Duchess of Sussex v Associated Newspapers Ltd.

REASONS FOR REFUSING PERMISSION TO APPEAL (continued)

Misuse of private information

1. Mr White addressed oral argument in support of grounds 1 and 2 (without of course resiling from his other grounds).

2. His first point was put as a failure to apply a critical analysis to the Article 8 right, leading to a failure to weigh that right rigorously, either at stage 1 or at stage 2. The argument was that this skewed or may have skewed the balancing exercise in favour of the Article 8 right. I cannot see any arguable basis for this contention. The judgment contains a detailed analysis at Stage 1, which is then reviewed at Stage 2 for the purposes of the balancing exercise.

3. The second argument was that the judgment failed to address the case of *AAA*. It did not, but the reason is not that I ignored the point for which the defendant cited the case. The argument advanced by the defendant in reliance on AAA was encapsulated in paras 52 and 53 of its skeleton argument: when weighing the privacy right "C's own conduct in relation to her personal information and that of others comes into play … the Court should take into account the extent of C's dealings with information about her personal and family life when weighing the privacy right asserted in this case." The pleaded case was that it should be inferred that the Letter was written and sent "with a view to it being read by third parties" (Re-re-Amended Defence ¶13.7) and that the claimant had "knowingly caused or permitted information to enter the public domain (ibid ¶13.8).

4. The judgment dealt with both those matters when addressing the first stage, dealing with the claimant's intentions at [87-93]. When addressing the second stage, at [97-100], I returned to those and other matters on which the defendant relied, and made an evaluative assessment. At [100] I dealt expressly with the defendant's case about "the claimant's attitudes towards publicity for and about her private life and the private lives of others". I adopted the words at the end of [99]: "I cannot envisage a Court attaching any great significance to this factor at the second stage".

5. A judgment need not deal with every argument or identify or explain every factor that weighed with the Judge; it is sufficient that it identifies the essential issues and enables the parties and any appellate tribunal readily to analyse the essential reasoning: *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 [2002] 1 WLR 2409. It is certainly not necessary for a judgment to address every case cited, and every submission made about its significance. In my view, this judgment met the relevant standard.

Copyright infringement

6. Mr Speck focused his attention on two submissions: a contention that my decision to find infringement without first making a finding on the precise ambit of the copyright was wholly novel (Ground 7); and a submission that my approach to the Article 10 defence gave it too narrow a scope, and treated competing rights as having greater weight thereby contravening the principles in *In re S (A Child) (Identification)* [2004] UKHL 47 [2005] 1 AC 593 (Ground 9, esp para 15 of the Grounds).

7. My conclusions on the copyright issues were findings on the particular facts of this case. If this approach has not been adopted before, that may be because no case has presented the same factual matrix. At any rate, as Mr White pointed out at an earlier hearing in this case, everything was new once. It remains my clear view that, on the facts of this case,

the prospect of a co-owner or even a separate copyright is and that, as I held (at [166], [168]:

> "It is not possible to envisage a Court concluding that Mr Knauf's contribution to the work as a whole was more than modest. The suggestion that his contribution generated a separate copyright, as opposed to a joint one is, in my judgment at the very outer margins of what is realistic. …
>
> … these in substance and reality are matters that go only to remedies, and are capable of resolution by case management."

8. As for the principles in *In re S,* established 17 years ago, I suspect I may have cited these more often than any other Judge at first instance. They are so well-embedded in the jurisprudence it is hardly necessary to reiterate them. But I did so in this case, albeit via citation of my recent judgment in *Sicri* and the Court of Appeal decision in *ZXC* at [105]. This ground appears to rest on a misplaced semantic analysis which cannot be sustained when what I said is read properly in context. In particular, the suggestions that I treated property rights as weightier than freedom of expression, or treated the effect of Article 10 as substantially covered by the fair dealing defence are in my view untenable