the Articles but of articles which are not the subject of the claim and do not report the contents of the Letter. Schillings' letter dated 9/12/19 confirmed that these articles are not relied on as separate or further causes of action [**B/23/367]**. When the Defendant requested particulars of this complaint, the Claimant identified 4 further articles also said to be false (Response 27(d) [**B/5/40-41**]), but refused to provide most of the particulars asked for. The Claimant has also refused to withdraw the claim that these 9 articles are merely exemplars of a wider class of false and misleading article (Response 27(a) [**B/5/37**]. For reasons set out below, the Defendant seeks to strike out the Claimant's reliance on these 9 articles and on unspecified others– none of which are the subject of the claim – in support of her damages plea.

12. The various difficulties with the Claimant's case were set out in RPC's letter of 21 November 2019 [**B/23/354 - 360**]. In response, the Claimant's solicitors accused the Defendant of employing a tactic of "*trying to avoid meeting our client's complaint on the merits for as long and in as many different ways as possible*" [letter 27 November 2019 [**B/23/362**]. This was very far from the truth, but, in the light of the high profile of this claim, did put pressure on the Defendant to serve its Defence as quickly as possible and before the issues with the Claimant's statements of case had been resolved by the Court. The Defence is therefore a long document that seeks to deal squarely with as many of the allegations raised in the PoC and Further Information as possible. It is apparent from the Defence that the resolution of the factual and legal issues raised by the PoC will necessarily be a lengthy and complex process. At the same time as serving the Defence, the Defendant issued and served the current application seeking

to strike out the parts of the PoC and Further Information in order to keep this claim within its proper bounds.

13. The Claimant has not responded to the application by way of proposed amendment or withdrawal or the service of any evidence. On 6 April 2020 the Defendant wrote to the Claimant stating that, in the light of the current public health situation, it was incumbent on the parties to seek to avoid the hearing if possible and that, if the Claimant would withdraw the disputed parts of her case, the Defendant would not seek any costs [**B/23/374**]. Schillings responded shortly on 16 April stating that their client "*considered it was unreasonable to accept the Offer*" [**B/23/375**].

Principles of law: allegations of bad faith

14. The Claimant pleads allegations dishonesty, deliberately seeking to dig or stir up issues between the Claimant and her father, and malicious intent, as part of her claim for misuse of private information. However, it was established by the decision of the Court of Appeal in ***Campbell v MGN Ltd*** [2003] QB 633at [66]-[69], [71] that dishonesty or other "*complex tests of the mental state of the publisher*" are not relevant in a claim for misuse of private information (the point was not pursued in the subsequent appeal to the House of Lords) [**AB/2/42-43]**.

15. Where allegations of bad faith are not relevant to a claim they should not be pleaded or investigated by the Court. Under the RSC such irrelevant allegations of bad faith were liable to be struck out as scandalous under RSC Order 18 rule 19 – see the notes at 18/19/15 in the 1999 White Book [**AB/16]**. Although the CPR do not refer expressly to striking out scandalous material, the same approach is open to the Court, and appropriate under CPR 3.4(1)(b) (power to strike out material "likely to obstruct the just disposal of the proceedings") and/or CPR 3.1(k) (power to exclude an issue from consideration).

16. Further, it is trite law that even if an allegation of bad faith is relevant to a cause of action it must be properly pleaded. The **Chancery Guide [AB/17/428]** sets out rules for the pleading of allegations of bad faith, reflecting the requirements of CPR 16.4(1)(e) and 16PD.8.2. Paragraph 10.1 states:

"*… a party must set out in any statement of case:*

- *Full particulars of any allegation of fraud, dishonesty, malice or illegality; and*
- *Where any inference of fraud of dishonesty is alleged, the facts on the basis of which the inference is alleged*."

17. Paragraph 10.2 provides:

"*A party should not set out allegations of fraud and dishonesty unless there is credible material to support the contentions made. Setting out such matters without such material being available may result in the particular allegations being struck out and may result in wasted costs orders being made against the legal advisers responsible*".

