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Case No: IL-2019-000110

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

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Date: 01/05/2020

Before:

MR JUSTICE WARBY

- -

Between:

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

- -
- -

David Sherborne (instructed by **Schillings International LLP**) for the **Claimant**
Antony White QC and Alexandra Marzec (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing date: 24 April 2020

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Approved Judgment

Mr Justice Warby:

1. This judgment is given after the hearing of a pre-trial application in this action, by which the defendant seeks to strike out some of the allegations in the claimant's Particulars of Claim for misuse of private information and breach of data protection rights. In the course of the hearing, the application was expanded to take in parts of the Reply as well.

2. In summary, the defendant targets three aspects of the claimant's case: allegations that (1) the defendant acted dishonestly, and in bad faith; (2) the defendant deliberately dug up or stirred up conflict between the claimant and her father; and (3) the claimant was distressed by the defendant's "obvious agenda of publishing intrusive or offensive stories about [her] intended to portray her in a false and damaging light". The grounds of attack on each aspect of the case are that the allegations are irrelevant in law, or inadequately particularised, or that it would be disproportionate to litigate the issues raised so that they should be excluded from the scope of the case on case management grounds.

3. I agree that all three categories of allegation should be struck out of the Particulars of Claim, and the Further Information about it. I also agree that passages of the Reply should be struck out. Some of these conclusions are however without prejudice to the claimant's right to come back with an application for permission to make amendments that comply with the applicable law and principles. A more detailed account of my conclusions and reasons follows.

The parties and the action

4. The claimant may need no introduction, but I shall adopt the description in her Particulars of Claim. She is a well-known American actor, business entrepreneur, and women's rights activist. She was best known for her role on the NBC Universal television drama series, *Suits*, in which she played a leading role for several years. She has also been heavily involved in philanthropic and advocacy work with The United Nations and World Vision, of which she was global ambassador. The claimant became Her Royal Highness, The Duchess of Sussex, following her marriage to His Royal Highness Prince Harry, The Duke of Sussex in May 2018. I add that she is often referred to in the media by her former name, Meghan Markle. Her father is Thomas Markle.

5. The defendant is the publisher of *The Mail on Sunday*, described by the claimant as "a hugely popular and influential weekly tabloid newspaper which enjoys an enormous circulation and even greater readership within this jurisdiction". The defendant also owns and operates the *MailOnline* website, described by the claimant as "the most popular UK newspaper website with millions of daily users within this jurisdiction".

6. The claimant sues the defendant in respect of the following articles published in The Mail on Sunday and/or on *MailOnline* on 10 February 2019.

Publication	Pages	Headline
The Mail on Sunday	pp4-5	"Revealed: The letter showing true tragedy of Meghan's rift with a father

		she says has ‘broken her heart into a million pieces’”
	pp6-7	“Meghan: Stop painful attacks on Harry; Her dad: I like him…. I’ll always love you”
MailOnline	-	“Revealed: The Handwritten letter showing true tragedy of Meghan’s rift with a father she says has ‘broken her heart into a million pieces’”
	-	“Meghan Markle urged her father to stop ‘painful’ attacks on ‘patient, kind and understanding’ Prince Harry in five-page letter – but anguished dad says ‘I like him… and I’ll always love you”;
	-	“Secrets of Meghan’s letter revealed: note to her father saying her heart has been ‘broken into a million pieces’ reveals she is a ‘narcissistic showman whose self-control is wavering”

7. Three causes of action are relied on: misuse of private information, breach of duty under the General Data Protection Regulation (EU) 2016/679 (GDPR), and infringement of copyright. The claimant seeks damages, including aggravated damages, for misuse of private information, and compensation under the GDPR. She claims damages, including additional “flagrancy” damages, for copyright infringement. Other remedies claimed in addition, or in the alternative, include injunctions to restrain further publication, licensing, dissemination or processing of the claimant’s private information or copyright material; orders for the cessation of processing, the erasure of the personal data, and the communication to third parties of such cessation and erasure; and delivery up and forfeiture of all copies of “the Letter” in the defendant’s possession, power, custody or control.

8. As indicated by the claim for delivery up, and more clearly by the headlines quoted above, at the heart of the claim is a letter written by the claimant to her father (“the Letter”). Paragraph 3 of the Particulars of Claim describes the Letter in this way:

> “In August 2018, the claimant wrote a private and confidential letter to her father, Thomas Markle, which detailed her intimate thoughts and feelings about her father’s health and her relationship with him at that time. The claimant sent the Letter to her father on or around 27 August 2018.”

9. The claim form was issued on 29 September 2019. Particulars of Claim were filed on

14 October 2019. The defendant asked for Further Information about the claim. A response was filed on 11 November 2019 ("the Response"). A second request was made, and a Response to that was filed on 9 December 2019 ("the Second Response"). On 14 January 2020, the defendant filed its Defence, and the application that is before me now. It seeks an order striking out parts of paragraphs 9 and 19 of the Particulars of Claim, and all the corresponding parts of the Response and Second Response. On 17 April 2020, shortly before the hearing, the claimant filed a Reply to the Defence.

The issues in the action

10. The claims have a narrow focus. The claims in misuse of private information and data protection relate solely to "the words in the Articles which report the contents of, or contain extracts from, the Letter"; the copyright infringement claim relates to "the words and images included within the Articles that republished extracts from the Letter" (Response 1).

11. The essence of the claims can be shortly stated; the Letter is an original literary work of which the claimant was the author; she is the owner of the copyright in the Letter; by reproducing words and images from the Letter, issuing copies to the public and communicating copies of a substantial part via its print and online publication the defendant infringed that copyright; the information in the Letter was private and confidential, and contained the claimant's personal data; the disclosure of such information in the Articles represented a misuse of the claimant's private information and/or processing of the claimant's personal data which was unlawful and unfair, in breach of the duties owed by the defendants under the GDPR; and the defendant has failed to comply with a notice requiring it to cease processing the data.

12. The Defence is a substantial document, but the main issues to which it gives rise can be distilled as follows. Its starting point is that the claimant is "a major public figure" whose fitness to perform royal duties and to receive public money is a proper matter for public scrutiny and whose past and present conduct "is rightly of enormous public interest". The defence case in response to the three strands of the claim is this:

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

    (2) Although the information in the Letter was personal data, the defendant's processing of it was not unlawful nor was it unfair. Reliance is placed on the Convention and Charter rights already mentioned, and on a contention that the claimant impliedly consented to the disclosure. Alternatively, the defendant relies on the exemption for processing for the special purpose of journalism provided for by Article 85 of the GDPR. Continued processing was and is legitimate.

    (3) Although it is admitted that the claimant wrote the Letter, it is denied that the Letter is an original literary work. If, contrary to the defendant's case, copyright subsists in the Letter "the extent to which the Letter is the claimant's own intellectual creation is very limited"; the defendant did not reproduce a substantial part of that

aspect of the Letter; or, if it did, the claimant's rights are outweighed by the other rights and interests engaged.

13. The challenge to the claimant's case that the contents of the Letter were private and confidential in nature might seem at first a little surprising. The conventional view is set out in *The Law of Privacy and the Media* (3rd ed, OUP, 2016):

> "*(c) Correspondence*
>
> **5.92 Confidentiality** The court has protected the confidentiality of private correspondence since at least the late eighteenth century.[271] It is clearly established that, as a starting point, the contents of private letters are to be regarded as subject to a duty of confidentiality owed by the recipient to the writer.[272] …
>
> **5.93 Privacy** Correspondence is explicitly protected by Article 8. In *Maccaba v Lichtenstein*, Gray J accepted that as a starting point 'correspondence between A and B on private matters such as their feelings for each other would be a prime candidate for protection'.[275] In *Copland v UK*, the ECtHR considered that emails (including personal email use at work) were included within private life for the purpose of Article 8.[276] Similarly, in *Imerman v Tchenguiz*, the Court of Appeal held that emails concerned with an individual's private life, including his personal financial and business affairs, were within the scope of Article 8.[277]
>
> [271] *Thompson v Stanhope* (1774) Amb 737, 27 ER 476.
> [272] *Philip v Pennell* [1907] 2 Ch 577, Ch; *Haig v Aitken* [2001] Ch 110.
> …
> [275] *Maccaba v Lichtenstein* [2004] EWHC 1579 (QB), [2005] EMLR 6 [4]. Also *McKennitt* …[*v Ash* [2006] EWCA Civ 1714 [2008] QB 73] [76].
> [276] *Copland v UK* (2007) 45 EHRR 37.
> [277] *Imerman* …[*v Tchenguiz* [2010] EWCA Civ 908 [2011] Fam 116] [76]–[77]."

