Neutral Citation Number: [2020] EWHC 2160 (Ch)

Case No: IL-2019-000110

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 August 2020

Before:

MR JUSTICE WARBY

- -

Between:

HRH The Duchess of Sussex	**Claimant**
- and -	
Associated Newspapers Limited	**Defendant**

- -
- -

Justin Rushbrooke QC and Jane Phillips (instructed by **Schillings International LLP**) for the **Claimant**
Antony White QC and Alexandra Marzec (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing date: 29 July 2020

- -

Approved Judgment

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

.....

MR JUSTICE WARBY

Mr Justice Warby:

Introduction

1. The issue on this application is whether the identity of confidential media sources should be protected from public disclosure. Normally, when such an issue arises it is the claimant who seeks disclosure of the sources. The media invariably maintain that the protection of confidential sources is of high importance, and that names should not be disclosed or publicised. In this unusual case, the roles are reversed. The defendant, a newspaper publisher, wishes to publicise the identities of five media sources, maintaining that their identities are not private or confidential information, or otherwise deserving of protection in fact or law. The claimant is seeking orders to prevent such publicity, relying on evidence – which is unchallenged – that the sources provided information for publication on an express undertaking that they would remain anonymous.

2. The individuals concerned are not sources of anything that has yet been published by the defendant. They provided information for a favourable "exclusive" article about the claimant that appeared in *People,* a US Magazine, dated 18 February 2019 ("the People Article"), under the headline "The Truth about Meghan", with a standfirst saying "Her best friends break their silence". Nonetheless, it is an unusual scenario.

3. I have concluded that for the time being at least the Court should grant the claimant the orders she seeks, the effect of which will be to confer protection on the sources' identities. That is confidential information, the protection of which at this stage is necessary in the interests of the administration of justice. This is an interim decision. Although it has been afoot for ten months now, the action has progressed slowly. It is still some way from trial. The weight to be given to the relevant factors may well change as the case progresses. Those that require that confidentiality should prevail over transparency at this preliminary, case-management stage, may fade or even evaporate if and when there is a trial at which one or more of the sources gives evidence.

4. I have also concluded that directions towards a trial must be given promptly. The case has been slowed down by case management issues. It should now move forward at a greater pace. Disclosure, inspection and exchange of witness statements come next. The order that deals with the outcome of this application will fix a trial window, and an early Costs and Case Management Conference at which a timetable for those further pre-trial steps will be laid down, and budgets set.

The procedural background

5. The claimant sues the defendant for publishing articles in the *Mail on Sunday* and *MailOnline* on 10 February 2019 in which, without the claimant's consent, the defendant reported the contents of a letter the claimant wrote to her father in August 2018 ("the Letter"), and set out extracts from the Letter. The causes of action relied on are misuse of private information, breach of duty under the GDPR, and copyright infringement. Further details of the claimant's case, and a summary of the main issues in the action, can be found in the judgment I gave on 1 May 2020, granting the defendant's application to strike out parts of the claimant's statements of case: [2020] EWHC 1058 (Ch) ("the Strike-Out Judgment").

The relevant issues

6. At [12(1)] of the Strike-Out Judgment I summarised the defendant's answer to the claim in misuse of private information:

> "The defendant disputes the contention that the contents of the Letter were private and confidential, and denies that the claimant had a reasonable expectation that it was or would remain private. Alternatively, publication was justified in pursuit of the protection of the rights to freedom of expression of the defendant, its readers, and Mr Markle."

7. In support of its case that the contents of the Letter were not private or confidential, and that the claimant had no reasonable expectation that they were and would remain so, the defendant alleges that the claimant's own conduct was such as to forfeit or at least weaken any expectation of privacy. The defendant's general case is stated in paragraph 13.8 of the Defence:

> "… the Claimant herself had knowingly caused or permitted information about her personal relationship with her father, including the existence of the Letter and a description of its contents, to enter the public domain."

8. Six pages of particulars are pleaded in support of this contention. These are largely about the People Article. The article is said to have first appeared in hard copy and online on 6 February 2019 (and therefore before the articles complained of). All elements of the article are relied on, and copies are reproduced in the Appendix to the Defence. The particulars set out an inferential circumstantial case that the publication of the People Article, and the widespread republication of its contents by other publishers, was something "sought and intended" by the claimant, and something which she "caused or permitted", or "acquiesced in". The inferential case is based mainly on (i) the content of the People Article, which is said to be so intimate and detailed that it is to be inferred that she provided it, (ii) the silence of both Kensington Palace and the claimant on the question of whether the friends gave their interviews to People magazine with the claimant's consent, and (iii) the fact that the claimant "to the best of the defendant's knowledge" had not complained to *People* or others about the publication of the information in the People Article.

9. The claimant's response is that the defendant's case is misconceived. The interview was not authorised by her: she "did not know of the *People* interview, let alone procure or consent to any reference to the Letter": paragraph 12.11 of the Reply, and see also paragraph 3.5. Her case is set out in more detail paragraphs 12.8 to 12.10 of the Reply. She says that whilst the People Article was "based on interviews given by five unnamed friends of the claimant" she "did not know that a number of her friends agreed to give an interview about her" but only "later discovered" that "some of her close circle of friends became extremely concerned" about media publicity and its impact on her, as a result of which "one of her closest friends decided that they should help by arranging to give anonymous interviews to this American magazine … in which they might explain what the claimant was truly like." She specifically denies having any knowledge that her friends would make any reference to the Letter or its contents. She maintains, further, that the reference to the Letter was in any event only a "brief and

passing reference" made by one of the friends, with no detail, and that the summary of the Letter that was provided was "completely wrong". She relies on that last point as bolstering her case that she did not authorise any revelation of, or about, the Letter.

