Neutral Citation Number: [2021] EWCA Civ 1810

Appeal Nos. A3/2021/0609 and A3/2021/0943
Case No: IL-2019-000110

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST
Mr Justice Warby

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 02/12/2021

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
DAME VICTORIA SHARP, PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
LORD JUSTICE BEAN

BETWEEN:

HRH THE DUCHESS OF SUSSEX

Claimant/ Respondent

- AND -

ASSOCIATED NEWSPAPERS LIMITED

Defendants / Appellants

- -

Andrew Caldecott QC, Adrian Speck QC, Alexandra Marzec, Isabel Jamal, and Gervase de Wilde (instructed by **Reynolds Porter Chamberlain LLP**) appeared on behalf of the **Defendant/Appellant**

Ian Mill QC, Justin Rushbrooke QC, Jane Phillips, and Jessie Bowhill (instructed by **Schillings International LLP**) appeared on behalf of the **Claimant/Respondent**

Hearing dates: 9-11 November 2021

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JUDGMENT

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. The central question in these appeals is whether the judge (Mr – now Lord - Justice Warby) was right to make orders for summary judgment in favour of the claimant, Meghan, Duchess of Sussex (the Duchess or the claimant) against the publishers of the Mail on Sunday newspaper and the MailOnline, Associated Newspapers Limited (Associated Newspapers or the defendant). Summary judgment was granted in respect of the Duchess's claims for misuse of private information and infringement of copyright. The claims relate to the publication in a number of Mail articles (the Articles) of about half the contents of a 5-page handwritten letter (the Letter) which the Duchess had sent on 27 August 2018 to her father, Mr Thomas Markle (Mr Markle).

2. The Duchess contended and the judge found that the contents of the Letter were private and concerned personal matters that were not matters of legitimate public interest, and in which she enjoyed a reasonable expectation of privacy. He held that the Articles interfered with that reasonable expectation, and were not a necessary or proportionate means of correcting certain inaccuracies about the Letter contained in an article published on 6 February 2019 in People magazine in the USA (the People Article). Taken as a whole, the disclosures in the Articles were manifestly excessive and, therefore, unlawful, and there was no prospect of a different result being reached after a trial. The interference with freedom of expression which this outcome represented was a necessary and proportionate means of pursuing the legitimate aim of protecting the Duchess's privacy.

3. In his judgment of 11 February 2021, the judge also held that the Duchess was entitled to summary judgment on the issues of subsistence and infringement of copyright in the Letter, but that the issue remained of whether a Mr Jason Knauf (Mr Knauf), a former member of the Kensington Palace Communications Team, was a co-author. After the judgment, it became clear that Mr Knauf had not co-authored the Letter and claimed no copyright in it, and the judge gave final summary judgment on the copyright claim in a further judgment of 12 May 2021.

4. The judge approached the application for summary judgment on the basis that Associated Newspapers would be able to make good its pleaded case (except where it was manifestly untenable). As will appear, however, events since the judgment have forced Associated Newspapers to withdraw or amend some aspects of its pleaded case, but, as will also appear, that does not seem to me to affect the outcome of this appeal.

5. In mounting its appeal, Associated Newspapers relied on a number of supposedly novel features of the facts it alleges, which I can summarise very briefly as follows: (i) The Letter was written by a very high-profile public figure as part of a media strategy to enhance her image. This is one of the allegations which is not now pursued, though it is still alleged that the Duchess thought, at the time that the Letter was prepared with the benefit of comments from Mr Knauf, that it was likely to reach the public domain. (ii) The Letter's contents were unusual in that they included details of communications between the Duchess and Mr Markle, which were in some respects false. (iii) The contents of the Letter were briefed to the prospective publishers of the book *Finding Freedom* (the Book) written by Omid Scobie and Caroline Durand (the

Authors) with the Duchess's cooperation, and to People magazine. (iv) Mr Markle had a history of going to the media, which was what the Letter complained about. (v) The Articles were the continuation of a debate on a matter of public interest, which the Duchess had initiated through the agency of friends. (vi) Much of the true position was peculiarly within the Duchess's own knowledge and could not be ascertained in advance of disclosure and trial.

6. Associated Newspapers' main points on the privacy case seem to have shifted as the appeal has progressed. Rather than track these developments, I will recite the 6 grounds relating to privacy points on which it was granted permission to appeal,[1] namely (1) the judge failed to make findings on the factors relied on as undermining or diminishing the weight of the Duchess's privacy right, (2) the judge wrongly thought that the Duchess's disclosures of the Letter to People magazine and the Book were relevant only to the issue of public domain, and not to her conduct and ambivalence, (3) the judge failed to recognise that the Duchess's disclosures to People magazine and the Book and her intentions in relation to disclosing the Letter were relevant to the assessment of the *Murray* factors (taken from *Murray v. Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 at [36]) at stage one, (4) the judge gave inadequate weight to the Article 10 rights engaged, and assessed them on an overly restrictive basis, especially in relation to reply to attacks, (5) the judge failed to attach sufficient significance to the prospect that Associated Newspapers' pleaded case would be made good at trial, and (6) the judge wrongly assessed what further evidence was likely to be available at trial.

7. The main point made by Associated Newspapers is perhaps that the judge failed to realise how the People Article traduced Mr Markle, and did not even mention aspects that entitled him to reply to the attack that it constituted on him. The main elements of that attack were, as Mr Andrew Caldecott QC, leading counsel for Associated Newspapers, put it: Mr Markle cold-shouldered her at [really in the run-up to] the wedding, the most important point of her life, lied about her shutting him out, and gave a cynical and self-interested response ignoring her pleas for reconciliation in a loving letter, all in the teeth of his daughter being always dutiful and supporting him with incredible generosity.

8. The main legal points in this appeal are that: (i) the judge wrongly stated the test, by suggesting that the defendant had to justify an interference with the claimant's right of privacy, when the proper approach was to balance the competing rights and interferences under articles 8 (article 8) and 10 (article 10) of the European Convention on Human Rights (ECHR) (the appropriate test issue), (ii) the judge adopted a flawed analysis of the factors undermining the Duchess's alleged reasonable expectation of privacy (the reasonable expectation of privacy issue), (iii) the judge was wrong to apply a strict test of necessity and proportionality to Mr Markle's right of reply to the People Article; a much broader approach to the facts was required on authority (the right of reply issue).

9. As to copyright, Associated Newspapers' two main grounds of appeal are that (i) the judge failed properly to evaluate the interference with article 10, saying that this was not one of the rare cases in which freedom of expression would outweigh copyright in the absence of a fair dealing defence, and (ii) the judge failed properly to evaluate

[1] Renumbering them to ignore those grounds for which permission was not granted.

the fair dealing defence, bearing in mind the limited scope of the copyright in the Letter and the wide scope of the concept of reporting current events.

10. The Duchess supported the judge's reasoning, but filed a Respondent's Notice contending that Associated Newspapers' defence, even if relevant to the issues, had no reasonable prospect of success. The Duchess submitted that a trial would be a further intrusive process in a case in which it could already be seen that there could have been no justification for the publication of large tracts of her private Letter. In essence, the Duchess contended that the judge was right to reject Associated Newspapers' primary case that Mr Markle was entitled to put the Letter into the public domain in order to correct the record created by the People Article. The Letter, for the most part, merely reinforced the points made against Mr Markle in the People Article. The judge correctly identified the inaccuracies in the People Article and also correctly held that it was not necessary or proportionate for Mr Markle to publish "long and sensational articles revealing and commenting on extensive extracts from the Letter, without first approaching [the Duchess]".

11. Both sides sought to adduce new evidence before us. The most important parts of that evidence were perhaps the statement of Mr Knauf promulgated by Associated Newspapers exhibiting certain texts passing between him and the claimant and Prince Harry, Duke of Sussex (the Duke) and the statement of the Duchess herself in response. We agreed to look at all the new evidence *de bene esse*, leaving the decision as to whether to admit it over until these judgments were delivered. In the result, there was little oral argument based upon the new evidence, since it revolved around the drafting of the letter and what the Duchess knew about discussions between the Kensington Palace Communications Team and the Authors of the Book (which was itself not published until August 2020).

12. Against this background, I will deal first with some essential factual background, then with the judge's reasoning, before addressing the issues.

Factual background

13. At [37]-[63], the judge set out some of the essential facts. The following is a brief summary of those paragraphs, with some of my own interpolations reflecting the argument before us.

The father-daughter relationship at the time of the wedding

14. The judge first described the "father-daughter relationship at and after the time of the wedding". Mr Markle did not attend the wedding of the Duke and the Duchess on 19 May 2018. He was admitted to hospital days beforehand for emergency heart surgery. Text messages annexed to the Duchess's reply made plain that, before the wedding, Mr Markle had behaved in ways which caused his daughter "concern because of the publicity they were likely to and did cause, and the impact on her, [the Duke], and [Mr Markle]".

