GROUNDS OF APPEAL

MISUSE OF PRIVATE INFORMATION

GROUND 1 – The Judge erred in failing to make findings at either stage 1 or stage 2 in relation to the factors relied on by the Defendant as undermining or diminishing the weight of the Claimant's privacy right, and his conclusion that these factors did not require investigation at trial meant he was unable to make such findings.

1. The Judge erred by failing, either at stage 1 or stage 2, to identify, assess and make findings in relation to the factors relied on by the Defendant as undermining or diminishing the weight of the Claimant's privacy right, and by conducting no analysis of whether such factors were capable of undermining or diminishing the weight of the privacy right, and if so to what extent. Further the Judge's incorrect conclusion that these factors did not require investigation at trial meant he was unable to make such findings.

    (i)The Judge held at J/[64] that the stage 1 issue, whether the Claimant had a reasonable expectation of privacy, was "*binary*" (ie, a yes/no question), and that she would only fail on this issue if the court concluded that it would be "*unreasonable for her to expect the Defendant to treat the information as private and not for publication*". At J/[66] the Judge then formulated "two main questions", the first of which was whether the facts pleaded in the Defence, assuming them to be true, would provide a reasonable basis for finding that there was, at any material time, "***no*** *reasonable expectation of privacy*" (emphasis added). In the last sentence of J/[64] the Judge recognised that there could be factors which undermine a reasonable expectation of privacy, rather than defeat it altogether, and he stated that these may come into play at stage 2.

    (ii) However, the Judge did not, either at stage 1 or stage 2, identify, assess and make findings in relation to the factors relied on by the Defendant as undermining or diminishing the weight of the Claimant's privacy right, or analyse whether such factors were capable of undermining or diminishing the weight of the privacy right, and if so to what extent.

    (iii)Instead, insofar as the Judge considered such factors at all at stage 1, he asked himself the wrong question at J/[86] – whether the factors there under consideration

(the Claimant's disclosures of information about the Letter to the authors of the Book and to People Magazine) meant "*that the Claimant lost **any** right to privacy in the contents of the Letter*" (emphasis added), as opposed to considering whether such factors were capable of diminishing the weight of the privacy right. He treated the privacy right, which he defined as a right "*to exercise close control over particular information about a given aspect*" of a person's private life, including when, to whom and to what extent it should be disclosed as something that could be lost or upheld, instead of a right of greater or lesser weight depending on the facts of the case. Similarly, at J/[87]-[93] the Judge wrongly treated the Claimant's intention to disclose the Letter as part of a media strategy as an all-or-nothing point which either meant she had no reasonable expectation of privacy at all, or was legally irrelevant. The Judge failed to consider whether such an intention if established at trial was capable of diminishing her privacy right, and if so to what extent.

(iv) At stage 2 the Judge referred briefly to the factors relied on by the Defendant as undermining or diminishing the Claimant's privacy right at J/[97]-[100], but made no assessment of or findings in relation to these factors and did not analyse whether such factors were capable of undermining or diminishing the weight of the privacy right, and if so to what extent. At J/[99] the Judge correctly acknowledged that prior publication about the existence and nature of the Letter could weaken the privacy right, and that an intention to make it public might also do so, but simply dismissed these factors saying "*I cannot envisage a Court attaching any great significance to this factor at the second stage*".

(v) The Judge held that there was no need for a trial in relation to these factors, but this meant he was unable to make findings as to the extent to which these factors did in fact undermine or diminish the weight of the Claimant's privacy right – that must depend upon the facts found at trial in relation to the Claimant's disclosures and intentions.

(vi) The Judge's approach in relation to the factors relied on by the Defendant as undermining or diminishing the weight of the Claimant's privacy right was inconsistent with the decision of the Court of Appeal in *AAA v Associated Newspapers Limited* [2013] EWCA Civ 554 (which was cited to and relied on by the Defendant before the Judge). In *AAA* disclosures by the Claimant of the allegedly private information, made both before and after the publication of the

newspaper articles complained of, were held to be relevant at stage 1 to reduce or weaken or compromise her reasonable expectation of privacy, and to demonstrate an inconsistency or ambivalence in her approach to the information – see [3], [7], [21]-[25], [34]-[37]. That weakened or compromised privacy right was then relevant to the balancing exercise at stage 2: [45]. It is clear from *AAA* that detailed findings of fact are required in order that the extent to which a claimant's privacy right is reduced or weakened or compromised by her conduct and disclosures may be determined. The Judge in the present case made no such findings, and his conclusion a trial was unnecessary meant he was unable to do so. The exercise was the more important in this case since the account allegedly given by the Claimant's friends on her behalf and caused by her (eg RAD 15.2C) was given to the public and pleaded as '*one-sided and/or misleading*' (eg RAD 15.3) in several significant and specified respects.

(vi) The Judge's approach wrongly skewed the Article 8/10 balance in favour of Article 8 when neither right has precedence or presumptive priority. Balancing an Article 8 right the strength of which is <u>not</u> rigorously assessed and weighed, against an Article 10 right the strength of which <u>is</u> rigorously assessed and weighed, will inevitably tend to favour the Article 8 right. In the present case the Judge's approach wrongly amounted to balancing the Claimant's Article 8 right, upheld on the basis that the Defendant had not shown that she had <u>no</u> reasonable expectation of privacy, but not weighed in any rigorous manner, against the Defendant's Article 10 right the exercise of which he scrutinised with almost mathematical precision, leading him to a conclusion that a reference to only one paragraph out of the 15 paragraphs in the Letter was justified. The resultant skewing of the balancing exercise in favour of Article 8 was wrong in principle. Nor did the Defendant as a matter of law on the facts of this case have to satisfy any strict '*necessity*' test as [105], [120], and [125(5)] suggest. The decisive factor in *Campbell* was harm.