10. This was the state of the pleadings at the time of the Strike-Out Judgment. The application that is before me now arises from developments since then. My decision was not appealed. It led to amendments of the claimant's case, which reduced its scope. In addition, the defendant has asked for and the claimant has provided three rounds of further information about her case. Most of the details of these steps are immaterial. What matters for present purposes are the defendant's Requests for Further Information, pursuant to Part 18 of the CPR, the claimant's responses, the timing of service and filing, and the parties' attitudes to these. The evidence shows the following.

11. On 3 June 2020, the defendants served a Request asking the claimant to identify the friend who spoke anonymously to People magazine and made passing reference to the Letter, and the other friends who gave an interview to *People* magazine (Requests 2 and 6).

The Response, and attendant publicity

12. The claimant's lawyers prepared a response, dated 30 June 2020, which was signed with a statement of truth ("the Response"). The friend who made passing reference to the Letter was identified in a Confidential Schedule to the Response. She was referred to in the body of the Response as "Friend A". The other friends were also identified in the Confidential Schedule. They were referred to in the body of the Response as "Friends B to E". The Response also asserted that "The friends of the Claimant who gave the interview to People magazine deliberately chose to speak anonymously (which was respected by the magazine)."

13. The Response also contained further information of the claimant's case as to "the true position as to the nature and extent to which she and her husband were 'publicly funded' as working members of the Royal family…" The claimant asserted, among other things that:

> "The contribution of public funds towards crowd security was far outweighed by the tourism revenue of over one billion pounds sterling that was generated from the Royal wedding of The Duke and Duchess of Sussex which went directly into the public purse."

14. At one minute to midnight on 30 June 2020, the claimant's lawyers sent a short email to those acting for the defendant stating, "Please see attached letter and enclosures." The email was received at midnight. The letter said, "Please find enclosed by way of service the Claimant's Response to the Defendant's third CPR Part 18 Request and corresponding enclosures." The attachments were a letter, and three further documents: the Response, an Appendix containing press articles, and the Confidential Schedule. The covering letter, which had been prepared earlier, said that the documents "have been filed at Court". In fact, they had not.

15. Upon receipt, Keith Mathieson of the defendant's solicitors RPC "promptly forwarded Schillings' email and its four attachments to the Defendant". The record does not show whether he was waiting up for it.

16. At 4:58pm UK time on 1 July 2020, the defendant published a lengthy article on its website www.dailymail.co.uk headed "Meghan Markle names the five friends behind People article" and containing the following further words (among others):

> - Meghan Markle is suing MailOnline's owner Associated Newspapers over an article in The Mail on Sunday.
>
> - Article reproduced parts of a handwritten note she had sent to her father Thomas Markle in August 2018
>
> - ANL has said Mr Markle shared the letter only after Meghan's friends gave an interview about it to People
>
> - Meghan has now identified the five friends, who spoke anonymously, naming them in confidential papers….
>
> The Duchess of Sussex has identified the five close friends who gave an interview to People magazine criticising her father – but denies she authorised them to do it in the latest bombshell documents released as part of her High Court battle against the Press …
>
> Today, new legal documents showed that Meghan has now identified the five friends – who spoke anonymously – with the papers just referring to them as A, B, C, D and E, though she named them in a confidential section.
>
> The friends have never been named, with People magazine previously referring to them as 'Meghan's inner circle – a long-time friend, a former co-star, a friend from LA, a one-time colleague and a close confidante.'"

17. At 5:09pm the defendant published a further lengthy article, headed "Meghan Markle claims Britain made a profit out of her £32 million wedding to Prince Harry because it made £1BILLION in tourism windfall." The article said (among other things):

> "The claim was made within the latest documents released as part of her High Court battle against the Mail on Sunday …"

18. Some six hours later, another article was published on the dailymail.co.uk website, attributed to the Press Association. This one was headed "Meghan 'unprotected' by monarchy after media attack, court papers suggest". It stated that this claim had been made by the claimant "according to leaked court documents …" This article also referred to documents "seen by the PA news agency" which referred to the five friends "identified in an undisclosed confidential schedule".

19. On 2 July 2020, the defendant published a "splash and spread" story about this case in the hard copy edition of the Daily Mail. The lead story on the front page was headed "MEGHAN: THE PALACE HUNG ME OUT TO DRY". There was a continuation heading on pages 2 and 3: "Meghan: I DID discuss letter to my dad with close friends (but I never authorised them to talk to People magazine about it)". Another story on pages 2 and 3 was headed "Our wedding raked in £1bn for Britain, claims Duchess."

20. All these articles were plainly based on the Response. But they were not based on copies obtained from the court. Although the default position is that a non-party may obtain a copy of a statement of case from the Court's records without first asking for the Court's permission, such documents first have to be submitted to the Court for filing, processed, and accepted for filing. The first two articles were published before the Response had even been filed at Court. All three articles were published before the Response became available to a non-party from the Court records. The records generated by the electronic filing system ("CE File") show that the Response, its Appendix, and the Schedule were all submitted after close of business, at 6:32pm, on 1 July 2020. They were not accepted for filing by the clerk until around 11am the following day, 2 July 2020.

21. The Schedule had been submitted with a request that it be treated as a confidential document "not to be made available to third parties without the permission of the Court as it contains private and confidential information". This request was reviewed by Court staff and accepted. Accordingly, the document was accepted for filing on that basis, with the result that to those – such as the judiciary – who have unrestricted access to CE File, it shows in pink on the CE File screen. Further, Mr Rushbrooke tells me on instructions, and I accept, that the only document that has ever been accessible to third parties as a matter of fact is the Response.