15. The judge thought it was clear that the run-up to the wedding was fractious, revealing substantial differences of approach to dealing with the media. Without going into details, Mr Markle did engage with the media (e.g. a front-page Mail on Sunday report on 13 May 2018 was headed "Meghan's Dad staged photos with the paparazzi", and

reported that Mr Markle was "colluding with the paparazzi to stage a series of lucrative photo opportunities", for which he apologised by text to the Duchess on 14 May 2018). The Duke texted Mr Markle on 17 May 2018 asking him to "stop talking to the press for your sake and hers", and expressing concern that Mr Markle had not "returned any of our 20+ calls since we all spoke on Saturday morning".

16. The judge thought that Mr Markle was well aware that the Duke and Duchess wanted him to avoid engaging with the media, and that all their correspondence was personal and private in character. Mr Markle continued, thereafter, to have dealings with the media which resulted in press articles. The Articles themselves referred to "a series of damaging interviews" given by Mr Markle.

17. Associated Newspapers point to the details of the text messages exchanged between the Duchess and Mr Markle in the lead up to the wedding, pointing out that there were many loving messages from Mr Markle to which the judge made no reference in his summary. In short, the judge seems to have focused his citation of texts on Mr Markle's dealings with the media.

The Letter

18. The Letter was sent on 27 August 2018 by FedEx. The judge set out the parts of the Letter which were published in the Articles and some context as follows (bold text identifies words published in the Articles, and italicised text is the judge's interpolations):

> **Daddy,**
>
> **[1] It is with a heavy heart that I write this, not understanding why you have chosen to take this path, turning a blind eye to the pain you're causing.** The last time we spoke was 7 days before our wedding when Harry and I called you. This was followed by a turbulent and confusing week where we called you multiple times a day to try to understand what was happening.
>
> **[2] From my phone alone, I called you over 20 times and you ignored my calls,** opting instead to solely speak to tabloids - **leaving me in the days before our wedding worried, confused, shocked, and absolutely blindsided.**
>
> **[3]** Post wedding you then made a choice to begin an onslaught of media interviews, which are still ongoing. **Your actions have broken mv heart into a million pieces - not simply because you have manufactured such unnecessary and unwarranted pain, but by making the choice to not tell the truth as you are puppeteered in this. Something I will never understand.**
>
> **[4] You've told the press that you called me to say you weren't coming to the wedding - that didn't happen because you never called. You've said I've never helped you financially and you've never asked me for help which is also untrue; you sent me an email last October that said, "if I've depended too much on you for financial help then I'm sorry but please if you could help me more, not as a bargaining chip for mv loyalty.** You already have that whether you realize it or not."

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

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

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

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

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

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

[11] We all rallied around to support and protect you from day one and this you know. So to hear about the attacks you've made at Harry in press, who was nothing but patient, kind, and understanding with you is perhaps the most painful of all. I will truly never understand it.

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

> **[13]** My hope is that you can take a moment to reflect on this. To remember our conversation seven days before the wedding when we asked you if the claims of you working with the paparazzi and press were true and told you if we tried to protect you from the story running (something we've never attempted to do for anyone - ourselves included) that we wouldn't be able to use that strength to protect our own children one day. Even knowing that, you said it wasn't true.
>
> **[14] I believed you, trusted you, and told you I loved vou. The next morning the CCTV footage came out. You haven't reached out to me since the week of our wedding, and while you claim you have no way of contacting me, my number has remained the same. This you know. No texts, no missed calls, no outreach from you – just more global interviews you're being paid to do to say harmful and hurtful things that are untrue.**
>
> **[15] If you love me, as you tell the press you do, please stop. Please allow us to live our lives in peace. Please stop lying, please stop creating so much pain, please stop exploiting mv relationship with mv husband**, and **please stop taking the bait from the press. I realize you are so far down this rabbit hole that you feel (or may feel) there is no way out, but if you take a moment to pause I think you'll see that being able to live with a clear conscience is more valuable than any payment in the world.** I ask for nothing other than peace, and I wish the same for you.
>
> Meg

19. Mr Markle replied to the Duchess in September 2018. Some of his reply was published in the Articles. It ended: "I wish we could get together and take a photo for the whole world to see. If you and Harry don't like it? Fake it for one photo and maybe some of the press will shut up".

The People Article

20. The People Article entitled "The Truth about Meghan" was first published on 6 February 2019. The sub-headline read: "[a]fter staying quiet for nearly 2 years, those who know Meghan best are setting the record straight: 'we want to stand up against the global bullying we are seeing and speak the truth about our friend'". The People Article was based on interviews with five of the Duchess's friends, each of whom spoke on condition of anonymity. The stated purposes were to correct the record and defend the Duchess against false and harmful publicity. The judge cited the following passages from the People Article (which he numbered and highlighted):

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

> **[B]** The next morning when the car got there [to take him to the airport], he wouldn't get in. [Later] Meg heard he had a heart attack and she's calling and texting, even up to the night before the wedding. It was like, "Please pick up. I love you, and I'm scared." It was endless.
>
> **[C]** After the wedding she wrote him a letter. She's like, "Dad, I'm so heartbroken. *I love you. I have one father. Please stop victimizing me through the media so we can repair our relationship*". Because every time her team has to come to her and fact-check something [he has said], it's an arrow in the heart.
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> **[D]** He writes her a really long letter in return, and *he closes it by requesting a photo op with her*. And she feels like, "That's the opposite of what I'm saying. I'm telling you I don't want to communicate through the media. Did you hear anything I said?" It's almost like they're ships passing. …

21. The parties and the judge agreed that the People Article inaccurately recorded the Letter and the Duchess's purpose in sending it. The Letter did not seek to repair the father-daughter relationship and was not an olive branch as the People Article alleged. Its main purposes were to reprimand Mr Markle for his previous conduct, and to try to dissuade him from talking to the press in future.

22. Associated Newspapers contend that the judge left out of his summary of the People Article some essential aspects including allegations that: (i) Mr Markle cruelly cold-shouldered the Duchess in the pre-wedding period, (ii) Mr Markle had lied in alleging that the Duchess had shut him out after the wedding, and (iii) the Duchess was always taking care of her father with incredible generosity.

The Articles

23. The judge said that Mr Markle's evidence was that, having read the People Article, he was shocked by what it said about him. It "misrepresented the tone and content of [the Letter]" and he quickly decided that he "wanted to correct that misrepresentation". It also misrepresented Mr Markle's reply, as it "implied that [he] wanted a photo for publicity reasons". Mr Markle said he had never intended to talk publicly about the Letter, but decided to do so to defend himself publicly against vilification "by making out that [Mr Markle] was dishonest, manipulative, publicity-seeking, uncaring and cold-hearted, leaving a loyal and dutiful daughter devastated". Mr Markle spoke to the Mail on Sunday, which "respected [his] wish to publish extracts from [the Letter]". He chose the extracts with the sole purpose of defending himself "by countering the impression given of me and of the letters between Meg and me" by the People Article.

24. Mr Edward Verity, the editor of the Mail on Sunday said that his editorial assessment was that there were "good reasons to publish the story". It seemed clear that the tone and contents of the Letter had been misrepresented, in a way that was unfair to Mr Markle: "what [Mr Markle] was saying was credible and … he was entitled to correct the record". Mr Markle's information "called into question" the conduct and behaviour of the claimant as a "prominent member of the Royal family". It appeared that the Duchess had "used" People magazine to promote a particular positive image as part of what Associated Newspapers called "Meghan's media fightback" and there were "serious questions around the appropriateness" of that fightback. It was "absolutely vital" to quote from the Letter, for the purposes of ensuring credibility.

"[T]he point … was not just to convey what was in the Letter but rather to correct a misleading description in a previous report". The judge inferred that Mr Markle had provided the Mail on Sunday with a copy of his reply. Associated Newspapers made no contact with the Duchess in relation to their proposed content.

25. The judge dealt in detail with the Articles published on 10 February 2019. The front-page trailer showed a photograph of the Duchess and Mr Markle under the heading "World Exclusive" on "Meghan's shattering letter to her father", followed by two double page spreads. There were 88 separate quotations from the Letter. The judge described in great detail the True Tragedy Articles which said that "the full content of a sensational letter written by [the Duchess] to her estranged father shortly after her wedding can be revealed for the first time today". They referred to what had been said by the five friends to People magazine and contained indirect quotations from Mr Markle that the Letter was "far from conciliatory and has left him feeling devastated". It was "unfair" for the friends to "spin a line" while he was being "criticised for 'giving a handful of interviews to the press'". There was a story-within-a-story headed "How Meghan's media fightback led her Dad to reveal letter he wanted to keep secret", reporting that "[Mr Markle] told no one about her letter and planned to 'keep it totally private out of respect for her' – until her friends launched their 'attack' on him last week. … [the Duchess was] said to have authorised five of her closest friends to speak to US People magazine to correct the falsehoods". "The [People] article painted Meghan in a glowing light, while insisting the negative stories about her were lies. But Mr Markle says Meghan's decision to reveal the private letter in the pages of the magazine left him with no choice but to go public: 'The letter was presented in a way that vilified me and wasn't true,' he said last night. 'It was presented as her reaching out and writing a loving letter in the hope of healing the rift, but the letter isn't like that at all. Meghan can't have it both ways. She can't use the press to get her message across but hang me out to dry. I have the right to defend myself'".