14. The textbook goes on to observe:

> "It has, however, been suggested that correspondence is not categorically entitled to protection nor its contents 'inherently private'.[279] The nature of the information contained in the correspondence will accordingly be relevant.[280]
>
> [279] *Abbey* … [*v Gilligan* [2012] EWHC 3217 (QB) [2013] EMLR 12] [37]–[39].
> [280] See N A Moreham, 'Beyond Information: Physical Privacy in English Law' (2014)] 73 CLJ 350, 372."

15. The starting point of the Defence is 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. The recipient of a letter is entitled to tell his or her own story about matters which may be referred to in the letter, including disclosing the state of his or her family relationships and interactions."

Here, it is alleged, there were no special circumstances, nor was there any such mutual understanding; the claimant knew it was possible or even likely that her father would disclose the contents of the Letter, including for publication in the media; all the more so because (it is averred) such disclosure and publication were lawful in the US.

16. The Defence goes on to assert that:

(1) the Letter "was written and sent with a view to it being read by third parties and/or disclosed to the public, alternatively knowing that this was very likely";

(2) the claimant herself "had knowingly caused or permitted information about her personal relationship with her father, including the existence of the Letter and a description of its contents to enter the public domain"; and

(3) the Letter "does not appear to contain the Claimant's deepest and most private thoughts but to be an admonishment by the Claimant of her father for failing to behave as she would have wished."

17. Mr Sherborne for the claimant has suggested, with some justification, that the present case has some resemblance to *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch) (Blackburne J) [2006] EWCA Civ 1776 [2008] Ch 57. That case related to a "splash and spread" in the Mail on Sunday, reporting and reproducing parts of the Prince of Wales' travel journal of his visit to the hand-over of Hong Kong in 1997, which were disparaging of the formalities and behaviour of the Chinese participants. The Prince sued for breach of confidence and copyright infringement, and sought summary judgment. His case was that the journals set out his private and personal thoughts and impressions of the tours to which they relate, that these matters were not in the public domain and constituted his confidential information. The defendant denied any wrongdoing, relying on grounds summarised by Blackburne J as follows:-

> "7. It contends that the information in the Hong Kong journal was not confidential and denies that the claimant had any reasonable expectation that it would be kept from the public. It contends that the information in the journal was not intimate personal information but information relating to the claimant's public life and to a zone of his life which he had previously put in the public domain. It claims that, as a result, much of the information was already in the public domain and that other elements of it were of the same or substantially similar character as information that the claimant had made public. It alleges that in any event the information concerned the claimant's political opinions which the electorate had a right to know as being within the ambit of the Freedom of Information Act 2000, alternatively because it relates to the claimant's political behaviour whereby,

> departing from established constitutional conventions affecting the heir to the throne, the claimant has intervened in and lobbied on political issues. Alternatively, and for the same reasons, there was a powerful public interest in the disclosure to the public of the information which outweighed any right of confidence the claimant might otherwise have.
>
> 8. The defendant further contends that the use of extracts from the Hong Kong journal did not infringe copyright as the use was not of a substantial part and in any event amounted to fair dealing for the purpose of reporting current events and, or alternatively, for the purpose of criticism and review, alternatively publication of it was in the public interest."

Blackburne J granted the claimant's application, concluding that there was no real prospect of the defendant successfully defending the claim. An appeal against that conclusion was dismissed by the Court of Appeal which concluded (so far as the privacy claim was concerned):-

> "74. … the judge was correct to hold that Prince Charles had an unanswerable claim for breach of privacy. When the breach of a confidential relationship is added to the balance, his case is overwhelming."

18. As will be seen, the pleaded case for the claimant in the present action is that the private and confidential nature of the information in the Letter is "obvious" and "self-evident". The claimant's case, submits Mr Sherborne, is "clear and straightforward". In his skeleton argument, he summarises it in this way:

> "The publication of the detailed contents of the Letter is an infringement of her Article 8 "*right to respect for her private life, family, home and **correspondence**"* (emphasis added), as well as an infringement of the copyright which she holds in the Letter and her data protection rights as its data subject. The fact that the Letter contained her most personal thoughts (as the Defendant itself reported[1]) only serves to strengthen this. No consent was sought or obtained by the Defendant before its contents were revealed to millions of its readers. There was no public interest served by the publication, which was neither presented as nor capable of contributing to a debate in democratic society relating to matters of legitimate public interest. Rather, it was disclosed with the sole and entirely gratuitous purpose of satisfying the curiosity of the Defendant's readership about the Claimant's private life of the Claimant, a curiosity deliberately generated by the Defendant: see paragraphs 9(6) and 9(7) of the Particulars of Claim."

19. The footnote in the bracketed words refers to an article published in the *Daily Mail* on 11 February 2019 (the day after those complained of), under the heading "You watched me suffer as my sister spread lies*"*, in which the defendant itself described the Letter as

"a deeply personal handwritten letter" in which the claimant "pours out her heart" to her father. Mr Sherborne further submits that the defendant's application is a:

> "misconceived … attempt to remove factual elements of the claim (… which the court will need to take into account in its multi-factorial assessment at trial) which go to the heart of the claimant's complaint about the disclosure of her private information."

The factual elements referred to are also said to go to the heart of:

> "…what is falsely claimed by the Defendant to have been its 'public interest' basis justifying this disclosure (as well as her distress at the fact that the Articles complained of form part of a pattern of intrusive and offensive coverage by the Defendant)."

20. I mention these points now because they have some bearing on the issue I shall come to, of whether aspects of the pleaded case are superfluous and disproportionate.

21. On the present application, I am not concerned with the claim for copyright infringement. The data protection claim is relevant only inasmuch as the aggravated damages claim covers that tort as well as misuse of private information. I am mainly concerned with the misuse claim. The nature of the arguments advanced means that, in relation to this claim, it will be necessary to look at some aspects of the Defence and the Reply in a little more detail. But the principal attack is on the Particulars of Claim, and it is to those that I need to turn first.

The Particulars of Claim

22. It is necessary to quote, but it is sufficient to quote only those parts which are under attack on this application, with enough context to enable the reader to understand the parties' arguments:

> "**Misuse of the Claimant's Private Information**
>
> 8. The contents of the Letter are self-evidently private and confidential and/or fall within the scope of the Claimant's private and family life, home and correspondence under Article 8 of the European Convention on Human Rights; alternatively, the Claimant had a reasonable expectation that the contents of the Letter were private and would remain so. In further support of this contention, the Claimant will rely upon the following facts and matters:
>
> (1) The Letter was obviously private correspondence written by the Claimant to her father.
>
> (2) Further, it contained the Claimant's deepest and most private thoughts and feelings about her relationship with her father and were detailed by her at a time of great personal anguish and distress.

(3) The Claimant intended the detailed contents of the Letter to be private, and certainly did not expect them to be published to the world at large by a national newspaper, and without any warning.

9. The publication of the contents of the Letter was wrongful and constituted an unjustified infringement of the Claimant's right to privacy and a misuse of her private information. The Claimant will rely on the following matters in support of this contention:

(1) The facts and matters set out in paragraphs 8(1) to 8(3) above.

(2) The Defendant's actions were a very serious interference with the Claimant's right to respect for her private and family life. The publication of her private correspondence is manifestly a gross intrusion and invasion of privacy.

(3) Although the Claimant is well-known to the public, the details of her feelings about her relationship with her father are not a matter of legitimate public interest, nor do they relate to her public profile or work.