22. As the defendant's evidence states, "on Wednesday 1 July and Thursday 2 July there was widespread media coverage of the Response", which was international. Mr Mathieson, the maker of the statement, exhibits a number of articles and suggests that this coverage was independent of the defendant's articles. That seems most improbable. The claimant's case is that all this third-party publicity flowed from the defendant's own premature reporting. The claimant's lawyers have not done a comprehensive analysis, and nor have I. But all the third-party coverage to which I have been able to put a time, or infer a time, pre-dates 11am BST on 2 July 2020. This includes an article in *Newsweek*, on which the defendant places particular reliance. It was published at 6am EST. The inference I draw is that the majority if not all of the extensive national and international coverage referred to by the defendant was prompted by the defendant's own articles, or by the "leak" referred to in the Press Association copy, which seems likely to have come from the defendant. The third-party coverage included mention of the Confidential Schedule, but none of it named any of the five friends.

23. The claimant, through Jenny Afia of her solicitors, Schillings, suggests that before these events the defendant had been astute to publicise its own case. The evidence supports that claim. Ms Afia exhibits a series of articles published by the defendant on its own website on the day of service of the Defence, and "multiple news articles" which followed on the defendant's website and on other media outlets. Among these is an article dated 16 January 2020 headed "Meghan Markle's private texts to best pal Jessica Mulroney could be released in bombshell court case". The article explains that "The defence papers filed at the High Court state the newspaper will seek disclosure from

Meghan of her exchanges with her friend Jessica Mulroney". The Defence does indeed say this.

24. On 6 July 2020, the defendant's solicitors wrote to those acting for the claimant asserting that the use of a Confidential Schedule to the Response was illegitimate. They suggested that the Schedule formed part of the Response and was "as such … properly reportable by the media". They said that unless by 9 July 2020 the claimant applied for an injunction they would assume that the claimant did not persist in "the claim that the information in the Schedule has any different status to that in the rest of the Response."

The application, and attendant publicity

25. On 9 July 2020, the claimant filed and served the present application, seeking the following orders:

> "1. Pursuant to CPR Part 18.2, the information in [the Schedule] … must not be used by the Defendant for any purpose except for that of these proceedings. Without prejudice to the generality of the foregoing, the Defendant must not:
>
> (a) publish and/or communicate and/or disclose to any other person and/or otherwise use all or any part of any information contained in the Confidential Schedule except for the purpose of these proceedings; and/or
>
> (b) publish any information which is liable to, or might identify those people named in [the Schedule] or which otherwise contains material which is liable to, or might lead to, the identification of those people … in any such respect, provided that nothing in this Order shall prevent the publication, disclosure or communication of any information which is contained in the public judgments of the Court.
>
> 2. Upon the [Court] being satisfied that it is strictly necessary, an order pursuant to CPR Part 5.4C(4):
>
> (a) (i) no copies of the Confidential Schedule; and
> (ii) no copies of the witness statements in support of this application
> will be provided to a non-party without further order of the court
>
> (b) Any non-party other than a person notified or served with this Order seeking access to, or copies of the abovementioned documents, must make an application to the Court, proper notice of which must be given to the other parties.
>
> 3. The Clamant be permitted in these proceedings to refer to

> those people whose names are set out in [the Schedule] as Friends A to E."

26. The application was supported by two witness statements dated 9 July 2020. One was from Ms Afia. Her statement had two exhibits, one being designated as a Confidential Exhibit. It contained evidence about Friend C, and some hearsay evidence from Friend C. The other statement was from the claimant herself. It was short, containing little that was factual – or certainly little that needed to be proved, by the claimant or anyone else. Mr Rushbrooke has not seen a need to rely on the claimant's witness statement in his written or oral submissions. The statement did contain argument, comment, and criticism of the defendant, including this (in paragraph 5):

> "Each of these women is a private citizen … and each has a basic right to privacy. …for the Mail on Sunday to expose them in the public domain for no reason other than clickbait and commercial gain is vicious and poses a threat to their emotional and mental wellbeing. The Mail on Sunday is playing a media game with real lives."

27. The defendant suggests that the claimant's side briefed the press in relation to this application, and the evidence bears this out. The record shows that the application notice and supporting witness statements were all submitted for filing at 8:06am and filed at 8.32am. The evidence of Mr Mathieson is that they were served on the defendant at 8:30am and that by 8:45am, within 15 minutes of receiving the application, he received a call from a representative of Sky News asking if he had a comment to make about it. The defendant's side had not made the application public. At 9:30am, a copy of the title page of the claimant's witness statement was posted on the Twitter feed of someone called Omid Scobie, accompanied by a quotation attributed to "a close source", criticising the *Mail* for wishing to "target five innocent women through the pages of its newspapers and its website". Mr Scobie then tweeted the passage from the witness statement that I have quoted above. The inference invited is that he had been provided with a copy by representatives of the claimant. This seems very likely. From 10:02 the national media were reporting at length on the content of the claimant's witness statement. The Sun reported under the headline "GAME PLAYING. Meghan Markle says 'I'm not on trial' as she tries to ban 'vicious' naming of pals who gave interview to support her". There was much in similar vein, in (among other outlets) Sky News, The Times, The Express online, and The Daily Telegraph. Again, no detailed analysis has been conducted but it seems improbable that all this reporting was a product of searches of the CE File system.

28. Indeed, there is evidence to support the defendant's assertion that the claimant's side have been energetically briefing the media about these proceedings from the outset. This includes (though it is not limited to) an email sent to media representatives at 11.13am on 20 April 2020 by James Holt, Head of Engagement and Communication at Sussex Royal (the Duke and Duchess's foundation). This attached two documents. One was a confidential "background summary note" of this action, headed "Crib Sheet". The other was a copy of what the email called a "legal filing", namely the claimant's Reply. The Reply had been submitted for filing at 5:06pm on Friday 17 April 2020 and served on the defendant two minutes later. The record shows it was accepted for filing at 10:56am on Monday 20 April. Mr Holt's email was sent less than twenty minutes later.