26. It is to be noted that the Articles published the parts of the Letter emphasised at [18] above. The second double-page spread included what the judge called the "Harry Articles". He also dealt with what he called the "Handwriting Article". I need not repeat these contents here. But it is important to note that the detailed coverage of the Letter in each of the True Tragedy Articles and the Harry Articles included numerous point-by-point rebuttals of what the Duchess had said in the Letter. The Letter was quoted and then Mr Markle's response to each point was recorded.

The Book

27. In August 2020, the Book was published, and as a result Associated Newspapers' case was amended to allege that the Duchess had collaborated in its production. The Book was relied upon in support of (i) its case on co-operation and its case that any expectation of privacy in the Letter had been "compromised" by the Duchess's conduct in that she (ii) had permitted information about her own private life and correspondence "to enter the public domain by means of the Book" and (iii) did not object to details of her own or others' personal relationships and correspondence being publicly disclosed, provided the disclosure was favourable or flattering.

28. The most relevant passages from the Book, which were recited by the judge from the amended defence, were as follows (numbering added by the judge):

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

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

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

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

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

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

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

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

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

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

> **[xi]** "It is so painful for her because she was so dutiful. Giving him money. Trying to give him whatever help he needed," a confidant said. "She will always feel devastated by what he's done. Always, but at the same time, she has a lot of sympathy for him. Because he never went knocking on the press's door. He was silent for almost two years. Then they just sort of whittled him down. Bombarding him every day. Moving in next door to his house. He couldn't escape it. So now, it's just like he's so far gone".
>
> **[xii]** She didn't reach out again. Instead, Meghan put up what her father described in one of the many interviews he gave following their written exchange as a "wall of silence".

The judge's reasoning

Summary judgment principles

29. The judge dealt with the principles applicable to strike out and summary judgment at [10]-[18]. Neither side has made any criticism of his treatment, so I can take these passages shortly.

30. The judge recorded the provisions of CPR Part 24.2, which allows the court to give summary judgment against a defendant if it considers "(a)… that the defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial". The judge then said correctly that "[i]n this context there is no assumption that what is asserted in the Defence is true; evidence to the contrary is admissible, and is commonly adduced by the applicant and by the respondent. But it is possible to seek summary judgment on the footing that the claim is plainly meritorious and the defence contentions, even if true, could not amount to an answer to the claim". That was, as I have said, essentially the basis on which the matter was argued before the judge and before us.

31. The judge then cited Lewison J's judgment in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) [15] (approved by the Court of Appeal in *AC Ward & Sons Ltd v. Catlin (Five) Ltd* [2009] EWCA Civ 1098). He adjusted the 7 principles to be taken from that case as follows:

> i) The court must consider whether the [defendant] has a "realistic" as opposed to a "fanciful" prospect of success;
>
> ii) A "realistic" [defence] is one that carries some degree of conviction. This means a claim that is more than merely arguable …
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial" …
>
> iv) This does not mean that the court must take at face value and without analysis everything that a [defendant] says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents …

> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial …;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case …;
>
> vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of … successfully defending the claim against him … Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: …

32. The judge referred to Mummery LJ's warning in *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661 at [18] and [11] that the court should be alert to "the defendant, who seeks to avoid summary judgment by making a case look more complicated and difficult than it really is", and "the cocky claimant who … confidently presents the factual and legal issues as simpler and easier than they really are and urges the court to be 'efficient' …". As the judge also correctly said, neither CPR Part 24, nor the overriding objective, permits the court to enter judgment on the basis that the claimant has a strong case, the defence is not likely to succeed, and the time and costs involved in a trial are disproportionate to the potential gains. The judge said that his focus had to be on "whether it [was] realistic or fanciful to suppose the claims might fail at trial". The judge did not gain much help from the rarity of summary judgments in the privacy field.

Essential legal principles

33. At [28]-[32], the judge dealt with the essential legal principles governing the misuse of private information. Uncontroversially, he pointed out that the Human Rights Act 1998 obliged the court to interpret, apply and develop English law in conformity with the ECHR, so that the court must, in a privacy claim against the media, ensure that it properly reconciles the competing rights under the ECHR: article 8(1) requires the state to respect a person's "private and family life … and [her] correspondence", and article 10(1) "guarantees the right to transmit and receive information and ideas

without state interference". Both rights are qualified, so that interferences are justified only if they are prescribed by law, and are necessary and proportionate in pursuit of one of the legitimate aims identified in articles 8(2) and 10(2). The judge said that: "[h]ere, on each side of the equation, the legitimate aim for consideration is "the protection of the rights of others"".

34. The judge summarised the two-stage test for the tort of misuse of private information in domestic law by reference to *ZXC v. Bloomberg LP* [2020] EWCA Civ 611 [2020] 3 WLR 838 ("*ZXC*") at [40-48] and [103-109] and *Sicri v. Associated Newspapers Ltd* [2020] EWHC 3541 (QB) [2021] 4 WLR 3 ("*Sicri*") at [63-74], [111-119], and [120-122]. He summarised the two stages in ways that were not much disputed before us as follows:

> 30. At stage one the question is whether the claimant enjoyed a reasonable expectation of privacy in respect of the information in question. One way the question has been put is to ask whether a reasonable person, placed in the same position as the claimant and faced with the same publicity, would feel substantial offence. There must be something of a private nature that is worthy of protection. In some cases, the answer will be obvious; but the methodology is to make a broad objective assessment of all the circumstances of the case. These include (1) the attributes of the claimant, (2) the nature of the activity in which the claimant was engaged, (3) the place at which it was happening, (4) the nature and purpose of the intrusion, (5) the absence of consent and whether it was known or could be inferred, (6) the effect on the claimant and (7) the circumstances in which and the purposes for which the information came into the hands of the publisher ("the *Murray* factors"). If the information, or similar information about the claimant, is in the public domain, or is about to become available to the public, the Court must have regard to that. In such a case it is a matter of fact and degree as to whether the legitimate expectation of privacy has been lost. Privacy rights can survive a degree of publicity for the information or related information.
>
> 31. At stage two, the question is whether in all the circumstances the privacy rights of the claimant must yield to the imperatives of the freedom of expression enjoyed by publishers and their audiences [Associated Newspapers would add "or vice versa"]. The competing rights are both qualified, and neither has precedence as such. The conflict is not to be resolved mechanically, on the basis of rival generalities. The Court must focus intensely on the comparative importance of the specific rights being claimed in the particular case; assess the justifications for interfering with each right; and balance them, applying a proportionality test. The Court must have regard to the extent to which it is or would be in the public interest for the material to be published. The decisive factor at this stage is an assessment of the contribution which the publication of the relevant information would make to a debate of general interest. Other factors to be weighed in the balance are the subject-matter, how well-known the claimant is, the claimant's prior conduct, and editorial latitude. When examining the demands of free speech, the court should be slow to interfere in respect of matters of technique, form and detail; it should defer, to the extent appropriate on the facts, to the professional expertise and judgment of journalists and editors.

35. The judge noted that, where, as here, the defendant publisher was bound by the Editors' Code of Conduct (the Code) enforced by the Independent Press Standards

Organisation the Court was obliged to have regard to it. He mentioned clauses 2 and 3 and the definition of privacy.

36. The judge dealt with the two stages of the alleged misuse of private information between [64] and [129].

Stage one – reasonable expectation of privacy

37. At [64], he explained his approach to the first stage, stating the issue, which he said reflected the legal position, as: whether the claimant enjoyed a reasonable expectation that the contents of the Letter were private and would remain so. He said that: "at this stage of the analysis the issue is binary, the only available answers being yes or no". The judge then explained that "[t]he claimant will fail on the issue, and the defendant will succeed, only if the court concludes that the information at issue and/or the surrounding circumstances were such that it would be unreasonable for the claimant to expect the defendant to treat the information as private and not for publication or – putting it another way - that the reasonable person of ordinary sensibilities placed in the position of the claimant would not feel substantial offence at the disclosure in question". The judge thought that "[f]actors relied on as undermining the claimant's case [at stage one], but which fall short of defeating it altogether, may come into play at the second, balancing stage".

38. At [66], the judge asked and answered the two main stage one questions in the negative: the defence had not set out any case which, assuming it to be true, would provide a reasonable basis for finding that there was, at any material time, no reasonable expectation of privacy, and the defendant had no realistic prospect of successfully defending this issue at trial. Further, there was no real prospect of the court concluding after a trial that, at the time the Articles were published or later, the contents of the Letter were not private, or that the claimant did not enjoy a reasonable expectation that they would remain private.