(4) The Letter was published by the Defendant as a "world exclusive", in the most sensational and inflammatory terms possible, and given huge prominence, including on the front page of the *Mail on Sunday* and the home page of *MailOnline*. The Articles included numerous photographs or mock-ups of the Letter itself.

(5) The Claimant had not courted publicity in relation to the detail of her relationship with her father.

(6) In publishing the Information, the Defendant was disclosing private and highly sensitive information about the private life of the Claimant. By contrast, the publication of this material was neither presented as, nor capable of, contributing to a debate in a democratic society relating to matters of legitimate public interest.

(7) Rather, it was disclosed with the sole and entirely gratuitous purpose of satisfying the curiosity of the newspaper's readership regarding the private life of the Claimant, a curiosity deliberately generated by the Defendant.

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

(9) Pending full disclosure of the Defendant's process of obtaining and preparing the Letter for publication, the Claimant will contend that it deliberately manipulated the contents in this way not because these parts which it chose to omit or suppress were more private or sensitive (as they plainly were not) but because these parts of the Letter would have undermined the Defendant's intended negative characterisation of the Claimant, demonstrated the falsity of the account given in the Articles about her contact with her father and her concern for his welfare *and/or been generally unfavourable to the Defendant as one of the 'tabloid' newspapers which had been deliberately seeking to dig or stir up issues between her and her father* (emphasis added).

(10) Despite these deliberate omissions, the Defendant sought to deceive the public by stating that they were disclosing the "***full content***" of the ***"five-page letter"***, in both the sub-heading and the body of the Articles defined at paragraphs 4(1) and 4(3) above. As explained in sub-paragraphs (8) and (9) above, and in paragraphs 19(4) and 19(5) below, this was completely untrue, and highly misleading, as the Defendant knew full well, since large sections of the Letter were deliberately omitted or suppressed by the Defendant, and the meaning thereby intentionally distorted or manipulated.

(11) Further, the Defendant published the contents of the Letter for commercial profit, without seeking the Claimant's consent and/or in the belief that the Claimant would not have agreed to it being published, if permission had been properly sought in advance which it was not. The Court will be invited to infer that the Defendant took this deliberate decision not to warn the Claimant in advance because it knew that she would object to the publication of the Letter and/or attempt to prevent the same.

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

…

Remedies

19. By reason of the matters set out above, the Claimant has been caused considerable distress, damage, humiliation and embarrassment. The Claimant will rely in support of her claim for general and/or aggravated damages, further or alternatively compensation pursuant to Article 82 of the GDPR and section 168 of the DPA, upon the following facts and matters:

19.1. The Defendant's actions were flagrantly unlawful and constituted a gross invasion of the Claimant's privacy.

19.2. The Claimant was shocked and deeply upset by the publication of the detailed contents of her private letter to her father. The fact that the Defendant deliberate chose to publish them in such a sensational and inflammatory manner, and without any warning or attempt to seek consent from her beforehand only served to make this far worse.

19.3. Given the self-evidently private and sensitive nature of the contents of the Letter, the Claimant will invite the Court to draw the inescapable inference that this decision not to warn the Claimant or seek her consent was a deliberate decision taken in order in order to avoid the risk of her seeking to prevent the publication (had she been so warned) and in order to secure the enormous 'scoop' which the Defendant wished to achieve with such a highly sensational story.

19.4. Worse still, the Defendant chose to selectively edit the extracts of the Letter in a calculated attempt to portray the Claimant in an unfavourable light. Paragraph 9(8) above is repeated. While

substantive parts were kept intact, those sections were cherry-picked to only disclose the parts that fitted the Defendant's agenda. For example, the omitted parts, which amount to almost half the letter, were removed as they demonstrate the Claimant's kindness and concern about the UK tabloid media exploiting her father, and did not fit the Defendant's narrative. Despite these deliberate omissions, the Defendant deceived and misled its readers by announcing that they were disclosing the "*full content"* of the *"five-page letter*", in both the sub-heading and the body of the Articles defined at Paragraphs 4(1) and 4(3) above.

19.5 The Claimant sets out below a visual representation of the Letter, reconstructing those sections which were reproduced by the Defendant in the Articles (shown in blurred form) and those sections which were deliberately omitted (shown in the form of redacted blocks of text, so as not to reveal more of the Claimant's private correspondence).

19.6. Further, the Claimant will refer to the fact that even once the proceedings were issued, and the Defendant's decision deliberately to suppress sections of the Letter was pointed out to the public, the Defendant then chose to put out a press release defending its actions and stating that "*specifically, we categorically deny that the duchess's letter was edited in any way that changed its meaning.*" This was plainly a lie, as the Defendant knew full well. Paragraphs 9(8) and (9) above are repeated.

19.7 The Claimant has been deeply shocked and upset by the Defendant's deliberate and blatant distortion and manipulation of the true sentiment of her Letter (the privacy of which had already been violated by the Defendant).

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

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

published on *MailOnline* on 20 November 2016;

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

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

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

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

19.9. Despite letters from the Claimant's solicitors outlining her distress and concern about the Articles, the Defendant has treated the Claimant's complaint in a dismissive manner, even refusing to accept the publication of the detailed contents of the Letter constituted an invasion of her privacy.

19.10. Further, despite all of the above, the Defendant still retains a copy of the Letter. Paragraph 16 above is repeated. This has only served to increase the Claimant's ongoing sense of intrusion."

The Responses

23. The Response is another lengthy document. Again, it is necessary to quote, but only parts of it are relevant.

24. The defendant asked about the allegation in paragraph 9(8), that it "chose to deliberately omit or suppress parts of the Letter in a highly misleading and dishonest manner *…"*. Request 8 was: "Please state on what basis it is alleged that such omission or suppression was dishonest". Response 8 was as follows:-

> "The omitted or suppressed parts of the Letter amount to almost half of the actual contents of the Letter, despite the Defendant claiming to its readers that it was publishing the Letter *in full*.

> The omitted parts demonstrate the Claimant's care for her father and others, as well as her concern about the UK tabloid media exploiting her father, and the fact that she addresses untruths previously published by the Defendant. Those elements did not fit the Defendant's narrative within the Articles. In such circumstances, the pronouncement by the Defendant that it was revealing the '*full content*' of the '*five-page Letter*' was intentionally misleading and dishonest."

Request 9 was: "Please state whether it is the Claimant's case that, if the Letter was to be published, the Defendant ought to have published the omitted parts of the Letter." Response 9 was as follows:

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

25. The defendant asked about the allegation in paragraph 9(9). Request 16 was: "Give all facts and matters relied on in support of the allegation that the Defendant, and each other newspaper referred to, had been deliberately seeking to dig or stir up issues between the Claimant and her father". Response 16 was in these terms:

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

26. The defendant asked about paragraph 19.4, seeking to know the basis on which the claimant alleged that the distortion was dishonest. In Response 25, the claimant repeated Response 8.

27. The defendant asked about paragraph 19.8. Request 26 asked the claimant to identify each and every article relied on in support of the allegation of an "obvious agenda of

publishing intrusion or offensive articles ... intended to convey her in a false and damaging light". Response 26 was:

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

28. Request 27 asked for details of each and every article relied on in answer to request 26, seeking to know the specific words relied on, the meanings attributed to them, and particulars of why they were false and what is alleged to be the true position. Response 27 began by asserting that:

> "(a) This is part of the Claimant's claim for damages and therefore the use of examples is a proportionate and reasonable method of supporting her case in this respect. (b) Furthermore, this is not a claim for defamation and there is therefore no need to specify or attribute a meaning to the articles identified."