The relevant procedural law

29. The relevant provisions of CPR 5.4C are as follows:-

> "(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of—
>
> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
>
> …
>
> (2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.
>
> …
>
> (4) The court may, on the application of a party or of any person identified in a statement of case—
>
> (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);
>
> (b) restrict the persons or classes of persons who may obtain a copy of a statement of case;
>
> (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or
>
> (d) make such other order as it thinks fit.
>
> (5) A person wishing to apply for an order under paragraph (4) must file an application notice in accordance with Part 23.
>
> (6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission."

30. The rule is concerned with documents that form part of "the records of the court". The Court's powers and duties in relation to documents used in Court proceedings are broader than this. The common law principle of open justice allows a non-party to seek copies of documents that fall outside the scope of r 5.4C, and it may require the Court to provide or facilitate access: see *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 [2020] AC 629.

31. CPR 18.1 provides that a party may request, and the Court may order the other party to provide, further information about a statement of case. CPR 18.2 makes provision for the imposition of a "Restriction on the use of Further Information" in these terms:

> "The Court may direct that information provided by a party to another party (whether given voluntarily or following an order

made under rule 18.1) must not be used for any other purpose except for that of the proceedings in which it is given."

The evidence

32. I have already referred to the evidence filed and served with the application notice. On 23 July 2020, the claimant served an additional witness statement, designated as a Confidential Witness Statement. This is from Friend B. On the same day, the defendant served two statements from Mr Mathieson, one being a Confidential Witness Statement. On 24 July 2020, the defendant served a further Confidential statement, from Ms Miah of the defendant's solicitors. On 27 July 2020, a second statement of Friend B was served by way of reply.

33. The main features of the evidence filed on behalf of the claimant can be summarised shortly.

(1) Friend B says that she and the four others spoke to *People* magazine in early 2019 "on condition of anonymity". It was Friend B who organised the interviews. She was concerned at the way the media were treating and portraying the claimant. Friend B spoke to the editor, Jess Cagle, to ask what she could do to help the claimant. He "offered up" having her inner circle of friends talk about the claimant anonymously. They all agreed to speak on the basis their identities would not be revealed, and they would not have done it otherwise. There were two main reasons for anonymity: (1) to avoid media intrusion into their privacy and (2) to avoid the appearance of seeking publicity for themselves. The claimant played no part in arranging the interviews, was not aware they were being planned, and did not become aware of the article until after it was published. Friend B makes clear she wishes the confidentiality that was promised to be respected. She expresses concern on her own behalf and that of the other four, that if their identities are revealed they will suffer media intrusion. Reference is made to the children of the five, and the potential impact on them of media publicity about their parents.

(2) Ms Afia's Confidential Exhibit gives evidence about one of the other four friends, including hearsay evidence from that friend. Ms Afia suggests (with reasons) that this friend would suffer intrusion and distress if the orders sought are not made.

(3) The claimant's witness statement is, as I have said, short on factual material. It does however make clear that she fervently wishes her friends' anonymity to be preserved, and has not been able to identify a good reason why it should be overridden.

(4) Ms Afia identifies four reasons for placing the names of the five friends in a Confidential Schedule: (a) to protect the claimant's privacy; (b) to protect the friends' reasonable expectations as to confidentiality; (c) none of the five has ever been identified or confirmed publicly as an interviewee for the People Article; (d) none of the friends is a party to the action or a witness, and the case is at an early stage. Ms Afia adds that she is concerned "that the publicity will intimidate one or more of the Five Friends and dissuade them from agreeing to give evidence in support of the claimant's case at trial."

(5) Ms Afia suggests that the defendant is "exploiting its position as both a party to this litigation and a major news publisher". It has, she suggests, been seeking to publish information in this case "to either whip up interest in the case, boost revenue, or seek to gain a litigation advantage." When the Response was served, the defendant "stole a march on its commercial rivals by splashing the details" on its website, and later in hard copy.

34. The main features of the defendant's evidence, apart from matters I have already mentioned, are these:

(1) Mr Mathieson says that the claimant did not impose any restrictions on the use that could be made of the Response. He takes issue with the suggestion that the defendant could have obtained any meaningful commercial advantage as a result, as the story had been widely published online by the time the *Daily Mail* published on 2 July. There is in any event "nothing wrong with a publisher publishing stories about litigation to which it is a party" and no "litigation advantage" has been identified by Ms Afia. The defendant has no need to whip up interest in the case. The claimant is doing just that. In contrast to the claimant's briefings, the defendant's content has been "very fair" on an objective analysis.

(2) Mr Mathieson further suggests that the concerns and criticisms expressed by or on behalf of the claimant are lacking in evidential support. He is critical of paragraph 5 of the claimant's statement, suggesting that she "provides no basis" for what she says. Further, he suggests, there is "scant evidence" to support the contention that confidentiality is required out of concern for the privacy interests of the five friends, including their emotional and mental wellbeing. Now they have been named they will "be drawn ineluctably into the proceedings". If their privacy interests will be affected, that is nothing new. It was always going to happen. There could be no justification for any of the friends giving evidence anonymously, and there can therefore be no warrant for conferring anonymity now.

(3) Ms Miah, an Associate Solicitor at RPC, challenges an assertion in the first witness statement of Friend B, that she has "not sought to publicise or benefit from her friendship with the claimant." Relying on a number of press cuttings exhibited to her statement she asserts that "Plainly, [Friend B] has previously publicised her friendship with the claimant. The defendant does not know what benefit she received from doing this publicity, but infers it was to raise her public profile".