39. The following was, the judge said, plain and obvious and pointed to a reasonable expectation of privacy [67]-[70]: none of the detailed contents of the Letter had entered the public domain. That was the "very essence of the [Articles], which trumpeted that they "Revealed" the contents of the Letter "for the first time" over four pages of "World Exclusive" print coverage". The People Article had, as the Articles said, disclosed the existence of the Letter. In relation to the *Murray* factors, it was, objectively assessed, obvious that: (1) the claimant was a public figure, who had a high public profile, and about whom much was written and published, (2) the activity she was engaged upon in writing the Letter was not an aspect of her public role, but a communication to her father about his behaviour, (3) which she was doing in a private letter sent by courier to him alone, (4) the "intrusion" involved the publication of much of the Letter over four pages of a popular newspaper and online to a very large readership, (5) there was no consent, (6) the unwanted disclosure was likely to cause the claimant at least some distress in the context, (7) the information was given to the defendant by the claimant's father. The judge said that the argument made it necessary for him to consider 6 aspects in more detail: the claimant's status and role, whether the Letter or its contents were private in nature, the character and location of the recipient, the public domain, other disclosures by the claimant and claimant's intentions.

40. The judge concluded that the defendant's allegation that the facts it relied upon as showing that claimant's conduct and familial relationships were subject to public scrutiny could not lead the court to conclude that they deprived the claimant of any reasonable expectation of privacy in the contents of the Letter.

41. On the private nature of the letter, the judge concluded that the facts pleaded by Associated Newspapers did not support the conclusion that the claimant had no right to expect that the contents of her Letter would be treated as private and would not be published.

42. On the nature of the contents of the Letter, it was plainly correspondence containing matter relating to the claimant's family life, so that article 8 was engaged. Whilst that was not conclusive as to claimant's reasonable expectation of privacy, the case that the Letter contained her deepest and most private thoughts and feelings corresponded with the description given in the Articles: "Meghan's private letter revealing true tragedy of her rift with her father". Associated Newspapers pleaded at [13.2] of its defence that "as a general principle, a recipient of a letter is not obliged to keep its existence or contents private, unless there are special circumstances, such as a mutual understanding between sender and recipient that the contents of a letter should be kept private", but that approach was rightly not pursued. It was at odds with a large body of authority.[2] None of Associated Newspapers' submissions was capable of supporting the conclusion, on the facts, that the claimant had no right to expect that the contents of her Letter would be treated as private. It was not a business letter. It was delivered only to Mr Markle. The majority of what was published was about the claimant's own behaviour and feelings. These features were reflected in the headline to the first Article and the language used. If it were appropriate to use that formulation, this information was the claimant's not her father's. What information related to Mr Markle did not relate to him alone. Mr Markle's undoubted right to tell his own life story did not override the claimant's right to keep the contents of her Letter private, which itself did not significantly impinge on Mr Markle's right. All he was prevented from doing was using the contents of the Letter as a means of telling his story.[3] A close examination of the information showed that there was relatively little in the Letter that Mr Markle could claim was shared experience, engaging his privacy rights. The judge gave examples pointing out that, even where the Letter concerned his conduct, the focus was on the impact his actions had had on the claimant. Where the claimant accused Mr Markle of lying over denying that he was working with the paparazzi, the evidence showed he had, and the Articles bore out that he had apologised.

43. On the character and location of Mr Markle, neither the claimant's knowledge that Mr Markle was likely to disclose the Letter to the media, nor the fact that US law made publication lawful, was capable of defeating the claimant's case that objectively she had a reasonable expectation of privacy.[4]

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2 See *Maccaba v. Liechtenstein* [2004] EWHC 1579 (QB) at [4], *Toulson and Phipps on Confidentiality (4th Ed.)* at [1.004], [1.012] and [1.045], *Gatley on Libel and Slander* 12th edition at [22.5 n 41].

3 See *McKennitt v. Ash* [2008] QB 73, per Buxton LJ [50], and [2005] EWHC 3003 (QB) per Eady J at [77].

4 Risk-taking might affect damages, but did not excuse intrusion: see *Mosley v. News Group Newspapers Ltd* [2008] EWHC 1777 (QB) per Eady J at [225-226].

44. As to whether the Letter was in the public domain, Associated Newspapers' pleaded case fell short of alleging actual disclosure. All that was said was that the claimant permitted information about the existence of the Letter and a description of its contents to enter the public domain. There was no real prospect of any evidence arising that the contents of the Letter entered the public domain except through the Articles. Associated Newspapers' elaborate case as to how the People Article arose did not bear on the public domain issue, because contents were to be distinguished from description. The Book did not appear until August 2020, and, when it did, it did not contain any words from the Letter that had not already been published by the defendant. Its pleaded case that the information in the Book about Mr Markle and the Letter could only have come from the claimant was manifestly untenable.

45. Although public domain disclosures of similar information might weaken a reasonable expectation of privacy, it was fanciful to suppose that any of the disclosures relied upon placed so much relevant information about these matters in the public domain that the claimant lost any right to privacy in the contents of the Letter.

46. As to the allegations that the claimant wrote the Letter either intending to disclose it or knowing disclosure to be very likely, the judge held that these allegations did not operate to rebut the claim to a reasonable expectation of privacy. Moreover, the inferential case that the claimant was "considering using the Letter as part of a media strategy to improve or enhance her image" (which has now been dropped) had no sound basis in law. The claimant had no need to prove her intention to keep the Letter private in order to establish that she had a reasonable expectation of privacy.

47. On the basis of the reasons I have shortly summarised, the judge concluded at [95] that the claimant would be bound to win at trial on her reasonable expectation of privacy.

Stage two - the balancing exercise

48. The judge described the stage two issues as (i) whether the interference with the claimant's reasonable expectation of privacy involved in publishing the Articles was necessary and proportionate in pursuit of the legitimate aim of protecting the rights of others, and (ii) whether the interference with freedom of expression that would be represented by a finding of liability was necessary and proportionate in pursuit of the legitimate aim of protecting the rights of the claimant. It may be noted here that Associated Newspapers criticised the judge's use of the word "necessary" in the second formulation. The judge recorded the submission that was also made to us to the effect that the factors raised at stage one were relevant also at stage two to reduce the claimant's expectation of privacy that she may have had. He concluded at the outset of this section that: "taking the defendant's case on each of those factors at its highest", there was no real prospect of the court "striking the balance against the claimant and in favour of the defendant and its readers".

49. The judge then cited Lord Hoffmann at [57] in *Campbell v. MGN Ltd* [2004] 2 AC 457 (*Campbell*), where he said that: "[a] person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters".

50. The judge dealt with three factors to which he thought a court would not attach great significance in the balancing exercise: (i) that the People Article was authorised by the claimant, and that she passed information about the contents of the Letter to friends and to the Authors, (ii) the fact and content of disclosures made to the Authors for the purposes of the Book, and (iii) the inference that the claimant was ready and willing to publicise details of her own private life and did not object to publicity about her, so long as it was favourable.

51. The judge said that the court should take into account the Strasbourg jurisprudence that "[a]rticles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well-known that person might be, cannot be deemed to contribute to any debate of general interest in society" (see *Dupate v. Latvia* Application 18068/11, 19 November 2020 at [51]).

52. The judge thought that the real issue on this part of the case was whether the Articles might be justifiable for the purposes of correcting the record or, to adopt the language of the Code: "preventing the public from being misled". If that were established, the defence would in all probability succeed, regardless of the weight attached to the other circumstances under consideration.

53. *Campbell* was the highest authority for the proposition that the disclosure of otherwise private information may be justified if the claimant has herself misled the public, and the disclosure is necessary for and proportionate to the purpose of putting things right. The Court had also to take account of editorial latitude (see also *Ali v. Channel 5 Broadcasting Ltd* [2019] EWCA Civ 677 at [83] and [92], and *Sicri* at [67(3)] and [111]-[119]). The relevant provisions of the Code were consistent with these principles.

54. The judge analysed the defendant's case on stage two at [109]-[127]. The question was whether the disclosure was justified by the misleading nature of the People Article and the consequent damage to Mr Markle's reputation. Because of the "somewhat muddied nature of the evidential position", the judge focused first on the defence at [15.3]-[15.7] about the People Article being one-sided and misleading and depicting Mr Markle as having acted unreasonably and unlovingly from the week before the wedding, which Mr Markle believed to be false. That part of the defence was "entirely hopeless" because it could not be the law and there was no authority that the mere fact that a person "believes" his portrayal is untrue is enough to justify a reply: "[m]oreover, the notion that the use of the Letter is legitimate or even relevant to bolster such a reply is not just unexplained, it is unsustainable". It was fanciful that the Court would find the disclosure of the contents of the Letter necessary or proportionate.