Notwithstanding this, Response 27 went on to set out, at some length, the claimant's case in relation to the five articles identified in sub-paragraphs 19.8(1) to (5). Having done so, the Response went on to expand the claimant's case by adding another four articles to this complaint:

> "The Claimant will also refer to the numerous articles <u>(as exemplified below)</u> which the Defendant chose to publish about the 'renovation' of Frogmore Cottage, the Claimant's official residence, in which it stated that the Claimant had:
>
> (a) "splashed out £5,000" on a copper bathtub (which does not exist and is completely untrue);
>
> (b) "forked out £500k" on soundproofing to block out the noise of planes (which does not exist and is completely untrue);
>
> (c) variously installed a "yoga studio" (which does not exist and is completely untrue); an "orangery" (which does not exist and is completely untrue), a "tennis court" (which does not exist and is completely untrue) and a "guest wing" for her mother to stay in when she visited (which does not exist and is completely untrue).
>
> The clear intention was to portray the Claimant in a damaging light by suggesting that she had indulged in this series of absurdly lavish renovations, which were in fact false (as the Defendant was informed at the time) and entirely made up. Furthermore, the Defendant sought to portray these renovations as being done at "the taxpayer's expense", costing "£2.4m of YOUR cash". This was also false and misleading. In fact, the Cottage is a

grade 2-listed 17th century residence, which was already undergoing much needed renovation for safety, and its refurbishment back to its original state as a single family home was funded by Her Majesty the Queen, as part of her obligation and responsibility to maintain or refurbish the upkeep of buildings of historical significance through a portion of the sovereign grant, made in exchange for the revenue from her Crown Estate (which is several times the amount of the sovereign grant).

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

29. The emphasis in this quotation is mine. Noting that even the expanded case was being advanced by way of example only, the defendant made a further Request, seeking the same details as before. The Response was:

> "(b) The passage referred to is part of the Claimant's claim for damages and therefore the use of examples is a proportionate and reasonable method of supporting her case in this respect.
>
> (c) Notwithstanding this, the Claimant has already identified in her Response 27(d) those articles upon which she intends to rely. This is the case which the Defendant is expected to meet.
>
> (d) Furthermore, this is not a claim for defamation and there is therefore no need to specify or attribute a meaning to the articles identified.
>
> (e) The Claimant's case in relation to these articles has already been set out in Response 27(d)."

The application

30. The application asks the Court to strike out the following:

> "(a) the allegation of dishonesty in paragraph 9(8);
>
> (b) [the words which I have emphasised in paragraph 9(9) above];
>
> (c) the allegation of malicious intent in paragraph 9(12);
>
> (d) paragraph 19.8; and

(e) all the parts of Claimant's Further Information purporting to support the above paragraphs, namely:

(i) Responses 8, 9 (insofar as it contains an allegation of dishonesty), 16, 25, 26 and 27 of the Response; and

(ii) Responses 1 to 3 of the Second Response."

31. The grounds identified in the application notice for striking out these parts of the statements of case are that:

(1) the allegations of dishonesty and malicious intent in paragraphs 9(8) and 9(12) do not form part of any cause of action advanced against the defendant, are in any event not properly pleaded, and it would be a waste of costs and time and oppressive to the defendant to investigate the issues raised;

(2) the allegation in paragraph 9(9) is a bald assertion unsupported by any particulars, and the Response makes clear that there are no or no reasonable grounds for making this allegation;

(3) paragraph 19.8 contains allegations which are impermissible because they are not relied on as causes of action, and are irrelevant and/or they are not properly pleaded and particularised and/or it would be disproportionate to litigate the issues raised.

Procedural rules and principles

32. The rule relied on is CPR 3.4(2), which gives the court power to strike out a statement of case, or part of one:

> "… if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

33. The application notice relies on sub-rules (a) and (b) and the Court's inherent jurisdiction. The statements of case and the parties' arguments also call for consideration of sub-rule (c). The core principles are clear:

(1) Particulars of Claim must include "a concise statement of the facts on which the claimant relies", and "such other matters as may be set out in a Practice Direction": CPR r 16.4(1)(a) and (e). The facts alleged must be sufficient, in the sense that, if proved, they would establish a recognised cause of action, and relevant.

(2) An application under CPR 3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true.

The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should "grasp the nettle": *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725, But it should not strike out under this sub-rule unless it is "certain" that the statement of case, or the part under attack discloses no reasonable grounds of claim: *Richards (t/a Colin Richards & Co) v Hughes* [2004] EWCA Civ 266 [2004] PNLR 35 [22]. Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment.

(3) Rule 3.4(2)(b) is broad in scope, and evidence is in principle admissible. The wording of the rule makes clear that the governing principle is that a statement of case must not be "likely to obstruct the just disposal of the proceedings". Like all parts of the rules, that phrase must be interpreted and applied in the light of the overriding objective of dealing with a case "justly and at proportionate cost". The previous rules, the Rules of the Supreme Court, allowed the court to strike out all or part of a statement of case if it was "scandalous", a term which covered allegations of dishonesty or other wrongdoing that were irrelevant to the claim. The language is outmoded, but I agree with Mr White that the power to exclude such material remains. Allegations of that kind can easily be regarded as "likely to obstruct the just disposal" of proceedings.

(4) "Abuse of process" is a sub-set of category (b). An abuse of process is a significant or substantial misuse of the process. It may take a variety of forms. Typical examples are proceedings which are vexatious, or attempts to re-litigate issues decided before, or claims which are "not worth the candle" (*Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75 [2005] QB 946). But the categories are not closed.

(5) Rule 3.4(2)(c) gives the court "an unqualified discretion to strike out a claim or defence where a party has failed to comply with a rule, practice direction or court order": Civil Procedure n. 3.4.4. In many cases there may be alternatives (see, for instance, my judgment in *Candy v Holyoake* [2017] EWHC 373 (QB)) but the right approach to serious procedural default may be to strike out the entire claim or, by analogy, an entire section of it (*Hayden v Charlton* [2010] EWHC 3144 (QB) (Sharp J, DBE, affirmed on different grounds [2011] EWCA Civ 791)).

34. In the context of r 3.4(2)(b), and more generally, it is necessary to bear in mind the Court's duty actively to manage cases to achieve the overriding objective of deciding them justly and at proportionate cost; as the Court of Appeal recognised over 30 years ago, "public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for the fair determination of the dispute between the parties": *Polly Peck v Trelford* [1986] QB 1000, 1021 (O'Connor LJ). An aspect of the public policy referred to here is reflected in CPR 1.1(2)(e): the overriding objective includes allotting a case "an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".

Discussion

Dishonesty and malice: PoC 9(8) and (12)

35. This aspect of the application is exclusively concerned with the claim in misuse of

private information. The shape of that cause of action is now firmly established. The core elements are summarised in The Law of Privacy and the Media at 5.14:

> "A cause of action for misuse of private information will exist whenever:
>
> (a) the particular information at issue engages Article 8 by being within the scope of the claimant's private or family life, home, or correspondence; and
>
> (b) the conduct or threatened conduct of the defendant is such that, upon a proportionality analysis of the competing rights under Articles 8 and 10, it is determined that it is necessary for freedom of expression to give way."

Another way of putting the first limb is that the claimant enjoys a reasonable expectation of privacy in relation to the information at issue: see *Campbell v MGN Ltd* [2004] 2 AC 457 [21] (Lord Nicholls).

36. Dishonesty is not an essential ingredient of the tort. Plainly, the defendant's state of mind can have no bearing on the first limb of the test. Nor is it required at the second stage. *Campbell v MGN Ltd* [2002] EWCA Civ 1373 [2003] QB 633 is binding authority to that effect. The newspaper defendant had published confidential information about the claimant's private life which it had obtained from an informant. The Court of Appeal rejected as "misconceived" and "not acceptable" a submission that a media publisher of information which violates the right of enjoyment of private life will only be liable if it has acted dishonestly, knowing that the information is confidential and that its publication is not in the public interest: [66-69]. The court held:-

> "68 … dishonesty … is not an appropriate word to use in relation to the publication of information about someone's private life …. The media can fairly be expected to identify confidential information about an individual's private life which, absent good reason, it will be offensive to publish. We also believe that the media must accept responsibility for the decision that, in the particular circumstances, publication of the material is justifiable in the public interest."

37. The meaning of this passage is clear: a media publisher will be held responsible for publication of information which it is wrongful to publish, even if the publisher acts in good faith; and the publisher will be liable for a publication which is not justifiable in the public interest, even if it believed that it was so justifiable. Both issues are to be determined objectively.