18. These rules of pleading reflect the common law. In publication cases, even where allegations of malice (which are tantamount to dishonesty) are potentially relevant (eg in a Reply to a Defence raising qualified privilege) it is well-established that these are serious allegations that ought not to be put on the record unless there is proper material on which to do so. Principles of pleading have been set down to ensure that this principle is adhered to, as follows:

18.1 Mere assertion of dishonestly/malice "*will not do*", per Eady J. in ***Seray -Wurie v Charity Commission*** [2008] EWHC 870 (QB)[1] [**AB/5/99]** at [35]: *"A claimant may not proceed simply in the hope that something will turn up if the defendant chooses to go into the witness box, or that he will make an admission in cross-examination: see e.g.* ***Gatley on Libel & Slander*** *(12th edn) at 32.57* **[AB/18]**, *and also the remarks made by Lord Hobhouse in Three Rivers DC v Bank of England [2001] 2 All ER 513, 569 at [160]: 'Where an allegation of dishonesty is being made as part of the cause of action of the plaintiff, there is no reason why the rule should not apply that the plaintiff must have a proper basis for making an allegation of dishonesty in his pleading. The hope that something may turn up during the cross-examination of a witness at the trial does not suffice. It is of course different if the*

[1] An application by the claimant in that case for permission to appeal was dismissed by Sir Anthony May, P and Richards LJ and the approach of Eady J upheld: [2009] EWCA Civ 153.

admissible material available discloses a reasonable prima facie case which the other party will have to answer at the trial.'"

18.2 Where malice is alleged against a corporate defendant it is necessary to find and identify in the pleading the individual(s) who is/are responsible for the publication of the words complained of and had the relevant state of mind: ***Monks v Warwick District Council*** [2009] EWHC 959 (QB) [**AB/7/129-130]** per Sharp J at [23]-[24] (citing two decisions of Tugendhat J - ***Webster v British Gas Services Ltd*** [2003] EWHC 1188 (QB) [**AB/3/69]** at [30] and ***Bray v Deutsche Bank*** [2009] EMLR 215 [**AB/8/137-138]** at [16]). In such a case the Claimant must give particulars of the person or persons through whom it is intended to fix the corporation with the necessary malicious intent, as well as pleading the facts from which malice is to be inferred.

18.3 Each element of the claimant's case on malice/dishonesty must raise a probability of malice, and not merely a possibility: see ***Seray-Wurie*** at [32] – [33] **[AB/5/98]**; ***Monks*** at [23(iii)] **[AB/7/130]**.

Application to the Particulars of Claim

19. In **paragraph 9(8)** of the Particulars of Claim the Claimant alleges as part of her misuse of private information claim that the Defendant chose "*to deliberately omit or suppress parts of the Letter in a highly misleading **and dishonest** manner*" (emphasis added to denote the words the Defendant seeks to have struck out) [**B/4/17**]. Since dishonesty is irrelevant to the claim in misuse of information this allegation should be struck out.

20. In any event there is no pleaded basis at all for the allegation that anyone at the Defendant acted dishonestly when deciding which parts of the Letter to publish. It is not said who is alleged to have been dishonest, or what the credible basis for the allegation of dishonesty is against such person(s). It is difficult even to understand what is meant by the allegation of dishonesty in this context: what is said to be knowingly untrue? It is extremely common for the media to summarise or edit documents when reporting current events, and that is not a basis for an allegation of dishonesty. It is open to the Claimant to say, as she does, that the presentation of the Letter was

misleading (which is firmly denied), but there is no basis for her to allege that anyone working for the Defendant was dishonest in the drafting and editing process. No "credible basis" is specified for the allegation, as is required in the Chancery Guide.

21. In **paragraph 9(9)** the Claimant alleges, inter alia, that the Defendant was "*one of the 'tabloid' newspapers which had been **deliberately seeking to dig or stir up issues between her and her father***" [**B/4/17**]. This is an allegation of seriously improper deliberate (ie intentional) conduct to the effect that the Defendant's motive was to seek to manufacture or stoke a family dispute for the sake of having a good story or stories to publish. Again, such "complex tests of mental state" of the publisher are irrelevant to the claim for misuse of private information, and the allegation should be struck out.