35. Friend B's second witness statement is made in reply to the statement of Ms Miah. Over 45 paragraphs, Friend B addresses, one by one, the press cuttings cited by Ms Miah, explaining the context, and the role she played in relation to each. The gist of her evidence is that it is misleading and untrue to suggest that this material undermines what she said in her first statement.

Some matters that are not in dispute

36. Three points are not in dispute.

(1) The first is a matter of law: the importance of the fundamental common law principle of open justice. It is common ground that anonymity for parties, witnesses and – as here – third parties, should only be granted if and to the extent that it is

justified by some legitimate aim, and necessary for the due administration of justice. The dispute concerns the application of well-established principles to the particular facts of the present case, including the roles and circumstances of the claimant and the five friends, at this relatively early stage of the litigation.

(2) The second undisputed point is that each of the five friends gave her interview in return for an unqualified promise of confidentiality from People magazine. That is the evidence of Friend B, and the defendant has neither adduced evidence to challenge it nor sought to argue that it should be rejected at this stage. (Of course, it remains open to the defendant to present its inferential case at trial, and to invite the Court to reject any evidence given by or on behalf of the claimant at that stage).

(3) The third matter of common ground is that none of the friends' identities has been publicly confirmed. It is no part of the defendant's case that the information is not confidential because it is information that is in the public domain, as common knowledge. It is not said that everybody knows who the five are, or that everybody knows the identity of any one of them.

37. It is worth adding that, apart from the open justice principle, the defendant has not put forward any reason of public policy or any public interest justification for the public disclosure of the friends' identities at this stage. There is no appeal to any independent public interest argument.

The rival contentions

38. For the claimant, Mr Rushbrooke QC submits that the use of a Confidential Schedule to protect the identities of the five friends was and remains justified, both substantively and procedurally, and that the Court should grant the relief necessary to support and preserve it.

39. As to the substance, he submits that a breach of confidence occurs where:

> "(i) information has the necessary quality of confidence; (ii) it has been imparted in circumstances importing an obligation to the claimant and (iii) unauthorised disclosure is threatened."

Terry v Persons Unknown [2010] EWHC 119 (QB) [2010] EMLR 16 [49] (Tugendhat J). The identity of a confidential journalistic source is a category of information that attracts "supercharged" rights and duties of confidence. That is why publishers are given special protection against the disclosure of their sources by s 10 of the Contempt of Court Act 1981. The only relevant exception to this protection is where "disclosure is necessary in the interests of justice". This protection is given because of the source's right of confidence and the corresponding duty owed by the publisher to the source. The reason for the strong protection given to such sources is "to enhance the freedom of the press": *Goodwin v United Kingdom* (1996) 22 EHRR 123 [39], *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29 [2002] 1 WLR 2033 [38-39] (Lord Woolf). Mr Rushbrooke also relies on the privacy rights of the claimant and the five friends. Forcing the claimant to disclose the friends' identities is "an unacceptable price to pay for the right to pursue her claim", he submits. A proper balancing of the rights of the claimant and the friends against the open justice principle comes down clearly in favour of the former.

40. As to the procedural position, Mr Rushbrooke argues that CPR 18.2 mirrors equivalent provisions restricting the use of disclosed documents (CPR 31.22) and witness statements (CPR 32.12). An order under CPR 18.2 should be made when that is necessary to further the public interest in encouraging the co-operation of parties to litigation, by preventing collateral use of information they have only obtained through that litigation. It is necessary here, as the defendant is seeking to maximise the publicity surrounding the case; and to permit the defendant to publish the friends' names now would be to allow the defendant to benefit from its own wrong, if the claimant establishes her claim at trial. Mr Rushbrooke further submits that third parties have no automatic right to obtain a copy of the Schedule. The better analysis is that for the purposes of CPR 5.4C the Schedule is a "document filed with or attached to the statement of case", and hence outside the scope of automatic non-party accessibility. The practical and legal effects of the Court's acceptance of the claimant's request for confidential filing are the same: the Schedule is not accessible, without an application for that purpose. On that footing, no order is required under CPR 5.4C. The claimant's application is made by way of a fall-back position.

41. For the defendant, Mr White QC submits that any order the effect of which is to anonymise a party, witness or other individual represents a derogation from the open justice principle. A party such as this claimant, who seeks such a derogation bears the burden of establishing that it is necessary, and the need for the derogation must be established by clear and cogent evidence. The claimant's case falls short of doing so. It would be wrong, argues Mr White, to be seduced by Mr Rushbrooke's argument that anonymity should be preserved "for the time being". The Court should "grasp the nettle" and decide the issue now as one of principle rather than "leave it hanging".

42. Mr White refers by way of analogy to CPR 39.2(4), which requires hearings to be in public unless it is necessary to hold them in private for one of a limited number of specified reasons, and the interests of the administration of justice require it. He relies on some well-known passages from the jurisprudence:

(1) He refers to what Lord Atkinson said in *Scott v Scott* [1913] AC 417, 463 (the emphasis is added by Mr White):

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."

(2) Reference is also made to what Lord Woolf said in *R v Legal Aid Board ex p Kaim Todner* [1999] QB 966, 977 (again, the emphasis is added by Counsel):

> "This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the

> administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely" (emphasis added).

(3) Mr White places heavy reliance on the more recent decision of Flaux J in *Graiseley Properties Ltd v Barclays Bank PLC* [2013] EWHC 67 (Comm), where an application seeking anonymity for 207 bank employees whose emails had been reviewed by regulators investigating allegations of LIBOR-fixing was refused. Flaux J conducted a detailed review of the jurisprudence, including the well-known words of Lord Rodger in *re Guardian News and Media Ltd* [2010] UKSC 1 [2010] 2 AC 697 [63]. Mr White also highlights Flaux J's emphasis (at [54]) on the fact that the proper administration of justice does not include protecting people from reputational harm.