55. The allegation at [15.8] of the defence to the effect that the People Article falsely stated, to the claimant's knowledge, that Mr Markle had refused to get into the car that arrived to take him to the airport for the wedding did not, even if true, provide a rational or proportionate reason for disclosure of the Letter. The allegations in [15.10] and [15.11] of the defence that the People Article misrepresented Mr Markle's intentions about the photo opportunity suggested in his reply to the Letter went beyond Mr Markle's own evidence. The People Article was not in fact a misrepresentation, so was no basis for disclosing the Letter. The allegation at [15.12] of the defence about the People Article's coverage of Mr Markle's allegedly false claims as to his dealings

with his daughter being one-sided, misleading and/or untrue were confused and did not afford a reasonable basis for justifying the disclosure.

56. The remaining allegations in [15.9] and [15.13] of the defence alleged that the Letter was misdescribed in the People Article as a loving letter aimed at repairing the relationship, when it was no such thing. It was, therefore, "necessary, proper and in the public interest to publish the true and full story concerning the Letter and the response to it" so that the public was not misled. The judge found that this reasoning was not capable of justifying the disclosure, and there was no real prospect of the defence succeeding. There was no need for a trial, because the court already had the full texts of the People Article, the Letter and the Articles. His central conclusions were at [120] as follows:

> The People Article did portray the Letter in a way that was inaccurate, and that would have justified some steps to ensure the true position was made known to those who had been misled. But it is obviously wrong for the defendant to suggest that the inaccuracies in the 25 words of the People Article which they quote in [15.9] made it necessary and proportionate for it to publish the bulk of the contents of the Letter in the Mail on Sunday and MailOnline, for the purposes they identify (or any other purpose), without notice to the claimant. What was done was precipitate, largely irrelevant to any legitimate aim, and – making the fullest allowance for editorial judgment - wholly disproportionate.

57. The inaccuracy of the People Article's account of the Letter had been overstated. Whilst it would have been legitimate for Mr Markle to reply to its allegation of victimisation, there was no need to deploy the Letter for that purpose. The Articles did not use the Letter as evidence that Mr Markle was innocent of victimisation. It was also legitimate for Mr Markle to rebut the inaccurate suggestion that the Letter represented an olive branch, but this was not an attack on Mr Markle, so could only be justified as correcting the public record. It was not necessary or proportionate to publish long and sensational Articles revealing the Letter without first approaching the claimant. The defendant did not know whether the People Article had the claimant's blessing. The legitimate purpose could have been achieved proportionately by publishing a rebuttal consisting of a summary, without disclosing any of the actual contents of the Letter, when "the effect of the inaccuracy on Mr Markle's reputation and private life was modest". It would have been legitimate to publish just [15] of the Letter, without the rest. This conclusion was bolstered by the way the extracts from the Letter were used in the True Tragedy and Harry Articles, providing a tangential platform for Mr Markle's rebuttal: "[m]ost strikingly, [15] is not presented as evidence that the Letter was misrepresented in the People Article. Instead, in the blob paragraph Mr Markle is quoted as simply expressing bafflement at the expression "rabbit hole". In substance and reality, the main use made of the Letter was simply to portray what the claimant had said, accompanied by various comments from Mr Markle, many of which were not even pertinent to the selected extract".

58. At stage two, the judge concluded that the only tenable justification for the interference with the claimant's reasonable expectation of privacy was to correct some inaccuracies in the People Article about the Letter: "[o]n an objective review of the Articles in the light of the surrounding circumstances, the inescapable conclusion is that [save to a very limited extent] the disclosures made were not a necessary or

proportionate means of serving that purpose. For the most part they did not serve that purpose at all. Taken as a whole the disclosures were manifestly excessive and hence unlawful". There was no prospect that a different judgment would be reached after a trial: "[t]he interference with freedom of expression which those conclusions represent [was] a necessary and proportionate means of pursuing the legitimate aim of protecting the claimant's privacy". There was no compelling reason for a trial; quite the reverse.

The copyright claim

59. At [130]-[152] the judge dealt with the essential legal principles, the issues, originality and infringement, before turning to the fair dealing for the purpose of reporting current events and the public interest defences at [153]-[158], which are the subject of this appeal.

60. On fair dealing, the judge said that his previous analysis led "ineluctably to the conclusion that this defence could not succeed". The defendant's case identified 5 current events, broadly summarised, as: (i) the claimant's relationship with her father, (ii) the People Article disclosing the existence of the Letter, (iii) Mr Markle's reaction to the People Article, (iv) Mr Markle's dispute with the version put into the public domain, and (v) his dispute with the version of the claimant's conduct towards him. (ii)-(v) arguably qualified as public events. The only requirement of the defence which was satisfied was the acknowledgment of the author. Summary judgment dismissing fair dealing defences had been given in *Hyde Park Residence Ltd v. Yelland* [2001] Ch 143 (*Hyde Park*), *Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142 (*Ashdown*), and *HRH Prince of Wales v. Associated Newspapers Ltd* [2008] Ch 57. Guidance was to be found in *Ashdown* at [70] (approving an extract from Laddie, Prescott and Vitoria, The Modern Law of Copyright and Designs):

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

61. The judge said that the Letter was not intended for commercial exploitation, but the defendant knew it was unpublished. Communicating the Letter to the defendant here may have been unlawful. The copying of large parts of the original literary content of

the Letter infringed the claimant's privacy rights and was irrelevant and disproportionate to any legitimate reporting purpose. The reproduction was essentially for the purpose of reporting the contents of the Letter, which was not a current event. The use made was not fair.

62. On public interest and article 10, section 171(3) of the Copyright Designs and Patents Act 1988 (CDPA) preserved the common law defence. The court refuses to allow its process to be used for purposes that are contrary to the public interest (see *Hyde Park* at [43]). The protection of freedom of speech under article 10 was one aspect of the public interest: "[f]reedom of expression would prevail, in the public interest, in "those rare cases where this right trumps" those conferred by the CDPA: *Ashdown* [58]". The judge said that such cases will be few because: (i) copyright was itself a right protected by article 1 of the First Protocol to the ECHR, (ii) the protection of copyright was a legitimate aim capable of justifying an interference with freedom of expression, and the court had to strike a fair balance, (iii) it would be very rare for the public interest to justify the copying of the form of a work to which copyright attaches: *Ashdown* [59], and (iv) the fair dealing defence will normally itself properly reflect the public interest in freedom of expression: *Ashdown* [66].

63. The judge thought that this was not one of the rare cases referred to in *Ashdown*. There was "no basis on which the court could conclude that, although the copying of the work was not fair dealing for news reporting purposes, the public interest [required] the copyright to be overridden" for the reasons given under the heading of fair dealing.

The central issues

64. I have summarised Associated Newspapers' case on this appeal at [5]-[9] above. I shall deal with the main issues raised in this appeal as follows:

    i) **The new evidence issue**: Whether the new evidence provided by each of the parties should be admitted.

    ii) **The nature of the attack issue**: Whether the judge mistakenly failed to recognise the significance and importance of the People Article's attack on Mr Markle.

    iii) **The reasonable expectation of privacy issue**: Whether the judge adopted a flawed analysis of the factors undermining the Duchess's alleged reasonable expectation of privacy.

    iv) **The appropriate test issue**: Whether the judge wrongly stated the test, by suggesting that the defendant had to justify an interference with the claimant's right of privacy, when the proper approach was to balance the competing article 8 and 10 rights.

    v) **The right of reply issue**: Whether the judge wrongly applied a strict test of necessity and proportionality to Mr Markle's right of reply to the People Article.

vi) **The public interest/article 10 copyright issue**: whether the judge failed properly to evaluate the interference with article 10, saying that it would be a rare case in which freedom of expression would outweigh copyright.

vii) **The fair dealing copyright issue**: whether the judge wrongly relied on his privacy analysis to reject the fair dealing defence to breach of copyright, bearing in mind the limited scope of the copyright in the Letter and the wide scope of the concept of reporting current events.

Introduction to the issues

65. The introduction to this judgment serves to demonstrate the way in which the parties have complicated and elaborated the relatively simple issues raised by this appeal. The grounds of appeal, for which Bean LJ granted permission (see [6] above), have been neither followed nor much mentioned in argument. The extensive new evidence seems to have been more directed at correcting allegations raised in the pleadings than at issues that are relevant to the question at hand, namely whether the judge should have granted summary judgment in this case. Indeed, the parties exchanged lengthy amended draft pleadings in correspondence placed before us, even after the judge awarded final judgment.

66. It would not be an exaggeration to say that no expense has been spared in advancing and resisting the appeal. Unfortunately, however, it rapidly appeared in oral argument that what was lacking was a clear focus on the factual and legal errors that the judge was alleged to have made.