22. Further, although it is not expressly an allegation of bad faith, it is certainly an allegation of bad intention of similar gravity such that that it should not be put on the record without a proper basis, and the strict pleading rules set out in the Chancery Guide should apply. But in the Particulars of Claim it is made by way of bare assertion: no individual is identified; no incident or event is referred to that could possibly support this accusation or, if true, give rise to a probability that anyone responsible for the Articles had such motive.

23. The Defendant asked for particulars: see Request 16, and the Response thereto [**B/5/33-34**]. None were given. In Response 16 the Claimant merely made another bare and extremely vague assertion as to the Defendant's unspecified journalistic "*attempts and methods*" – none of which were specified and none of which were alleged to have been in any way improper – and unspecified "previous coverage", not alleged to have been unlawful. By way of apparent excuse for not giving any further details, the Claimant also asserted that it was "*disproportionate*" for the Claimant to have to give further particulars and suggested that it is for the Defendant to disclose all articles referring to the Claimant's father and all journalistic methods before any further particulars were given. It could not be clearer from this response that the Claimant's case on this matter is without any foundation and wholly speculative, and her aim is to see what turns up in disclosure that might provide a basis for it.

24. In the **Reply**, served on Friday 17 April 2020 (too late to feature in the AN), the Claimant included further allegations similar in nature to the allegation in paragraph 9(9). See: (a) **paragraph 3.6,** beginning with the words, "when in fact it was the same publisher …" (up to the end of the paragraph) **[B/8/219];** and (b) **paragraph 12.10**, from the words, "For the avoidance of doubt …" onwards **[B/8/230-1].** Although the allegations made in these words are of a similar kind to that in paragraph 9(9) of the PoC, they are even more serious allegations of impropriety than those in the PoC. The Claimant now alleges that the Defendant "harassed and humiliated", and "manipulated" and "exploited" Mr Markle, thus "causing" the dispute between the Claimant and her father. These allegations in the Reply are objectionable for all the reasons set out in relation to paragraph 9(9) of the PoC; in summary as follows:

24.1 These allegations of improper conduct do not support the Claimant's case on reasonable expectation of privacy, nor do they properly respond to the Defendant's case on the balancing exercise. It is impossible to see how the Defendant's Article 10 rights in the publication of the Letter are lessened or affected by journalistic inquiries in connection with articles other than those that are sued on in this case.

24.2 These are very serious allegations (harassment is a criminal matter as well as an allegation of unlawful conduct). If they were relevant to the claim, they would need proper and extensive particularisation. There is none at all. For example, what is the course of conduct constituting harassment? Carried on by whom? Why is it said that the Defendant caused alarm and distress, or humiliation? On what basis is it alleged that the Defendant manipulated or exploited Mr Markle, by whom, when; on what basis is it said that the Defendant was "well aware" of manipulation and exploitation (paragraph 12.10)?

24.3 In this context it appears that the Claimant has seen fit to put these allegations on the record without having spoken to Mr Markle, verifying these allegations with him or obtaining his consent (she admits in paragraph 14.7 of the Reply that she has had no contact with him since the wedding). It is therefore highly unlikely that she has any credible basis for these allegations of impropriety towards him, or that proper particulars could be given.

24.4 Even if proper particulars could be given, if these allegations were allowed to stand there would have to be a lengthy investigation of the Defendant's journalists' contacts with Mr Markle, put into the context of Mr Markle's dealings with the media generally. It is impossible to see how such investigation would assist in the resolution of the issues or be proportionate to what is at stake.

25. In **paragraph 9(12)**, in further support of the alleged "wrongfulness" of the publication of the words complained of as a misuse of private information, the Claimant alleges that the Defendant had a "***clear malicious intent** in publishing the letter*" [**B/4/18**]. The same objections apply to this allegation. Once again this "complex test of mental state" of the publisher is irrelevant to the claim for misuse of private information, and the allegation should be struck out.

26. Further, the basis for this allegation appears to be the publication of Article 5, in which the Defendant published analyses of the Claimant's handwriting [Article 5 is at **B/5/103-116**]. These analyses are clearly presented in Article 5 as the opinions of the experts upon a sample of handwriting. Readers will have taken those comments more or less seriously depending on their own views of graphology.