43. Counsel questions the invocation of the privacy rights of the claimant and the five friends. He points out that the claimant does not contend that the information disclosed in the People Article is private, and he submits she has no right of privacy in relation to her friends' identities as sources. As for the friends, he argues that the claimant has not provided enough information about them to support her reliance on their privacy rights. Pointing out that at least two are known to reside in North America he observes that in law, individuals who reside outside an ECHR Contracting State have no Convention right to respect for their private life (*Al-Skeini v United Kingdom* (2011) 53 EHRR 18 [130-142], *Abbas v Secretary of State for the Home Department* [2017] EWCA Civ 1393 [2018] 1 WLR 533 [23-25]). In any event, he submits, not all rights of confidence or privacy deserve the same weight. Non-party rights of confidence are often, if not invariably, interfered with in the course of litigation, for instance by the disclosure of private correspondence. The claims in this case are weak at best. He submits that the claim of Friend B to habitually protect her privacy has been "shown to be unsustainable".

44. As to procedure, Mr White draws attention to the definition of "statement of case" contained in CPR 2.3(1), which includes any further information provided under Part 18. The Schedule is part of the Response and is therefore accessible to anyone, automatically and without the need for permission, as a matter of procedural law. Any other approach would allow a party to place the majority of its Part 18 Response in a schedule labelled "confidential" and circumvent the rules. He suggests the touchstone of whether a schedule forms part of the Response is a cross-reference. There has been no determination by the Court that the information in the Schedule should be protected, or at any rate no judicial determination. Implicit in these submissions is an argument that the Court staff were wrong to accede to the claimant's request for confidentiality, and the Schedule ought now to be made publicly accessible. It would follow, of course, that the application under CPR 18.2 would fail.

Assessment

CPR 5.4C

45. I start with the main procedural issue. Nobody has been able to offer any clear explanation of why CPR 5.4C distinguishes between a statement of case and "documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it". One possible reason, alighted on by the defendant and by me before the hearing, is that at inception the CPR made a break with the previous regime, so that in a contract claim for example the written agreement relied on might be attached to or served with the Particulars of Claim. But the procedural archaeology has not been carried out.

46. For my part, I am not persuaded that the issue between the parties is resolved by referring to the definition of "statement of case" in r 2.3(1), or that it is helpful to import into this procedural context tests about incorporation by reference that may be applicable in the case of a charterparty, or other commercial agreement. The former does not clearly answer the question, and the latter seems inapt. I agree with Mr Rushbrooke that the better view is that the authors of the rule intended to exclude from automatic inspection any document that is related to a statement of case in one of the ways referred to (filed with, attached to, or intended to be served with it), but does not form part of the body of the statement of case.

47. This does involve treating a schedule or Appendix as a document separate from the Further Information itself, but that does not do any violence to the language of CPR 2.3(1). The definition seems to me designed simply to make clear for the avoidance of doubt that "statement of case" does not just cover the main pleadings (Particulars of Claim, Defence and Reply) but also Further Information about any of those documents. This is, moreover, a workable and practicable solution to a procedural issue that crops up relatively often. It allows a party the opportunity to separate from the body of their statement of case a related Schedule, Appendix or other document, third party inspection of which is objected to. The effect is that the document will not be open to inspection without an application for the purpose. The alternative is that the document will become available to the public at large as soon as it is accepted for filing.

48. It is true that a party might abuse the process by placing information in a Schedule or Appendix without any justification for doing so. But such abuse is open to scrutiny and could quite easily be controlled and put right by the Court, either upon application or of its own motion. An example of the latter is afforded by the decision of Mann J in *Hannon v News Group Newspapers Ltd* [2014] EWHC 1850 (Ch) [4], where he deprecated the fact that "much of the meat of the factual allegations made in these cases is contained in 'Confidential Schedules' to the Particulars of Claim." His response was to "revisit the appropriateness of maintaining confidentiality in the pleaded factual matter".

49. This analysis would seem to underly the way the CE File system has been set up. As I have mentioned, both the Appendix and the Schedule to the Response are inaccessible in practice. It was not necessary for the Schedule to be designated as confidential, or for reasons to be given, in order to shield it from automatic public view. That is the way the system operates. It is nonetheless convenient for the system to contain provision for claims to confidentiality to be made, and assessed, by the Court. Mr White is correct

to say that the assessment is not carried out in the first instance by a judge. It is treated as an administrative matter. But it is subject to judicial oversight in the ways that I have mentioned. The Schedule is therefore not a document that is, in fact or in law, open to public inspection without permission.

50. I note, incidentally, that the Response that is at issue on this application is not the only document, or the only statement of case, in this action that has a Confidential Schedule. Among others, the first two Part 18 Responses also have Confidential Schedules, to which no objection has so far been taken.

51. The next question is whether, as a matter of substance, the factual and legal status enjoyed by the Schedule was and remains justified. It will already be clear that I believe it was and is justified. The most straightforward way to approach this is through the prism of confidentiality.

(1) Although the defendant takes issue with the claimant's reliance on privacy rights, it does not dispute that the information at issue was and remains confidential in nature. This defendant, of all defendants, is well-aware of the importance of preserving source confidentiality, in general.

(2) The defendant has, as it seems to me, acquired the information in circumstances importing an obligation of confidence, subject only to any public interest that overrides that obligation. The claimant has expressly designated the information as confidential and clearly identified in her statement of case and, now, in evidence, the factual basis for doing so. I agree with the authors of *Toulson & Phipps on Confidentiality* (4th ed) when they say (at 20-081):

> "So far as the *protection* of third parties is concerned, a party may be required to disclose information in respect of which he owes a duty of confidence to someone else, if such information is relevant to the issues in the action. … The law would be deficient if the receiving party did not in such circumstances owe an obligation to the relevant third party not to use such confidential information otherwise than for the purpose for which it was provided'".