38. The law has developed since *Campbell,* but not in a way that robs the decision of its binding character on these points. On the contrary. The leading authority on how to approach to the question of whether the claimant enjoys a reasonable expectation of privacy is *Murray v Express Newspapers plc* [2008] EWCA Civ 446 [2009] Ch 481, where Sir Anthony Clarke MR made clear at [35] that "The first question is whether

there is a reasonable expectation of privacy. This is of course an objective question." The Master of the Rolls went on at [36] to set out the following summary of the law:-

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

39. The defendant's state of mind is not mentioned here. True, this is a non-exhaustive list of considerations, but state of mind is a subjective, not an objective question. Mr Sherborne has submitted that "purpose" and "motive" are linguistically difficult to separate, and overlap conceptually. He has further sought to persuade me that Strasbourg and domestic authorities show, or at least that they arguably support the view, that dishonesty, bad faith, or improper motives on the part of the defendant are among the circumstances of the case which can and should be taken into consideration at the first or at the second stage. They are aspects of the "form, content and *manner* of publication" (claimant's emphasis). I am not persuaded of either proposition.

40. The Strasbourg cases relied on are *Von Hannover v Germany (No2)* (2012) 55 EHRR 15 [108]-[113] and *Mosley v UK* [2011] ECHR 774 [114]. From domestic jurisprudence, Mr Sherborne refers to the "blackmail" cases, of which there are many. He selects *DFT v TFD* [2010] EWHC 2335 (QB) (Sharp J) and *ASG v GSA* [2009] EWCA Civ 1574 [6] – [8]. Heavy reliance is placed on the Northern Irish case of *EC v Sunday Newspapers Ltd* [2017] NIQB 117 [131-135] (Colton J). I do not consider it arguable that any of these cases is authority for the propositions advanced by Mr Sherborne.

41. *EC v Sunday Newspapers* was concerned entirely with the question of whether an objective justification existed for the offending publication. The offence of blackmail requires an unwarranted demand with menaces, not dishonesty or bad faith, and the cases cited make no mention of either. I do not agree that the court in those cases has been using the term "blackmail" in some loose, non-technical sense, which has different ingredients: see, for instance, *ASG* at [26]. The blackmail cases are all, or almost all, concerned with interim injunctions. What they show is that criminal speech occupies a low position in the hierarchy of free speech values, and will be given little weight in the Article 8/Article 10 balancing process. Neither *von Hannover* nor *Mosley* says anything about state of mind as an ingredient or factor in the assessment of whether a publication is wrongful, at any stage of the analysis.

42. In the passages cited from *Von Hannover,* the Grand Chamber set out "the criteria laid down in the case-law" for balancing freedom of expression against the right to respect for private life. Paragraph [112] is closest to the formula put forward by Mr Sherborne. It is headed "The content, form and consequences of the publication", and refers to "The way in which the photo or report are published and the manner in which the person concerned is represented …", not the publisher's state of mind. In paragraph [110] the Court recalls that its earlier decisions established that freedom of expression calls for a

narrower interpretation where the published matter "relate exclusively to details of a person's private life and have the sole aim of satisfying public curiosity in that respect". Again, though, there is no indication here or elsewhere in the jurisprudence that the Strasbourg court envisaged an evidential exploration of the publisher's state of mind.

43. The court in *Murray* was not using the word "purpose" as a synonym for intention, or motive or some form of bad faith. No authority was cited, nor was there any argument before the Court, to that effect and the issue did not arise on the facts. The sense in which the Court of Appeal was using the term "purpose" is evident from its further observation at [50], that the photographs objected to were "... taken deliberately, in secret and with a view to their subsequent publication. They were taken for the purpose of publication for profit."

44. Purpose and motive are conceptually separate and distinct. As I put to Mr Sherborne in argument, telling someone about infidelity by their spouse may have a legitimate purpose (the disclosure of wrongdoing to someone with a legitimate interest in knowing about it) but be inspired by a bad motive (to break up the marriage for personal advantage). Nor is a bad motive the same thing as dishonesty, although there are some close relationships between the two. The distinction was noted by the Court of Appeal in *Interbrew SA v Financial Times Ltd* [2002] EWCA Civ 274 [2002] EMLR [42] (Sedley LJ). (That case was not cited, but I mention it to illustrate, not otherwise). The distinction appears to me to be implicitly recognised in the claimant's pleaded case. In paragraph 9(7) of the Particulars of Claim it is asserted that publication was "for the sole … purpose of satisfying the curiosity of the newspaper's readership …". That formula corresponds with the approach indicated by the Strasbourg authorities, and has not been objected to. It is an allegation of a different character from those that are objected to.

45. I therefore conclude that dishonesty, malice, or bad faith are irrelevant to liability for misuse of private information. Such matters have no role to play as an ingredient of the claim and therefore do not belong in the Particulars of Claim. Mr Sherborne has submitted that they are or may be legitimate as rebuttal of the defendant's "spurious" defence based on freedom of expression. On general principles, the right place to plead such a rebuttal would be the Reply, not the Particulars of Claim. But for the reasons I have given, I disagree with the claimant's submission on relevance. Indeed, I am inclined to go further. The claim is for the wrongful disclosure or publication of private information. The allegation objected to is (or is mainly) one of dishonest suppression, that is to say non-disclosure of other information. I can see that this might go to damages: a claimant's feelings might be hurt by a disclosure of private information that she feels is misleading because it is partial. But it is harder to understand how the "suppression" of some information can form part of the cause of action for disclosing other information.

46. At all events, I am satisfied that the allegations of dishonesty are irrelevant to the case pleaded in paragraph 9 of the Particulars of Claim and that their incorporation in that paragraph is likely to obstruct the just disposal of the proceedings, by calling for an investigation which can have no bearing on the decision as to liability. This reasoning applies to paragraphs 9(8) and 9(12) of the Particulars of Claim, and Responses 8 and 9.

47. Mr Sherborne has submitted that the defendant's application is "confused and inconsistent" and that it would be "artificial", indeed pointless, to strike out the passages under attack, when other parts of the Particulars of Claim make the same or substantially the same allegations and have not been challenged. I disagree.

    (1) Allegations that the defendant's editing of the Letter was "misleading" or "highly misleading" are not the same as allegations of dishonesty; they are allegations of objective fact, which can be assessed by reference to the Letter, without exploring the state of mind of any journalist or editor.

    (2) To a lawyer, the word "deliberate" is not an allegation of dishonesty; it is an allegation of conduct which is not accidental.

    (3) The allegation in paragraph 7 of the Particulars of Claim that the defendant "deliberately *sought to mislead*" the public by "selectively" editing the Letter may nonetheless insinuate dishonesty. The same may be true of the allegations in paragraph 9(10) that the defendant's reference to the Letter was "completely untrue and highly misleading *as the defendant knew full well…"* and that its meaning was "*intentionally* distorted". But that is not the right way to make an allegation of that kind. It is trite law that any charge of dishonesty must be made explicitly, clearly and distinctly. I do not accept Mr Sherborne's submission that the import of these passages in the Particulars of Claim could not be clearer. The word "dishonest" could have been used, and particularised.

    (4) I can understand, and accept, Mr White's explanation, that the defendant did not apply to strike out those words as it did not regard them as allegations of dishonesty. His submission is that if that was the intention behind them, they should also be struck out. I agree. Mr Sherborne made clear that this was the intention. Accordingly, the principles I have identified apply equally to the words I have quoted.

48. I also accept the defendant's second and distinct ground for striking out, namely that the allegations of dishonesty and malice are inadequately pleaded. The Part 16 Practice Direction requires a claimant who wishes to rely in support of his claim on any allegation of "fraud", "misrepresentation" or "wilful default" to set out the details in the Particulars of Claim: 16PD para 8.2. These requirements are explained in paragraphs 10.1 and 10.2 of the Chancery Guide, in terms which reflect well-established common law principles:

> "10.1 … a party must set out in any statement of case:
>
> - full particulars of any allegation of fraud, dishonesty, malice or illegality; and
>
> - where any inference of fraud of dishonesty is alleged, the facts on the basis of which the inference is alleged.
>
> 10.2 A party should not set out allegations of fraud and dishonesty unless there is credible material to support the contentions made. Setting out such matters without such material being available may result in the particular allegations

> being struck out and may result in wasted costs orders being made against the legal advisers responsible."