27. The Claimant's case on malice here appears to be based on no more than the nature of the words that were published. The "*clear malicious intent*" appears to be sought to be inferred from the publication of "*derogatory allegations about the Claimant's character*", that is, the fact that parts of the handwriting analyses were unflattering (although the comments of the handwriting experts are by no means wholly negative), such as the words "*showman and a narcissist*". None of the requirements of pleading malice are adhered to: it is not said who within the Defendant is alleged to have been malicious, or why. It is also difficult to understand what the malice alleged here is said to consist of: is it alleged, for example, that the opinions reported were not real, or invented? Or that someone at the Defendant (who?) did not believe them – but how would that be relevant? Or that there was an improper motive; if so, what motive, and whose was it?

Principles of law: relying on separate publications in aggravation of damages

28. It is open to a claimant in an action in which damages for injury to feelings are sought to claim aggravated damages on the basis that the defendant has acted with malice. As part of his or her case on malice, a claimant may in some circumstances rely on derogatory statements made by the defendant about the claimant on occasions other than the publication of the words complained of. However, it is submitted that such reliance is subject to the principles governing the pleading of bad faith set out above, including the principle that such publications must raise a probability, and not mere possibility, of malice. Not all derogatory publications will properly constitute the basis of, or form part of, a plea of malice.

29. Further, reliance on other derogatory publications as evidence of malice is also subject to the principle, well-established since ***Pearson v Lemaitre*** (1843) 5 MAN & G. 700; (1843) 134 ER 742 **[AB/1]**, that if the evidence given to prove the existence of a malicious motive establishes another cause of action, no damages in respect of that other cause of action can be recovered. The claimant may not obtain damages on the basis of the publication of words other than those that are sued on. The modern case-law dealing with this topic has identified both a principled and a case-management based approach.

30. The decision of Gray J. in ***Collins Stewart Ltd v Financial Times Ltd*** [2006] EMLR 100 **[AB/4]** explains the correct approach as a matter of principle. Gray J stated at [24]-[27] **[AB/4/83-84]**:-

> "24. The starting point for any discussion of the legitimacy of the use to which Collins Stewart wish to put the subsequent articles is that they could, if they had chosen to do so, have complained of them as separate causes of action. Issues of meaning and any defences could then have been debated at trial in the usual way. In the event that Collins Stewart failed to establish that any of the subsequent articles was defamatory of them or *The Financial Times* established a defence to it, no question of additional damages would arise. If on the other hand liability were to be established against the newspaper, Collins Stewart would be entitled to further separate awards after the judge had directed the jury (or himself) to take care to avoid double-counting. This is a familiar and workable scenario.
>
> 25. However, Collins Stewart, for whatever reason, did not take that course. It is necessary to look with some care at the position which arises as a result of their having confined their cause of action to the original article. As it appears to me, Collins Stewart would be entitled to recover by way of compensatory damages the damage to its reputation, standing and good name flowing from the publication of the

> article of 27 August. Relevant factors would include the gravity of the libel and the extent of its circulation. …(citations omitted)
>
> 26. Such is the relatively generous ambit of recovery of compensatory damages in a libel action. What is the position where a claimant is the subject of a series of articles? There are various possibilities. Assume that the defendant publishes three defamatory articles referring to the claimant, articles A, B and C. If articles B and C add to the damage caused by the publication of the original article A and are not defensible, then I think that articles B and C should in principle generally be made the subject of separate complaint as separate causes of action. To do so would make matters simpler and clearer for the jury (or judge) if and when it comes to assessing damages. If on the other hand articles B and C, whilst defamatory of and damaging to the claimant, do not repeat the libel which was contained in article A, it appears to me to be objectionable in principle to allow the claimant to rely on articles B and C in connection with damages recoverable for the publication of article A. Articles B and C would be separate torts giving rise to separate claims for damages. If on the other hand articles B and C consist in part of the repetition of the libel contained in article A and in part of other distinct libels on the claimant, formidable problems will in my opinion arise in disentangling the recoverable and the irrecoverable damage in respect of article A.
>
> 27. My starting point is therefore that there are sound reasons both of principle and of practice why a claimant, whether an individual or a corporation, should not be permitted to seek to recover increased damages in respect of the publication by the defendant of article A by reason of the publication by that defendant of subsequent articles B and C which are not themselves the subject of complaint."