(3) In the absence of any public domain argument the confidentiality, and the corresponding obligation, remain.

(4) It is clear enough that the defendant is threatening to disclose the information, unless restrained. It invited this application, making plain that it would consider itself free to publish the names if no application was made.

52. Here, it is the claimant who seeks to protect the rights of the five friends, none of whom is a party or an applicant. But Mr White has not objected to the application on the formal basis that the claimant lacks standing. Rightly so, it seems to me, as the application is procedural, not an application for an injunction. CPR 39.2(4) reflects the Court's ability to provide procedural protection for witnesses. *Hannon* provides an illustration of the court protecting the confidentiality rights of non-parties who might or might not become witnesses. The claimants alleged that privacy and confidentiality rights had been infringed by *The Sun* newspaper paying a policeman for information, then using

it as the basis for a "sensationalist story" about them. Confidentiality as to "the identities of the journalist and policeman said to be involved" was approved and maintained by means of a separate schedule, because "different confidentiality constraints apply": see Mann J at [4].

53. Mr White does criticise the evidence adduced in support of the claim to protect third-party rights. Counsel points out that the application in *Graiseley* failed at the first hurdle, due to a lack of evidence as to the individual situations of the employees. He reminds me of what I said in *YXB v TNO* [2015] EWHC 826 (QB) [18]: "If the rights of any third parties … are relied on, they … should ordinarily speak for themselves." The submission is that, like the claims in *Graiseley*, the present application should fail on the basis that there is no evidence from Friends A, C, D or E, and the evidence of Friend B is not enough, nor good enough, to support the claimant's application. I disagree. Granted, Friend B does not state in terms that she has the authority of the others to speak on their behalf. And there is no evidence as to why the others have not given evidence. But there is some evidence about one of them from Ms Afia. And Friend B does speak, apparently first-hand, about the promises of confidentiality that were sought and given to both her and the other four friends. She clearly knows their individual circumstances, and provides some evidence about them. The attempt, through Ms Miah's statement, to discredit her "on paper", fails in my judgment. Her claims, and those of the claimant, that identification would risk harm to each of the five friends, are credible and persuasive.

54. The key question, therefore, is how to resolve the competing demands of confidentiality and open justice. The core test is the one identified by Mr White: the preservation of anonymity must be shown to be necessary in the interests of the administration of justice. But there is more to it than that. This is not an exercise in assessing competing generalities. As ever, it is necessary to consider the weight of the specific factors that are engaged, applying an intense focus to the particular facts of the case. As Mr White correctly submits, not every claim to source protection is of equal weight; as I put it in *Hourani v Thomson* [2017] EWHC 173 (QB) [2017] 1 WLR 933 [32], "not all sources are equal". Nor, however, are all claims to vindicate the principle of open justice of equal weight or merit.

55. The English law of open justice has two main strands. One is of recent origin. It derives from the duty not to act incompatibly with Convention Rights, imposed on the Court by s 6 of the Human Rights Act 1998. Article 6 of the Convention confers on a litigant, such as the defendant in this case, a right to a "fair and public hearing" in the "determination of his civil rights and obligations". This is concerned with trials at which final decisions are made, not interim or pre-trial processes. The defendant does not invoke this right at this stage of the process. Nor has the defendant had resort to Article 10 of the Convention. Mr White's arguments rely on the second strand: the longer-established common law principle of open justice. This goes beyond the Convention rights, as it does apply at the interim stage. But its demands vary according to the context. The passages cited by Mr White are concerned with trials and other hearings. In *Scott v Scott,* Lord Atkinson spoke of the importance of the impacts on witnesses and others of "the hearing of a case in public". Similarly, in *Kaim Todner.* Lord Woolf spoke of "the full glare of a public hearing". Mr White might also have cited the words of Lord Judge CJ in the more recent classic source, *R (Mohamed) v Sec of State for*

Foreign & Commonwealth Office [2010] EWCA Civ 65 [2011] QB 218 [38] (emphasis added):

> "…The public *must be able to enter any court to see that justice is being done in that court*, by a tribunal conscientiously doing its best to do justice according to law. …. any exceptions to the principle must be closely limited. …"

56. If one focuses on hearings at which substantive or procedural rights are determined by the Court, it is relatively easy to see the strength of the justifications for transparency identified in these classic sources. Open justice tends to foster public confidence in the impartial and fair administration of justice, to deter inappropriate behaviour by the Court, to ensure that evidence becomes available, and to limit the risk of uninformed and inaccurate comment about the proceedings. Not all of these factors translate so easily when it comes to the present context. I am not concerned with transparency for hearings or any decision-making process but for statements of case, Court orders, and other documents that are held on the Court file, or processed by the Court in relation to litigation. The approach to be adopted in this context was identified by the Supreme Court in *Dring* (above) at [45-46]:

> "45 ... the court has to carry out a fact-specific balancing exercise. On the one hand will be "the purpose of the open justice principle" and "the potential value of the information in question in advancing that purpose".
>
> 46. On the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain confidential unless and until they are deployed for the purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in a patent case."

I do not find *Graiseley* of any real help in conducting this process. It is a useful re-statement of the principles, but otherwise merely an example of their application to facts quite different from those of the present case.