49. Case law makes clear what is meant by "full particulars" of an allegation of dishonesty. The authorities, very familiar to media lawyers, include *Three Rivers DC v Bank of England* [2001] 2 All ER 513, 569 [160] (Lord Hobhouse), *McKeith v News Group Newspapers Ltd* [2005] EWHC 1152 (QB) [2005] EMLR 32 [26-27] (Eady J), *Seray - Wurie v Charity Commission* [2008] EWHC 870 (QB) [30-33], [35] (Eady J), and, in the context of allegations of malice or dishonesty against a corporate party, *Webster v British Gas Services Ltd* [2003] EWHC 1188 (QB) [30] (Tugendhat J) and *Monks v Warwick District Council* [2009] EWHC 959 (QB) [23-24] (Sharp J). The Particulars of Claim and Response fall short of the well-established requirements in a number of ways.

    (1) First, and fundamentally, there is a lack of clarity about what exactly is the "dishonesty" alleged, even where that allegation is express. It seems that there are at least two allegations: one of dishonest editing or "suppression" of aspects of the letter that affected its overall meaning, and another of dishonestly misrepresenting that the Articles set out the "full text" of the Letter. The second appears to be ill-founded: Mr White pointed to one of the Articles which told the reader that Mr Markle had passed the full text of the Letter to the defendant, but could not sensibly be read as suggesting that the entire text had been published in the Article.

    (2) Secondly, it is not said who is alleged to have been dishonest. It is trite that dishonesty or malice cannot be established against a corporation by aggregating the conduct of one employee with the state of mind of another. Fairness requires the identification of the individual(s) said to have behaved dishonestly. Mr Sherborne suggested that this was an artificial question as all the articles were written by a single journalist, Caroline Graham. When I asked if he was thereby saying that she was the target of the allegation of dishonesty he equivocated, suggesting that the allegation might be broader than this. Reasonably so. As Mr White pointed out, it is not obvious that editorial decisions about which parts of the Letter to quote were taken by the reporter. So, the claimant's case on this key point is unclear.

    (3) Thirdly, the statement of case fails to set out sufficient details of the facts from which the dishonest state of mind is to be inferred; no sufficient credible basis is stated for alleging dishonesty against the unidentified person(s) against whom the accusation is levelled.

50. Mr Sherborne submits that, if I am against the claimant on these points, the remedy is a request or order for further particulars of the claim. I do not consider that the burden of identifying what can and should be pleaded by the claimant ought to be cast on the defendant or the court.

51. I am satisfied that, as a matter of discretion, it is right to strike out all the passages I have mentioned. The overriding objective of deciding cases justly and at proportionate cost requires the Court to monitor and control the scale of the resources it devotes to each individual claim. Irrelevant matter should, as a rule, have no place in Particulars of Claim. There may be cases where the court would allow the inclusion of some minor

matters that are, on a strict view, immaterial. But where the irrelevant pleading makes serious allegations of wrongdoing which are partly implicit, unclear, lacking in the essential particulars, and likely to cause a significant increase in cost and complexity the case for striking out is all the clearer.

52. To Mr Sherborne's submission that the same matters are, or might properly be, relied on in aggravation of damages, there are four main answers: first, if that is the way in which they are to be relied on, it is in that context that they should be pleaded; secondly, if that is a legitimate way of putting the case, it needs separate justification; thirdly, the case is not adequately pleaded for that purpose; and even then, the Court needs to keep a watchful eye on the proportionality of litigating matters which go solely to damages.

Dishonesty: PoC 19.4

53. Mr White submits that the arguments I have upheld must lead to the striking out of what can now be seen as an allegation of dishonest distortion, in paragraph 19.4. His submission is that Response 25 makes clear that this is the allegation, and that the only pleaded basis for it is Response 8, which is itself unacceptable.

54. This aspect of the defendant's application could have been made clearer: the application notice attacks Response 8 but makes no mention of paragraph 19.4. The application to strike out also raises different issues. Paragraph 19.4 is pleaded in support of the claim for general and aggravated damages or compensation for distress, damage, humiliation and embarrassment which the claimant has been caused "by reason of the matters set out above". Aggravated damages are recoverable in misuse claims. There is authority, at least in the context of defamation, that a claimant may seek aggravated damages for distress resulting from the commission of the tort with a malicious motive: see *Pearson v Lemaitre* (1843) 5 Man & G. 700, 134 ER 742. I have in the past expressed some reservations about the scope of that principle, suggesting that it places too great a burden on a claimant and the court; the focus should be on the feelings of the claimant, who should be entitled to recover if the defendant's conduct led him or her reasonably to conclude that there was malice. But there is no attack on the claimant's reliance on malice in aggravation of damages here.

55. I shall strike out the passage objected to, on the footing that this follows the logic of Mr White's arguments on inadequacy of pleading, which I have accepted. I do so, however, without prejudice to the claimant's right to seek permission to plead an adequate case by amendment of the Particulars of Claim.

"*Stirring up": PoC 9(9)*

56. The allegation that the defendant was "one of the 'tabloid' newspapers that had been deliberately seeking to dig or stir up issues between the claimant and her father" is a separate and distinct strand of the pleaded case, which requires separate analysis. For one thing, it is not, or not just, an allegation that aspects of the defendant's conduct in respect of the publication complained of were actuated by improper motive; it also brings in extensive allegations of misconduct extraneous to the Articles complained of. Another factor is that some broadly similar allegations have reappeared in the Reply, albeit in a different form.

57. The first, and most obvious basis for striking out this part of the Particulars of Claim is the one already given: it is an allegation of deliberate wrongdoing, and such allegations are irrelevant to the claim in misuse of private information, which is the context in which 9(9) appears. Here, the point has all the more resonance, because the pleaded case is also one of bad faith, or at least impropriety, on other, additional occasions. Whether such allegations are, or may be, material by way of rebuttal of the defendant's pleaded defence is a separate matter, to which I shall come. But the fact, if it be so, that such matters might be relevant at that later stage would not justify pleading them in Particulars of Claim.

58. Secondly, and additionally, this part of the Particulars of Claim is liable to be struck out as impermissibly vague and lacking in particulars. Paragraph 9(9), as it stands, is plainly non-compliant with the rules and principles already cited. It is little more than a bare assertion. Response 16 does not amend the position, but makes it worse. Instead of giving details of the allegations already pleaded, it adds broad-brush assertions about unspecified journalistic "attempts and methods" and "previous coverage". Quite what, if anything, about these attempts, methods and coverage was allegedly unlawful, or otherwise wrongful is not specified. The contention that it is "disproportionate" to require such details cannot be sustained. The pleaded case as it stands is "embarrassing" in the old sense that it places the defendant in an impossible position, whereby it cannot tell what case it has to meet.

59. The suggestion, implicit in paragraph 9(9), that particulars cannot be provided or should not be expected until after disclosure is contrary to the long-standing principle that a party alleging misconduct must give particulars before obtaining disclosure (see, for instance, *Zierenberg v Labouchere* [1893] 2 QB 183, 188 (Lord Esher MR)). It is also bad on the facts. The complaint has two aspects. The first is an allegation of improper conduct towards the claimant's father. Such allegations should not be made, if the claimant cannot give details of what was done and when. The second aspect relates to published articles, and it cannot be said that the claimant's lawyers need the defendant to tell them what material the claimant is complaining about.

60. I would also have been minded to strike out this part of the Particulars of Claim on the grounds that it calls for enquiries that, if they have any relevance, would be wholly disproportionate to their value in supporting the claimant's case of misuse. The overriding objective requires the court to decide which issues need full investigation, and ensure that peripheral issues do not assume excessive importance: CPR 1.4(2)(c). The court's case management powers go so far as to allow it to exclude an issue from consideration (CPR 3.1(2)(k)), or to exclude otherwise admissible evidence (CPR 32.1(2)). Here, I recall that it is the claimant's case that the private and confidential status of the information is obvious and self-evident, and the misuse claim is very simple and straightforward. This ground of objection to paragraph 9(9) calls, however, for consideration of the Reply.