31. Although ***Collins Stewart*** involved a corporate claimant, the reasoning set out above has been considered and applied in cases involving claims by individuals. The correct approach was discussed by Tugendhat J in ***Clarke (t/a Elumina Iberica UK) v Bain*** [2008] EWHC 2636 (QB) [**AB/6/116-120]** at [51]-[61], although ultimately the decision in that case turned (at [61]) on case-management considerations. In ***Wallis and anor v Meredith*** [2011] EWHC 75 (QB) [**AB/10/197]** Christopher Clarke J doubted at [59] whether it would be open to a claimant to rely on an additional publication in aggravation of the damage due in respect of the publication that forms the cause of action, referring to ***Collins Stewart***, but he did not need to decide the point. In ***Miller v Associated Newspapers Ltd*** [2012] EWHC 3721 (QB) [**AB/11/239]** Sharp J considered ***Collins Stewart*** at [121], and refused to take into account in aggravation of damages subsequently published articles where the claimant had not set out the words complained of and their alleged meaning. In ***ZAM v CFW and TFW*** [2013] EMLR 27 [**AB/12/255-256]** at [70]-[71] Tugendhat J. expressly followed the reasoning in ***Collins Stewart*** at [24]-[27] set out above.

32. In addition to or in the alternative to the principled approach suggested in ***Collins Stewart*** at [24]-[27], when considering whether or not to permit reliance upon other

publications, the Court is bound to take into account case management considerations. An important part of the Court's case management function to ensure that claims are kept within proportionate and sensible bounds. Allegations in pleadings giving rise to issues that open up potentially difficult and lengthy factual and legal inquiries that are not necessary for the fair disposition of the case – for example, inquiries as to the accuracy of various publications that are not the subject-matter of the action – may be struck out on case management grounds. This was an additional reason for the decision in ***Collins Stewart*** itself – see [37]. It was also, as noted above, the basis for the decision of Tugendhat J in ***Clarke v Bain*** at [61].

33. In ***McLaughlin and ors v LB of Lambeth*** [2011] EMLR 8 [**AB/9/181-182]** Tugendhat J. struck out particulars in support of an aggravated damages case alleging a "campaign" against the claimant on the grounds of relevance and case management, stating:

> "110. If a trial were to encompass all the matters pleaded in para.15.2 of the Particulars of Claim, the Further Information and the Request for Further Information, then it would be much longer than if it did not encompass these matters. Even assuming that these matters were relevant to aggravated damages or an injunction (contrary to my view), then the inclusion of these matters would still be disproportionate. Aggravated damages are for injury to feelings. They are not capable of amounting to so large a sum as to justify litigating these matters in court. That is obvious. Damages for injury to feelings may be large, perhaps in five figures, but not so large as to be proportionate to the cost likely to be incurred in preparing for trial, and then trying, the issues that the claimants have chosen to plead. So Mr Caldecott is on strong ground when he submits that the purpose of pleading these matters and making the Request for Further Information of the defence must be a collateral purpose. I would accept that that inference should be drawn in this case."

34. And in ***Lokhova v Longmuir*** [2017] EMLR 7 (QB) **[AB/13/279]** Warby J observed at [57] that:-

> "Pleas in aggravation can sometimes be over-elaborate, calling for factual enquiries that are disproportionate to what is truly at stake. One must be careful not to let the aggravated damages tail wag the cause of action dog. Among the court's case management powers is the power to exclude an issue from consideration: CPR 3.1(2)(k). The scope of the case is not just a matter for the parties' choice. If the overriding objective requires it, the court should and will rule out, or decline to permit the incorporation of, issues which it would otherwise have been legitimate to raise."