67. The judge said at [119], as I have already mentioned, that he had the full text of the People Article, the Letter and the Articles and could interpret them as well as a judge could do after a trial. He thought he was in as good a position as a trial judge to assess "the extent to which the People Article misled the public about the Letter in a way that, making the fullest allowance for editorial judgment, made it relevant, necessary and proportionate to make the disclosures". Despite prompting from the bench, Associated Newspapers has not, even after a 2½ day hearing, clearly identified the triable issues that falsify this reasoning. Obviously, if the judge applied the wrong test, that is one thing, but on an appeal from the grant of summary judgment, the first question is usually to identify the factual issues that require oral and documentary evidence to be fairly resolved.

1. The new evidence issue: Should the new evidence provided by each of the parties be admitted?

68. The new evidence has been provided to the court, and also widely publicised in the press, nationally and internationally. In these circumstances, it would be surprising for us to decide that it is inadmissible, and that we could, even if we wanted to do so, close our eyes to it.

69. As I have said, the new evidence is more directed to the drafting of the Letter and to what the claimant knew about the contacts between the Kensington Palace Communications Team and the Authors of the Book than any of the central issues in the appeal. The fact that the Duchess permitted her staff to meet with the Authors, as the judge said or at least correctly inferred at [84], [99] and [100], was of no

consequence to what he had to decide: "[i]t does not matter how the quotations got into the Book. All that matters is the timing and extent of publication, which was plainly not enough to defeat the claimant's rights against the defendant …". The Book was published long after the Articles. The contents of the Letter were not in the public domain at the time the Articles were published.

70. In these circumstances, I would admit the new evidence as a matter of pure pragmatism. I very much doubt that the criteria for the admission of new evidence set out in *Ladd v. Marshall* [1954] 1 WLR 1489 are satisfied in respect of it, but the parties have both filed numerous argumentative documents and correspondence referring to it. Indeed, their draft amended pleadings, filed since judgment, are founded on it. In these circumstances, I take the parties to have tacitly agreed that the court should, if necessary or appropriate, have regard to the new evidence. I do not think it is of any important relevance to the appeal, but I have nonetheless considered it.

71. There is, however, one point that should be mentioned. One aspect of the new evidence was an acknowledgment by the claimant that her pleaded case had been inaccurate. A pleading served for the claimant on 17 November 2018 said that "the [claimant] does not know if, and to what extent, the Communications Team were involved in providing information for the Book, but the Communications Team did not otherwise contact the [claimant] for clarification of any matters relating to the Book, save in respect of the request for a photograph … which the [claimant] declined". After service of Mr Knauf's evidence, disclosing that he had provided some information to the Authors of the Book with her knowledge, the Duchess said in a witness statement that, when she had approved the pleading, she had not had the benefit of seeing the relevant emails, and apologised to the court for the fact that she had not remembered the relevant exchanges at the time. This was, at best, an unfortunate lapse of memory on her part, but it does not seem to me to bear on the issues raised in the grounds of appeal, and it has been given no prominence in Associated Newspapers' oral argument.

2. The nature of the attack issue: Did the judge mistakenly fail to recognise the significance and importance of the People Article's attack on Mr Markle?

72. This is, in one sense, the issue at the heart of Associated Newspapers' factual appeal. Shortly stated, it is said that the judge focused on Mr Markle's dealings with the press, rather than on the attack that the People Article had mounted upon him. Had the judge realised the significance of that attack, he would have realised that Mr Markle was fully entitled to respond to it in the public domain. People magazine has some 40 million US readers. Mr Markle was being traduced. Whether or not the claimant was directly responsible for passing information to People magazine, but particularly if she was, the Letter was a central part of the attack, and Mr Markle could not effectively and publicly respond to it without disclosing the contents of the Letter. Merely giving his side of the story was not enough.

73. As I have already said, Mr Caldecott identified three features of the attack on Mr Markle in People magazine, which the judge neglected, as being that Mr Markle (i) cold-shouldered his daughter at the time of her wedding, which was the most important point in her life, (ii) lied about her daughter shutting him out, and (iii) ignored her pleas for reconciliation in a loving letter, to which he responded in a cynical and self-interested way. These attacks were all made in the context of the

Duchess being portrayed as always dutiful and as supporting Mr Markle with incredible generosity.

74. It is true that, in reciting the facts, the judge did not quote extensively from the People Article (see [20] above). But that, in my judgment, does not mean that he had not understood its full import. Indeed, his treatment of the stage two issues focused at [109]-[127] on the misleading and attacking nature of the People Article and the consequent damage to Mr Markle's reputation. He dealt specifically with the allegations in Associated Newspaper's defence about Mr Markle's right to reply to the People Article.

75. We were taken in detail to the People Article itself, and to its online sequels. The People Article does indeed provide an encomium of the Duchess: for example, the start of the article describes her as "warm, thoughtful, generous and kind", and the online headline reads: Meghan Markle in her friends' own words: 'She personifies elegance, grace, philanthropy'. But, fairly read, the People Article is responding to her treatment in the UK press as, for example, "Duchess difficult" and as an uncaring daughter. The People Article dealt also with Mr Markle, but he was not its primary focus, any more than the Letter itself was its primary focus. I accept that the People Article made some serious allegations against Mr Markle as Mr Caldecott submits, but I do not accept that the judge misunderstood those allegations. It is true that the fourth passage cited by the judge stops before quoting the allegations against Mr Markle that "He's never called; He's never texted. Its super-painful because Meg is so dutiful …". But the Letter was not an answer to that allegation. It was simply more of the same.

76. Moreover, the passages the judge cited from the People Article do reflect most of the allegations on which Associated Newspapers rely. I accept that the People Article uses the existence of the Letter and Mr Markle's response to it as evidence of both his bad behaviour and the Duchess's good character. But I do not think the judge overlooked the thrust of the People Article. The judge's focus was simply on whether it was necessary or proportionate to deploy the contents of the Letter in answer to the People Article. As I have said, if the test is wrong, that is one thing (which I will deal with under the fourth issue below), but the judge did not misunderstand the facts.

77. It is also worth mentioning that the contents of the Articles themselves are actually more important than the details of the People Article. As the judge found, those Articles were remarkable because they were focused on revealing the contents of the Letter, not on providing Mr Markle's defence to the allegations in the People Article. The judge referred to the headline: "Revealed: The letter showing true tragedy of Meghan's rift with a father she says has 'broken her heart into a million pieces'" and to the first line of the first of the Articles: "[t]he full content of a sensational letter written by [the Duchess] to her estranged father shortly after her wedding can be revealed for the first time today". Mr Markle's responses were somewhat incongruously reported in answer to line-by-line quotations from the Letter.

78. Finally, and perhaps most importantly in this connection, it is suggested that the judge wrongly found that the allegation in the People Article that the Letter was an olive branch was not an attack on Mr Markle, and wrongly found that the effect of the inaccuracy of the People article on Mr Markle's reputation and private life was modest (see [125]). This seems to me to address the wrong question. The question is whether

it was appropriate (to use a neutral word) to publish large parts of the detailed contents of the Letter in order to rebut the allegation that the letter was an olive branch. The judge thought it was not, partly because, as he said at [125(1)], the use of the term "olive branch" was more a misdescription of the claimant's behaviour in writing the Letter than an attack on Mr Markle. The real questions here, though, are (i) whether the judge was wrong to think that further evidence was not needed to decide the issue, and (ii) whether the judge was wrong to decide it was inappropriate to deploy the content of the Letter in answer to the People Article.

79. As to the first question, it is hard to see what evidence could be adduced at trial that would alter or bear upon the issue. In reality, the judge at the summary judgment stage, just like the judge at trial, would have to look at the People Article and at the Letter (and perhaps at the Articles) to decide if the deployment of the contents of the Letter was appropriate to rebut the allegations made. As the judge said at [119], how Mr Markle understood the Letter was "of scant relevance" and he assumed anyway that what was pleaded was true. I will deal with the second question identified at [78] above under the fifth issue below.

3. The reasonable expectation of privacy issue: Did the judge adopt a flawed analysis of the factors undermining the Duchess's reasonable expectation of privacy?

80. I have set out the judge's reasoning on stage one of his analysis in some detail at [37]-[47] above, because it is important to see the lengths he went to in order to analyse whether the Duchess could, in all the circumstances of the case, truly be said to have retained her reasonable expectation of privacy in the Letter. The judge thought she could. It is not suggested that he was wrong about the legal test, nor that the test only admitted of a binary answer. What is suggested is that, at trial, undermining features could have been advanced to reduce the extent of the privacy that the Duchess might reasonably expect in the Letter. In particular, it is submitted that "the extent of the claimant's dealings with the Authors of the Book and People magazine could not be properly addressed summarily" and that the "fresh evidence after summary judgment bears out this complaint". The judge should, it is said, have taken the letter from Addleshaw Goddard dated 21 December 2020 as an indication that such evidence would become available (see [163] and [164] of the judgment referring to the Addleshaw Goddard letter in a different context).