The Reply

61. The defendant has applied, without amendment of its application notice, for an order striking out paragraphs 3.6 and 12.10 of the Reply. These contain what Mr White fairly

describes as "further allegations similar in nature" to those I have just been dealing with. It is enough to set out some extracts. The defendant is alleged to have:

> "3.6 … harassed and humiliated the author's father (despite him trying to avoid the limelight), had then exposed him to the world as a '*Royal scammer*' for staging 'fake' paparazzo photographs (in order, he claimed, to counteract the humiliation of him in the UK press) and had finally manipulated this vulnerable man into giving interviews, which he later described as '*lies and bullshit*' …
>
> 12.10 … published highly damaging and distressing stories about Mr Markle, exposing him to the world at large as a '*Royal Wedding scammer*' for having agreed to pose for '*fake*' photographs and then suggesting in its reporting that his '*heart attack*' was also fake (apparently contrary to the Defendant's position in this litigation) …"

62. As before, the grounds of objection are that these are serious imputations which are irrelevant, lacking in particularity, and speculative; and they are such as would require an investigation of the dealings of the defendant's journalists with Mr Markle that would be oppressive and disproportionate to its significance for what is really at stake. I have considered whether to ignore these objections on the grounds of lack of formality and lateness. The Reply, though it was served shortly before this hearing, was not late. The defendant could have sought to amend its application notice, but did not do so. The claimant has only had short notice of these objections. But I am satisfied that Mr Sherborne has had a fair and reasonable opportunity to respond to the substance of the objections, which largely mirror points already made about other aspects of the claimant's case.

63. Mr Sherborne submits, forcefully, that, in the present context, it is clear that the pleaded imputations about the defendant's conduct towards Mr Markle are relevant, indeed essential, to his client's case on liability for misuse of private information. They are relevant in rebuttal of the defendant's contention, outlined above, that publication was a justified exercise in freedom of expression because of (among other things) the claimant's own conduct in placing information about the Letter and/or her relationship with her father in the public domain. The nature of the claimant's case is clearly set out in the following wording of the Reply, which surrounds the passage cited from paragraph 3.6:

> "3. … it is manifestly absurd as a matter of principle, and demonstrably unsustainable on the true factual position (as set out in this Reply), for the Defendant to suggest, as it appears to do, that:
>
> ….
>
> 3.6 In revealing the detailed contents of this letter, the UK media publisher was simply seeking to 'set the record straight' on behalf of the author's father as to a '*dispute*' which had arisen as to the correct version of events surrounding their relationship (as opposed to self-

> serving commercial interest), when in fact it was the same publisher … [*that had behaved in the specified ways*] thereby causing the very '*dispute*' which they claim justified the publication of this letter, as well substantial damage to his relationship with his daughter."

64. Mr White suggests that this is a mischaracterisation of the defence case, and that it remains true that the supposed rebuttal is irrelevant. He has not persuaded me, at this stage, that the general line of reply reflected in the passages just quoted is plainly and obviously irrelevant, or otherwise impermissible, The reasoning in the passages quoted appears on its face to be legitimate, and the defendant's pleaded case does include the following (by way of example) at 15.13:

> "In the light of the publication across the world's media of the one-sided, and/or misleading, account of the Claimant's personal relationship with her father and the contents of the Letter set out in the People interview, it was necessary, proper and in the public interest to publish the full story concerning the Letter and the response to it, including Mr Markle's account of events. This was necessary for the sake of truth, fairness, and Mr Markle's reputation, and so that the public should not be misled."

Nor has Mr White convinced me that this aspect of the claimant's case ought necessarily to be excluded on the grounds of proportionality. But I do not need to decide those issues because I am persuaded that the Reply suffers from the same lack of particularity as paragraph 9(9) of the Particulars of Claim. The passages I have set out represent a general, broad-brush attack without any of the detail that would be necessary, applying the principles I have identified.

65. Mr Sherborne seems to have seen the force of this point, as he devoted a paragraph of the Skeleton Argument served on 23 April 2020 to setting out facts, said to be part of the "Background to the claim", which included details of 11 articles not mentioned anywhere in the statements of case. These were presented as "examples" of the defendant seeking to "dig or stir up issues between the claimant and her father". Mr White submits that the details given of the 11 articles are inadequate. I do not propose to adjudicate on that, as there are two other good reasons to conclude that this will not do. First, I accept, as obvious and axiomatic, Mr White's submission that a skeleton argument cannot serve as a statement of case. It cannot make good the deficiency in the pleading. Secondly, it is trite that pleading by way of example is not a legitimate approach.

66. It is on those grounds that I shall strike out those passages of the Reply, making clear that in doing so I am not precluding an application for permission to re-plead a case on the same or similar lines, which respects the principles of due particularity and proportionality.

The "agenda" articles: PoC 19.8

67. I strike out this paragraph, and the supporting Response, for reasons that resemble those I have just given in respect of Reply 3.6 and 12.10: I am not yet convinced that the

central proposition relied on by the claimant is wholly immaterial to her case, or necessarily illegitimate; but I am convinced that it cannot be legitimate for the case to remain as it presently stands.

68. Mr White objects on four grounds: the claimant is seeking to obtain damages for articles not sued upon; reliance on examples is impermissible; the pleading is inadequate; and in any event it would be wholly disproportionate to conduct the necessary investigation. Mr Sherborne submits that the defendant's case on this aspect of the case is wrong in principle, overblown and overstated. It is a relatively simple case, which is adequately pleaded, and could easily be assessed without disproportionate cost or complexity.

69. A claimant cannot, as a matter of well-established principle, use a claim for aggravated damages as a means of obtaining damages for torts other than the one(s) sued upon; nor may a claimant plead and seek to prove a case about extraneous conduct of the claimant that tends to establish other causes of action, without permitting the defendant to plead and seek to establish a defence to such a cause of action: see *Pearson v Le Maitre* (above), *Collins Stewart Ltd v Financial Times Ltd* [205] EWHC 262 (QB) [2006] EMLR 100 [24-27] (Gray J), *ZAM v CFW and TFW* [2012] EWHC 662 (QB) [2013] EMLR 27 [70]-[71] (Tugendhat J), my decision in *Rudd v Bridle* [2019] EWHC 893 (QB) [60(5)], and *ZXC v Bloomberg LP* [2019] EWHC 970 (QB) [2019] EMLR 20 [150(iii)] (Nicklin J). The objections to either course of action are obvious. The rule of law requires that damages should be recovered only for the consequences of conduct that is pleaded and proved to be unlawful, according to rules that are clear and accessible. An important distinction is to be drawn between a claim seeking damages for tort X, based upon conduct X and aggravating behaviour Y, and a claim which seeks compensatory damages for tort X and for additional conduct Y.

70. I am not persuaded that the pleaded case offends this principle. The claimant could not hope to use paragraph 19.8 as a vehicle to recover damages for libel or misuse of private information in these other articles, and I accept that this is not the intention behind this paragraph. But I do consider it to be highly unsatisfactory.

71. The pleaded case is convoluted, and needs some unpacking, for clarity. I shall focus on what the case actually says:

(1) Paragraph 19.8 and Responses 26 and 27 are pleaded in support of the case, stated in the body of paragraph 19, that the claimant has been caused distress "by reason of the matters set out above", that is to say the allegedly wrongful disclosures, in the Articles of 10 February 2019. That is their only possible relevance.

(2) These paragraphs are not, however, directly concerned with any allegedly wrongful disclosure in the Articles complained of. They relate to 9 entirely different articles. Five of those articles were published before the Articles complained of and four of them afterwards. The nine are each said to be "intrusive or offensive stories about the Claimant intended to portray her in a false and damaging light." The list is non-exhaustive. The 9 are said to be examples of a broader category of unidentified articles of the same character.