35. As appears from the passages set out above, case management considerations require the Court to balance the time and cost of litigating issues against any possible benefit to the claimant. In any media publication claim – including claims for misuse

of private information and data protection - in which a claimant sues in respect of words that are alleged to be false, fairness dictates that (a) the claimant must specify the meanings attributed to the words said to be inaccurate, and give particulars of inaccuracy (***NT1 v Google LLC*** [2019] QB 344 [**AB/14/326]** at [79]); and (b) the defendant must be permitted to advance truth or any other defence had the words been sued on in defamation. See ***ZXC v Bloomberg LP*** [2019] EMLR 20 **[AB/15/423]** at [150], a privacy case in which Nicklin J. stated that if a claimant wishes to seek an award of damages in respect of injury to reputation and/or vindication, "*then a defendant would have to be permitted to defend as true any underlying defamatory allegations that fall within the claim for misuse of private information (or advance any other defence that would have been available had the claim been brought in defamation: cf. Rudd v Bridle & Another [2019] EWHC 893 (QB) [60(5)]* per Warby J.*"*

Application to paragraph 19.8 of the Particulars of Claim

35. Paragraph 19 of the Particulars of Claim sets out the matters on which the Clamant relies "*in support of her claim for general and/or aggravated damages, further or alternatively compensation pursuant to Article 82 of the GDPR and section 168 of the DPA*". One of these matters is paragraph 19.8 of the Particulars of Claim, in which the Claimant pleads 5 articles (four before the publication of the Articles complained of and one after), none of which are alleged to contain the contents of the Letter, which articles are said to be "*examples*" of "*the Defendant's obvious agenda of publishing intrusive or offensive stories about the Claimant intended to portray her in a false and damaging light*" [**B/4/24**]. None of these articles was the subject of any complaint by the Claimant up to the time of service of the Particulars of Claim.

36. The Defendant asked for proper particulars of this allegation: see Requests 26 and 27, including asking the Claimant to identify each and every article relied on. The Claimant refused to do that, insisting that it may rely on "*examples*" (Response 26 and Response 27(a)) [**B/5/37**]; indeed relying on unspecified "*numerous articles*" of another class, "*exemplified*" by 4 further identified articles (Response 27(d)) [**B/5/40**].

37. The reliance on examples of articles said to be false and damaging is contrary to principle. The Defendant is entitled to know the case it has to meet, and in particular exactly what items of its journalism the Claimant seeks to attack, and on what basis, including what the allegation complained of in each article is and why it is said to be false. The reliance on "examples" is also incoherent: each article published by the Defendant contains different words and information and therefore gives rise to different issues and considerations. It is perfectly obvious that the fact that one article published by the Defendant might contain some inaccurate information pertaining to the Claimant cannot lead to the conclusion that any other article, containing different words and information, also does so.

38. More fundamentally, as set out above, it is not permissible for the Claimant to rely, in support of her damages claim, on articles that are not sued on and are not said to be unlawful. Damages, whether labelled general or aggravated damages, are available only in respect of unlawful conduct, and none of these additional articles is said to be unlawful.

39. Further, if and in so far as it is said that these additional articles are simply part of a case as to an improper "agenda" on the part of the Defendant and admissible on that basis, there is no proper, credible or reasonable basis for such alleged agenda. No particulars are given in paragraph 19.8 or in the Further Information which properly support it. All there is are allegations of falsity. The publication of Articles alleged to be false – even if the Claimant could prove they were false – does not begin to lay a foundation for a case that the Defendant publisher acted improperly with some ulterior motive; if it did, qualified privilege could never succeed in a defamation case in the absence of a truth defence.

40. In Response 27(c), the Claimant sets out her case in relation to the first 5 articles relied on [**B/5/38-39**]. Those particulars are essentially particulars of falsity. They do not conform to the principles of pleading bad faith set out above. There are some bald assertions of bad faith: in Response 27(c)(1): "*intended to be divisive"*; in Response 27(c)(2) and (4): "*deliberately inflammatory*", but no details or grounds are given for these allegations. It should be noted that the additional articles are all by-lined by different journalists, many of them working in different parts of the world. The only

link between the additional articles is that they all concern the Claimant and were all published by the Defendant. Indeed, in Schillings' letter of 9 December 2019, it is stated that the only issues arising on these articles are "truth or falsity" [**B/23/368**], thereby betraying that the Claimant's case on the articles goes no further than alleging falsity, and does not properly set out a case on any impropriety.