81. In my judgment, the judge dealt in impeccable detail with each of the *Murray* factors and with each of the points that were relied upon to undermine the privacy in the Letter. Whilst Mr Caldecott did not abandon the suggestion that there was no privacy in the Letter, he did not press the point in oral argument. I think he was right. I agree with the judge's analysis at [64]-[95].

82. As regards the submission that further evidence was likely to become available as to the claimant's contacts with People magazine and the Authors, that was obviously true.

83. At [84], the judge accepted that there was a triable issue as to whether Authors were given a copy of the Letter, but thought that it was, in relation to whether the Letter was in the public domain for the purposes of the claimant's reasonable expectation of privacy, one "of no consequence". As he said, it did not matter how the quotations got into the Book; all that mattered was the timing and extent of publication: "which was

plainly not enough to defeat the claimant's rights against the defendant, even from the date of publication of the Book". I agree.

84. In my judgment, the defendant is wrong to suggest that proving further dealings between the claimant and the Authors and People magazine, before or even after publication of the Articles, could abrogate her reasonable expectation of privacy in the detailed contents of the Letter. I accept, as does the defendant and as did the judge, that (a) the reasonable expectation of privacy question is binary, and (b) that if the claimant had put the contents of the Letter into the public domain, that might have had the effect of destroying her reasonable expectation of privacy. But it was and is plain that she did not do so before the Articles, even if it was disclosed to the Authors. The judge thought that it was manifestly untenable to plead, as the defendant had, that the information about Mr Markle and the Letter, contained in the Book, "could only have come" from the claimant. In addition, the judge said, and I agree, that Mr Verity's evidence that the Authors were given a copy raised a triable factual issue, but that it was of no consequence for the purposes of the public domain question. In these circumstances, neither the Addleshaw Goddard letter nor the possibility of further evidence about the claimant's dealing with the Authors or People magazine could possibly have deprived her of the reasonable expectation of privacy that she had in the detailed contents of the Letter, as the judge found on the basis of a copious analysis of the *Murray* factors.

85. Associated Newspapers also argued that the judge failed to have sufficient regard to the possibility that, at trial, the claimant might be shown to have been ambivalent to publication of the contents of the letter, as had been found in quite different circumstances in *AAA v. Associated Newspapers* [2012] EWHC 2103 (QB) at [96]-[101] and [116], [2013] EWCA Civ 554 at [25], [29] and [34]. I do not think that case assists the defendant. Of course, such a finding would be possible if there were any evidence that the claimant had published or intended to publish the contents of the Letter. But that evidence or anything approaching it was lacking. Indeed, it was not pleaded. Moreover, the new evidence militates against such a case ever being available to the defendant. It is plain from Mr Knauf's evidence that the claimant did not want the contents of the letter put into the public domain even if she was prepared for the possibility that it might become public.

86. Finally, the defendant argued under this heading that the question of whether the Letter was personal and private and written for a single addressee ought not have been decided summarily. I disagree for the reasons I have given.

4. The appropriate test issue: Did the judge wrongly suggest that the defendant had to justify an interference with the claimant's right of privacy?

5. The right of reply issue: Did the judge wrongly apply a strict test of necessity and proportionality to Mr Markle's right of reply to the People Article?

87. These two issues can conveniently be dealt with together. Associated Newspapers contended that the judge did not adopt the correct approach to the proportionality or balancing test at stage two. It accepted that the law was, as I have said (subject to one small amendment), correctly reflected in [31] of the judgment, but says that he lost sight of what he had said when he undertook the balancing exercise at [96]-[128].

88. The judge should, the defendant submitted, have followed the *dictum* of Baroness Hale in *Campbell* at [137] and [140]-[141], applying the approach of the Court of Appeal enunciated in *Re S* [2003] EWCA Civ 963 (subsequently upheld by the House of Lords at [2005] 1 AC 593 at [17] per Lord Steyn) as follows:

> 137. It should be emphasised that the 'reasonable expectation of privacy' is a threshold test which brings the balancing exercise into play. It is not the end of the story. Once the information is identified as 'private' in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it. Very often, it can be expected that the countervailing rights of the recipient will prevail. …
>
> 140. The application of the proportionality test is more straightforward when only one Convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. It is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a "pressing social need" to protect it. The Convention jurisprudence offers us little help with this. The European Court of Human Rights has been concerned with whether the state's interference with privacy (as, for example, in *Z v Finland* (1997) 25 EHRR 371) or a restriction on freedom of expression (as, for example, in *Jersild v Denmark* (1994) 19 EHRR 1, *Fressoz and Roire v France* (2001) 31 EHRR 2, and *Tammer v Estonia* (2001) 37 EHRR 857) could be justified in the particular case. In the national court, the problem of balancing two rights of equal importance arises most acutely in the context of disputes between private persons.
>
> 141. Both parties accepted the basic approach of the Court of Appeal in *In re S* [2003] 3 WLR 1425, 1451-1452, at paras 54 to 60. This involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each. The parties in this case differed about whether the trial judge or the Court of Appeal had done this, the appellant arguing that the Court of Appeal had assumed primacy for the Article 10 right while the respondent argued that the trial judge had assumed primacy for the Article 8 right.

89. Instead, the defendant submitted that the judge approached the matter as if he were dealing with a state intervention under article 8(2) (or article 10(2)) where the interference must be necessary in a democratic society (see *In re JR38* [2016] AC 1131 (*JR38*) at [67] and [72]). The defendant referred to the judge's use of the formulation "necessary or proportionate" at [28], [96], [105], [112], [119], [120], [125] and [128]. At [128], the judge reached the "inescapable conclusion is that, save to the very limited extent I have identified, the disclosures made were not a necessary or proportionate means of serving that purpose [namely, correcting inaccuracies about the Letter in the People Article]". Moreover, at [35], the judge appeared, submitted the defendant, to have approved the claimant's submission that the defendant had a burden to advance a viable justification for interfering with her reasonable expectation of privacy. He may have taken that approach from Simon LJ's judgment in *ZXC* at [46] where he referred expressly to *JR38* at [88] and [105].

90. Further, the defendant complained that the judge had adopted at [86] and [91] the starting point that the objective of the law was "to protect the individual's right to respect for her autonomy". There was no priority to either fundamental right. The objective was to balance the respective weight of the competing rights and the degree of interference with those rights which the grant or refusal of relief would represent.

91. Associated Newspapers referred to the line of defamation authorities culminating in *Adam v. Ward* [1917] AC 309, where Lord Atkinson had said at page 339 that:

> These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege ; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.

92. On this basis, it was argued by analogy that the judge was wrong to suggest at [112] and [116] that there was no authority for the proposition that the mere fact that a person believes the portrayal to be untrue is enough to justify a reply. The parameters of Mr Markle's entitlement to reply to the attack in the People Article were said to be much too narrowly stated. This led the judge at [103], the defendant argued, to reject the suggestion that disclosure of the Letter was a contribution to a debate of general or public interest, rather than simply for the purpose of satisfying public curiosity.

93. As I have already mentioned at [56] above, the judge dealt with the defendant's pleaded allegation that it was "necessary, proper and in the public interest to publish the true and full story concerning the Letter and the response to it" so that the public was not misled. It is a slight irony that the cornerstone of their case on appeal is to say that he applied the wrong test by holding that the publication was not necessary. I can deal with this contention shortly. In my judgment, the judge correctly stated the test he was applying at [31] of his judgment, and completely understood that he was bound by the House of Lords' decisions in *Campbell* and *Re S*. Both are repeatedly referred to in his recent judgment in *Sicri* which he cited at [106].

94. I do not think that the judge thought that the defendant had any burden of proof requiring it to establish that it should be allowed to publish the Letter. Nor do I think that, on a fair reading of the judge's judgment, that he thought the defendant had to show that publication was necessary in the public interest in order to outweigh the claimant's reasonable expectation of privacy. I accept that the judge fell in to the shorthand use of the question whether the publication was necessary and proportionate in pursuit of a legitimate aim. In my judgment, he used the word necessary as meaning "justified" just as Baroness Hale did at [152] in *Campbell* itself.