(3) Pausing there, the claimant is on the face of it inviting consideration of each of the 9 articles, to determine whether it is (a) about her; (b) intrusive or offensive (it appears that either will do); and (c) intended by some unspecified person on

behalf of the defendant to portray her in a false and damaging light (it appears that both are required). The claimant is inviting consideration of the same issues in relation to an unknown number of unidentified further articles. It is relevant to note that none of these are said to be articles written by Caroline Graham. They involve a large number of other journalists; according to Mr White, there were 14 other authors.

(4) The next step in the enquiry, it seems, would be to determine whether the articles, taken together, demonstrate an "agenda" of publishing stories of the specified character. That is not a term of art, and its meaning in this context is not crystal clear. But would seem to call for some examination of whether the articles were linked by some overarching editorial policy.

(5) It is obvious that the resolution of the pleaded issues would require very considerable time and effort. For each article, the features relied on in support of the contention that it was "intrusive" or "offensive" to the claimant would need to be identified. So would the respects in which it was "false and damaging". The claimant would have to say who intended them to be so, and on what grounds that allegation was made. There would then have to be an examination of the "agenda", of which details would need to be given and assessed by way of evidence. In this terrain, it is not difficult to imagine substantial arguments about the ambit of disclosure.

(6) The difficulties to which this exercise could give rise are illustrated when one considers some of the articles relied on. First, aspects of the claimant's case are only to be found in correspondence from her solicitors. That is no better than "pleading" by way of skeleton argument. Secondly, it appears from the correspondence that the claimant's case in relation to the "false and damaging" aspects of the article complained of in paragraph 19.8(2) is that it meant that, by working on the cook book referred to, she was supporting or endorsing terrorism. Her case in relation to the articles complained of in paragraph 19.8(4) is, apparently, that it suggested that by liking or eating avocados she was fuelling or supporting human rights abuses, murder and environmental devastation. Mr White made clear that these suggestions would be fiercely disputed as extravagant and untenable interpretations; he submitted, with justification, that this illustrates the need for the claimant to plead out what she says the articles suggested about her. Further, one of the articles complained of is said to have stereotyped an entire black community. The claimant's case as to how that amounts to something "about her" which is intrusive or offensive would need explanation.

(7) All of this might be legitimate, and some of it might be inescapable, and entirely proportionate, if the claimant was seeking to advance substantive claims for compensation in respect of these further articles, on the basis that they were tortious in their own right. There is of course nothing wrong in principle with a claimant putting forward a case that she has been the victim of a campaign of intentional wrongdoing, for which remedies should be granted. But that is not the nature of the claimant's case. She is not seeking damages *for* the 9 additional articles, or the others of which the 9 are examples. The Responses have made that clear, and Mr Sherborne has been emphatic that these matters are relied on only in support of a claim for damages for distress arising from the publication of the Articles complained of.

(8) The distress relied on is that caused by the "realisation" that the defendant's "deliberate and blatant distortion" of her Letter is "wholly consistent with" the defendant's "obvious agenda". Those are the facts that, if proved, could lead to an increase in the damages awarded for wrongful disclosure of the information in the Letter.

72. This analysis should be enough to explain my primary conclusions, which are these. First, that the pleading of the case is wholly inadequate. Much more detail would be required to enable the pleaded claims to be fully understood and dealt with. Secondly, and crucially, that the costs and time that would be required to investigate and resolve the factual issues raised by the case as currently pleaded bear no reasonable relationship of proportionality with the legitimate aim of recovering some additional compensation for emotional harm. Those conclusions are enough to justify my decision to strike out the passages objected to.

73. That the pleading of the case is inadequate seems to me to follow inescapably from the principles I have identified, and from the underlying purposes of pleadings, which are to ensure that the opposite party knows the case it has to meet and can prepare to do so.

74. The difficulties with this aspect of the case cannot be solved, however, by giving more details of the 9 articles, let alone more details of additional articles. That would tend instead to exacerbate the problems. The claimant is of course entitled to give evidence that the publication complained of caused her distress, and the principal reasons for that feeling need to be identified so that the defendant can challenge her case in this respect, or test or probe whether her reactions were reasonable ones. The reasons may include a belief that the disclosure complained of is false or inaccurate: *ZXC v Bloomberg LLP* [150(iv)] (Nicklin J). But any such case must, on each side, be pleaded clearly and concisely, and conducted proportionately. The case as presently pleaded is a long way from that.

75. There are many examples of the Court striking out allegations of this general character on case management grounds, as I am doing: see for instance the decisions of Tugendhat J in *Clarke v Bain* [2008] EWHC 2636 (QB) [61] and *McLaughlin and ors v LB of Lambeth* [2011] EMLR 8 [110], and my decision in *Lokhova v Longmuir* [2017] EMLR 7 (QB) [57] where I said this:-

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

76. This is not a new approach. Over 20 years ago the Court of Appeal held that civil claims must:

> "… by proper case management be confined within manageable and economic bounds. They should not descend into uncontrolled and wide-ranging investigations akin to public inquiries, where that is not necessary to determine the real issues between the parties."

McPhilemy v Times Newspapers Ltd [1999] EMLR 751, 773 (May LJ).

77. There also remain issues of principle. It is clear, in my judgment, that aggravated damages cannot be recovered for distress caused by conduct which is separate and distinct from that which is alleged to constitute the tort. There must be a genuine and close relationship between the tort and the matters relied on as aggravation. That is the explanation for the award of aggravated damages in *Campbell v MGN Ltd,* relied on by Mr Sherborne. A modest additional award was made to Naomi Campbell for follow-up articles which derided or belittled her in offensive terms for bringing the claims for compensation for the breaches of confidence and data protection rights which were eventually upheld, thereby "rubbing salt in the wound": [2002] EWHC 499 (QB) [166] (Morland J). The same principle explains one aspect of the award of aggravated damages in the phone-hacking case, *Gulati v MGN Ltd,* to which Mr Sherborne drew attention. Mann J held that, having committed the tortious conduct complained of, the defendants had then adopted "a posture of denial" during the Leveson Inquiry which was "capable of being an aggravating factor": [2015] EWHC 1482 (Ch) [213-214]. In *Gulati,* and in *Richard v British Broadcasting Corporation,* on which Mr Sherborne also relied, the principal aggravation was the commission of the tort as part of a series of acts, all of which were sued upon as torts in their own right: see *Gulati* [207] and *Richard* [2018] EWHC 1837 (Ch) [2019] Ch 169 [355] (Mann J).

78. Here, the claimant relies on 9 articles that are not sued upon, to support a claim for aggravated damages for distress caused by the 5 publications that are sued upon. The 9 articles lack any genuine or close connection with the torts complained of. They are of a disparate subject-matter, covering a period of time, linked in substance only by (a) their reference to the claimant, (b) her case that they are all intrusive or offensive and intended to depict her in a false and damaging light, and (c) the imprecise label "agenda". In my judgment the 9 articles could not justify an award of aggravated damages on the bases relied on in *Campbell, Gulati,* or *Richard*.

79. That, in fact, is not quite the way the case is pleaded. Analytically, paragraph 19.8 relies on the 9 articles as amounting to a pattern or course of misconduct, of which the publication complained of was one, distressing, instance. My provisional albeit somewhat tentative view is that the only necessary, and the only legitimate, averments at the stage of Particulars of Claim are that the claimant was distressed by the publications that are complained of as tortious because she (reasonably) considered them to be intrusive and offensive, false and/or misleading. But in view of the points I have already made, a decision on these issues can be reserved to a later occasion, if it becomes necessary.

Summary of conclusions

80. I have struck out all the passages attacked in the application notice, some further similar wording in the Particulars of Claim, and two further passages contained in the Reply. Some of the allegations are struck out as irrelevant to the purpose for which they are

pleaded. Some are struck out on the further or alternative ground that they are inadequately detailed. I have also acted so as to confine the case to what is reasonably necessary and proportionate for the purpose of doing justice between these parties. I do not consider that the allegations struck out on that basis go to the "heart" of the case, which at its core concerns the publication of five articles disclosing the words of, and information drawn from, the letter written by the claimant to her father in August 2018. Some aspects of the case that I have struck out at this stage may be revived if they are put in proper form.