41. For example, in Response 27(c)(1) [**B/5/38**], which relates to an article about the Claimant's upbringing published on 20 November 2016 [**B/14/302-305**], the Claimant asserts that it was false that she grew up in Compton. This article was published before the Claimant's marriage to Prince Harry and written by two journalists, one working in Los Angeles and one in New York. The article does not criticise the Claimant in any way. It is alleged that the article was "*intended to be divisive*", but not said how or why this is alleged and therefore it is impossible for the Defendant or the journalists concerned to respond to this serious allegation in any meaningful way. Looking at the article as a whole it is impossible to understand how it could be said to be "*intrusive or offensive*", or "*intended to portray her in a false and damaging light*", or part of any "*agenda*", and the particulars throw no light on that issue. Similarly, the article relied on in paragraph 27(c)(4) as to the Claimant's "*favourite snack*" [**B/17/320-324**] is a piece about the environmental effect of avocado production. The article opens with a commendation of the Claimant, stating that she has *"rightly been praised for making the fusty old Royal Family socially and ethically aware"* and goes on to comment mildly that the Claimant's fondness for the fruit is *"something of a faux pas"*. Similar points can be made about all the articles relied on. As particulars of a malice case, paragraphs 27(c)(1)-(5) are unsustainable.

42. Further, even if it could be said that the additional articles were part of a sustainable case in support of damages, this part of the Claimant's case should be excluded on case management grounds in order to keep this case within proper bounds. As it currently stands, this case will already involve a potentially lengthy investigation of the truth or falsity of various aspects of the Articles sued on. That is because, as stated above, the Claimant relies on the alleged "*falsity of the account*" in the Articles about the Claimant's relationship with her father in support of the allegation that the publication was "wrongful" (paragraph 9(9) [**B/4/17**]).

43. If paragraph 19(8) were allowed to stand, the consequence would be that there would need to be a similar inquiry in relation to each of the 9 articles identified by the Claimant as being relevant to damages. Most of the additional articles concern entirely discrete topics (except that 4 of them relate to the renovation of Frogmore Cottage). In Schillings' letter of 9 December 2019, it is said on the Claimant's behalf that the scope of the inquiry in relation to the articles relied on in paragraph 19.8 would be "*relatively limited*" and confined to an investigation of the truth or falsity of certain allegations [**B/23/368**]. That suggestion ignores the fact that the allegation against the Defendant in relation to these articles is journalistic impropriety (although, as stated above, the factual basis of that allegation is not made clear) and that therefore the Defendant's defence of that allegation is bound to go much further than simply the accuracy of the allegations the Clamant chooses to highlight, and would necessarily include the investigation of the circumstances of publication of each of those articles. The idea that the Defendant's defence in relation to each of these 9 articles would be limited to (or would even necessarily include) admitting or denying the accuracy of allegations specified by the Claimant is not remotely realistic. Inevitably the litigation in relation to the additional articles would expand the scope of this claim and increase the length of the trial greatly.

44. If the Claimant were to succeed in her claim in this action, she would be awarded damages in line with damages in other cases in which there has been a misuse of private information by the publication of information in the media, bearing in mind the nature of the information (plainly not of the most sensitive kind, such as sexual or medical information). Damages would not take account of the means of the Claimant and would not be increased with reference to the Claimant's great wealth. Any small additional damages by way of aggravation would not justify the enormous cost of litigating the propriety of publishing 9 separate articles, none of which are said to be unlawful.

45. In summary, the Defendant submits in relation to paragraph 19.8 (and the Further Information relation to this paragraph):
    45.1 The Claimant is not permitted to rely on "examples" of articles in support of her case; all facts and matters relied on must be set out.
    45.2 The Claimant is not permitted to rely in support of damages on publications that are not sued on or said to be unlawful.

45.3 Paragraph 19.8 does not plead a sustainable case on malice or impropriety because the alleged inaccuracy of the additional articles is not a proper basis for such an attack and there is nothing else to support the case.

45.4 In any event, it would be wholly disproportionate to litigate the Claimant's case on the additional articles.

ANTONY WHITE QC

ALEXANDRA MARZEC

23 April 2020