95. There is another reason why the defendant's submission that the judge applied the wrong tests must be rejected. The judge did exactly what the parties had asked him to do. He decided whether the binary test at stage one was answered in favour of the claimant, identifying his reasons in great detail, and then looked at stage two to see

whether the article 10 right to freedom of expression outweighed the claimant's reasonable expectation of privacy. He took into account the alleged weakening of the claimant's right caused by the pleaded disclosures to People magazine and the Authors. He took into account the realities of the allegations against Mr Markle in the People Article, and the realities of the nature of the publication in the Articles. His main conclusion was that the publication of extensive extracts from the verbatim contents of the Letter was disproportionate to the limited right to reply that Mr Markle undoubtedly had. Indeed the contents of the Letter, as I have said more than once, were a further rendition of the claimant's point of view, and therefore not naturally likely to be a reasonable way of rebutting allegations against Mr Markle. The way that the Articles deployed the Letter was anyway not by way of defence for Mr Markle. Instead, the Letter was splashed as a new public revelation. Even the response to the crucial [15] of the Letter (as numbered by the judge at [45], and at [18] above) alleging Mr Markle had lied and demanding that he stop going to the press was not answered with any rebuttal – just with a comment that Americans did not use the expression "you are so far down this rabbit hole". It is true that the sub-headline reading "How Meghan's media fightback led her Dad to reveal Letter he wanted to keep secret" suggested that the People Article was the catalyst for the publication of the Letter. But even that small section of the Articles only provides slim justification for the Letter being deployed to rebut the allegations that the People Article had made against him. It says that the Letter was not a loving one and did not reach out to him, and that the claimant could not have it both ways. But the remainder of the Articles simply glorify the disclosure of the contents of the Letter, which, as I have said, are actually more of the same in the sense that they accuse Mr Markle of bad behaviour; the opposite of a rebuttal by way of defence. To answer the second question posed at [78] above, in my judgment the judge was right to decide that it was inappropriate and disproportionate to deploy the detailed content of the Letter in answer to the People Article.

6. The public interest/article 10 copyright issue: Did the judge fail properly to evaluate the interference with article 10?

96. I am taking the article 10 defence first, because Mr Adrian Speck QC, who argued this part of the case for Associated Newspapers, put it first. Mr Speck criticised the judge for relying on *Ashdown* without mentioning the key differences between that case and this: there the justification for quoting from Mr Ashdown's memorandum was to establish authenticity and to prove that the journalist actually had it in his possession, whereas there was no such issue here. Moreover, the Letter was not obtained improperly as it had been in *Ashdown*, so that the defendant did not need to show this to be a rare case as the judge had thought at [157]. The judge lumped freedom of speech together with fair dealing, and used his arguments on privacy to reject both, without even considering Mr Markle's own right to free speech. The judge had also failed to evaluate the extent or weight of the copyright, in the sense of the intellectual creativity in the Letter. Had he done so, he would have realised that the Letter had a low level of copyright protection to put in the balance against the article 10 rights. It was wrong also to assume that using large parts of the Letter was more objectionable than using less, since using more allows fairer evaluation.

97. It is true that the judge dealt with the article 10 defence shortly at [157]-[158], having rejected the fair dealing defence broadly for the reasons that he rejected the defences to the privacy claim. It is true also that the balancing exercise between a copyright, which

is a property right, on the one hand and freedom of speech on the other hand is not identical to the balancing exercise that the judge had undertaken between article 8 and article 10 rights. It is also true that the Letter contained some pre-existing facts which were not themselves protected by copyright.

98. In my judgment, however, the judge understood that "the nature and degree of the originality involved in a work can affect the availability of defences such as fair dealing, public interest, and … freedom of expression" [139]. Secondly, nothing advanced by Mr Speck suggested that there was any triable issue that would look different after a trial. The balancing exercise that had to be undertaken was between the claimant's copyright in the Letter on the one hand and the article 10 rights of Mr Markle and Associated Newspapers. Whilst it is true that the judge did not expressly mention Mr Markle's article 10 rights, that was the context to the exercise he was undertaking. Thirdly, I think that Mr Speck's criticisms of the judge's references to *Ashdown* were overstated. Indeed, at [39], Lord Phillips CJ said in *Ashdown* that: "in most circumstances, the principle of freedom of expression will be sufficiently protected if there is a right to publish information and ideas set out in another's literary work, without copying the very words which that person has employed to convey the information or express the ideas. In such circumstances it will normally be necessary in a democratic society that the author of the work should have his property in his own creation protected". At [58], Lord Phillips said "[w]e prefer the conclusion of Mance LJ [in *Hyde Park* at [82]] that the circumstances in which public interest may override copyright are not capable of precise categorisation or definition. Now that the Human Rights Act 1998 is in force, there is the clearest public interest in giving effect to the right of freedom of expression in those rare cases where this right trumps the rights conferred by the [CDPA]". These *dicta* were relevant to what the judge had to decide, even bearing in mind the different factual context in *Ashdown*. Fourthly, I cannot see that the defendant has seriously impugned the balancing exercise that the judge carried out in what was a careful and detailed decision. I do not think it is a valid criticism to suggest that he did not set out all the arguments again under this heading, when he correctly explained the exercise he had to undertake and reached a clear conclusion. In the result, I also agree with the conclusion he reached.

7. The fair dealing copyright issue: Did the judge wrongly rely on his privacy analysis to reject the fair dealing defence?

99. Associated Newspapers adopted similar arguments on the fair dealing defence to those advanced under article 10. As I said at [61] above, the judge's main reason for rejecting the fair dealing defence was that the reproduction of the Letter was essentially for the purpose of reporting its contents, which were not a current event, and that the use made of the Letter was not fair.

100. In *Pro Sieben Media v. Carlton UK Television* [1999] 1 WLR 605 (*Pro Sieben*), Robert Walker LJ explained at page 614 that: "Criticism or review" and "reporting current events" are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries [was] doomed to failure. They [were] expressions which should be interpreted liberally…". The judge identified 4 topics at [153] that he considered current events (the People Article's description of the Letter, Mr Markle's reaction to the People Article and his dispute with it and with the claimant's view of her conduct towards him), and accepted that some other events might also arguably qualify. But the judge did not comment on the defendant's pleading that the Letter and the claimant's

views had entered the public domain by wide reporting. It was, the defendant argued, impossible to evaluate the fairness of the publication summarily. Moreover, the judge failed to understand how liberally the concept of fair dealing was to be interpreted and elided the question of fairness with the question of what was, in the context, reporting current events. According to Mr Speck, the judge simply took too narrow a view of the public interest in the current events surrounding the estrangement of the claimant and Mr Markle. And the Articles did report some of the events that the judge had himself accepted were current events.

101. My reasons for rejecting this ground of appeal are similar to those expressed above in relation to the public interest defence. The judge did understand the nature and degree of the originality involved in the Letter, and that it could affect the fair dealing defence.

102. Secondly, once again, Mr Speck did not point to a triable issue in relation to fair dealing, save to say that the evaluation of fairness should be done after a trial. I cannot see why. The judge could evaluate the copyright in the letter and balance it with what the People Article had made into current events, so as to take a view about what those current events were and the fairness of allowing publication of what was reproduced in the Articles. The judge accepted the existence of the Letter and its description of its contents had been put into the public domain by the People Article. The extract he cited at [154] from Laddie, Prescott and Vitoria made clear that that the defence would often succeed if the defendant's purpose was to right a wrong or to ventilate an honest grievance. The liberal reporting of current events adumbrated by *Pro Sieben* might, for completeness, have been mentioned by the judge, but does not really impact his reasoning at [155] and [156] to the effect that the defendant knew it was dealing with an unpublished work, it copied a large and important proportion of the work's original literary content, most of which infringed the claimant's privacy rights and was disproportionate to any legitimate reporting purpose. The fairness of the reproduction was, therefore, very limited. Most importantly, perhaps, the use made of the Letter was unfair, because it was not about reporting current events, but reporting the actual contents of the Letter to make the splash of publication already referred to.

103. Thirdly, I cannot see that the defendant has been able here, any more than under article 10, seriously to impugn the balancing exercise that the judge carried out between the copyright protection on the one hand and the fairness of publication on the other hand in the context of his determinations as to what were current events. In essence all that could be, and was, properly undertaken by reference to the People Article, the Letter and the Articles. I repeat that the judge's decision, looked at as a whole, was careful and detailed.

Conclusions

104. For the reasons I have given, I would admit the new evidence filed by both parties, and dismiss Associated Newspapers' appeal on all the grounds for which permission was given.

105. I should not leave this case without reiterating the narrowness of the issues we have had to decide. The appeal was against the judge's decision that it could be seen mainly on the basis of the central documents in the case (viz the People Article, the Letter, and the Articles themselves) that the claimant's reasonable expectation of privacy and copyright in the Letter had been infringed. After careful consideration of his detailed

judgment, I agree with the views the judge expressed on these very confined, mostly factual, questions.

106. Essentially, whilst it might have been proportionate to disclose and publish a very small part of the Letter to rebut inaccuracies in the People Article, it was not necessary to deploy half the contents of the Letter as Associated Newspapers did. As the Articles themselves demonstrate, and as the judge found, the primary purpose of the Articles was not to publish Mr Markle's responses to the inaccurate allegations against him in the People Article. The true purpose of the publication was, as the first 4 lines of the Articles said: to reveal for the first time [to the world] the "[t]he full content of a sensational letter written by [the Duchess] to her estranged father shortly after her wedding". The contents of the Letter were private when it was written and when it was published, even if the claimant, it now appears, realised that her father might leak its contents to the media.

Dame Victoria Sharp, President of the Queen's Bench Division:

107. I agree.

Lord Justice Bean:

108. I also agree.