57. The purpose of the open justice principle is to "allow the public to scrutinise the workings of the law": *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 [2013] QB 618 [1] (Toulson LJ). A person seeking access to or publicity for information held by the Court that is likely to advance that purpose may have a weighty claim. For its part, however, the court needs to apply careful scrutiny to claims for the public disclosure of information that is provided by one party to another. Information that has little to do with advancing public understanding of the legal process will have less weight. As Lord Judge CJ observed in *Mohamed* (above) at [41]:

> "… It is, of course, elementary that the courts do not function in order to provide the media with copy, or to provide ammunition for the media, or for that matter private individuals, to berate … anyone else. They function to enable justice to be done between parties. …"

58. It is in this context that the parties' tit-for-tat criticisms of one another for publicising details of this case in and through the media are of some relevance. Each side has over-stated its case about the conduct of the other. The defendant has not made good, for present purposes, Mr Mathieson's contention that the "real motivation" of the claimant and her husband is "to afford them an opportunity to wage their own campaign against the press rather than to obtain the remedies at which the proceedings are ostensibly directed". Nor does the evidence persuade me that the similarly hyperbolic assertions in the claimant's witness statement are soundly based. It is however tolerably clear that neither side has, so far, been willing to confine the presentation of its case to the courtroom. Both sides have demonstrated an eagerness to play out the merits of their dispute in public, outside the courtroom, and primarily in media reports.

59. This approach to litigation has little to do with enabling public scrutiny of the legal process, or enhancing the due administration of justice. Indeed, in some respects it tends to impede both fairness and transparency. This will be a judge-alone trial, not a trial by jury. But to fight proceedings in court and through litigation PR or sensational reporting at one and the same time is not designed to enhance understanding of the legal process. For a party to file and immediately publicise prejudicial and partisan characterisations of the other's litigation conduct in the media before a hearing certainly does not assist. Equally, the defendant's coverage of this litigation has provided readers with a good deal of information about the claimant, her views and her attitudes towards the Royal family, which is no doubt interesting to the public, but it has done relatively little to provide insight into the "workings of the law". The coverage has selectively highlighted aspects of the defendant's case and features of the claimant's case that are novel and interesting to the public. The focus is on sensational reporting of information that happens to be contained in the claimant's statements of case. There are references to the proceedings, but some of these involve speculation about what disclosure might be given, and to who might or might not be a witness.

60. The defendant's evidence and arguments have invoked the open justice principle, but they have not explained in any convincing way how the public identification of the five friends would have any real value in advancing the purposes served by that principle. In my judgment, at this stage, such disclosure would have very limited if any value to that end. The rights of confidentiality that are relied on by the claimant comfortably outweigh such value as disclosure might have for that purpose.

61. Anonymity can serve a variety of purposes, some valuable and some harmful. Confidentiality for media sources generally serves the beneficial purpose of enhancing freedom of expression. That is why it carries such weight in most balancing exercises. Confidentiality may, for instance, protect a whistle-blower from reprisals. That is not this case, as Mr White points out. But on the unchallenged evidence for the claimant, the purpose of the five friends was to defend the claimant against hostile media coverage, and to put the other side of the story. Anonymity was sought and granted to give them comfort that they could speak out without suffering adverse consequences. Functionally, therefore, anonymity facilitated the defence of others against harm from

publicity, and it increased the range of information available to the public. The defendant might say that there was no need or no proper justification for that. But at this point in the case I cannot reach any such conclusion.

62. At this stage, continued anonymity not only upholds the agreement made between People magazine and the five friends, and the reasonable expectations which that generated; it also supports the proper administration of justice by shielding the friends from the "glare of publicity" in the pre-trial stage. Generally, it does not help the interests of justice if those involved in litigation are subjected to, or surrounded by, a frenzy of publicity. At trial, that is a price that may have to be paid in the interests of transparency. But it not a necessary concomitant of the pre-trial phase. It is reasonable to be concerned that in that phase the peculiarly febrile atmosphere surrounding this case, and some of the coverage, could act as a deterrent and undermine fairness and due process. The evidence includes, for example, an article published by the defendant that speculates about whether one named individual will "still back Meghan in 'trial of the century'" after a falling-out between them. The evidence shows to my satisfaction that this article is misleading and inaccurate, as it relied on some garbled and false claims contained in third-party publications. But it is an illustration of the kind of undesirable pressure that potential witnesses might face.

63. For these reasons I conclude that it is necessary to grant the application under CPR 18.2. It follows that, if I had taken a different view on the interpretation of CPR 5.4C, I would have granted that application as well.

64. In the circumstances, it is not necessary to address the separate question of the privacy rights of the claimant and the five friends. But I should not be taken to accept that the claimant has no right of privacy (or indeed of confidentiality) in respect of information about who her five close friends are, the nature of her relationship with them, what they know about her, and the fact (known to her but not the public at large) that they are the individuals who provided information about her anonymously for publication in People magazine. Nor should I be taken to accept that the territorial limitations on the scope of Convention rights, relied on by Mr White, provide an answer to arguments based on the rights of privacy enjoyed by the claimant or the five friends, in English law.

The form of order

65. Subject to argument on the details, the order will take the form of paragraph 1 of the draft, and will have a further provision reflecting paragraph 3. It seems to me, however, that the current version of paragraph 3 is an unsatisfactory half-way house. The appropriate order is one that requires all parties to refer to the friends by the letters A-E. Clause 3 of the Model Order attached to the Master of the Rolls' *Practice Guidance: Interim Non-Disclosure Orders* [2012] 1 WLR 1003 provides a starting point. These orders will last until trial or further order. They will be kept under review and in any event reconsidered at the Pre-Trial Review that I will order, in the light of the circumstances as they then stand. Contrary to Mr White's submission, I do not believe that decisions of this kind must be made "once and for all". Rather the contrary. Such orders should be made or not made according to the evidence before the Court and the circumstances prevailing at the time. If made, they are required to be kept under review as circumstances change.