(vii) Further in this context the Judge was obliged under section 12(4)(b) of the HRA to have regard to IPSO Editor's Code of Practice which states that '*in considering an individual's reasonable expectation of privacy, account will be taken of the complainant's own public disclosures of information . . .*'. As to stage 2, the Code's definition of the public interest expressly includes '*protecting the public from being misled*'.

(viii) There is no basis in law for generally treating personal privacy rights as entitled to higher protection than confidentiality when assessing matters bearing on s12(4)(a)(i) of the HRA as [91] suggests.

GROUND 2 – the Judge erred in considering that the Claimant's alleged disclosures to the authors of the Book and to People Magazine and her intentions in relation to disclosing the Letter were relevant only to the issue of public domain, and not to her conduct and ambivalence.

2. The Judge considered the Defendant's pleaded case as to the Claimant's disclosures of information about the Letter to the authors of the Book and to People Magazine and her intention to disclose the Letter as part of a media strategy as relevant only to public domain - see J/[82] ("*none of this bears on the issue under discussion here, namely public domain*") and J/[86] ("*fanciful to suppose that a Court might find, after a trial, that any of the [alleged disclosures] alone or in combination with the other factors relied on, 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*"). That was an error. In *AAA* the two disclosures relied on as reducing or weakening or compromising the Claimant's reasonable expectation of privacy did not do so because they placed information in the public domain (the first of the two disclosures – at a country house weekend party – did not result in any information entering the public domain – see [25]). The reason the Claimant's disclosures in *AAA* were held to reduce, weaken or compromise the Claimant's reasonable expectation of privacy was because they demonstrated an inconsistency or ambivalence on her part towards the privacy of the information. The Defendant submits that the same applies in the present case, and the Judge wrongly failed to consider this important aspect of its case because he considered the only relevant issue was the extent to which the contents of the Letter had entered the public domain.

GROUND 3 – the Judge failed to recognise that the Claimant's alleged disclosures to the authors of the Book and to People Magazine and her intentions in relation to disclosing the Letter were relevant to the assessment of the *Murray* factors.

3. Despite citing "the *Murray* factors" at J/[69], the Judge failed to recognise the extent to which these factors supported the Defendant's case:-

(i) The Judge failed to recognise that the Court of Appeal in *Murray* had approved at [37]-[38] Patten J's ruling that the court should take into account the degree to which the Claimant's parents, who had control of the personal information (namely their child's image), had sought to shield the information from public disclosure;

(ii) The Judge failed to consider that "the nature of the activity" in which the Claimant was engaged (*Murray* factor (2)) was, on the Defendant's case, something very different from writing privately to her father; the Claimant was writing a document for the public record upon advice from royal family members and palace communications staff and for use as part of a media strategy. Had the Judge correctly characterised the nature of the activity, he could not have reached the conclusion that it was plain and obvious that the alleged facts that the Claimant had (a) written the Letter with a view to public disclosure; and (b) in due course sought to publicise the contents of the Letter by providing information about it to the authors of the Book and People Magazine, reflecting her intentions in writing it, would not affect the balancing exercise at trial.

GROUND 4 – the Judge failed to recognise the importance of the lack of any evidence of harm.

4. The Judge failed to weigh in the balance, or even refer to, the Defendant's case as to the absence of any real harm to the Claimant by the publication of the allegedly private information. The Judge appears to have accepted at face value the Claimant's case that the publication was harmful and distressing to her (J/[69(6)]), despite the fact that she served no evidence on this matter. The Judge's unquestioning acceptance of the Claimant's case on harm was particularly problematic because the Claimant's case on wrongfulness and harm as set out in the Re-Amended Particulars of Claim relied heavily on the alleged falsity of the Articles: paragraphs 9(8) – 9(10) and 19.5 - 19.7. At the very end of the hearing, in his reply submissions, leading counsel for the Claimant withdrew the allegation of falsity in paragraph 9(9) on the stated basis that it was not necessary for the Court to deal with it. It was and remains unclear what was being withdrawn because no amended pleading was put before the Court. The withdrawal, however, left the case on harm shorn of an element that had up to that point been centre-stage in the Claimant's case.

GROUND 5 – the Judge failed to attach any or any sufficient significance to the real prospect that the Defendant's pleaded case would be made good at trial.

5. Despite stating at J/[97] that he was taking the Defendant's case on each of the factors relied on as undermining or reducing the Claimant's reasonable expectation of privacy "at its highest", the Judge did not in reality do this.

(i) The Judge accepted the Claimant's case at J/[73] that the Letter "*contained [her] deepest and most private thoughts and feelings*", and at J/[76(1)] that it was "*a personal and private letter*", and at J/[76(2)] that the purpose of the Letter "*was to explain how the Claimant saw her father's behaviour and its impact on her, and to express her feelings about that and her wishes for the future*", even though he indicated later at J/[87]-[88] that he could not conclude with certainty that the Defendant's factual case (that the Claimant had written the Letter with a view to it being disclosed to the public and as part of a media strategy to improve or enhance her image) could not be made good at trial. If the Defendant's case on this key factual point were to be made good at trial the whole premise of the Claimant's case – that this was a private and confidential letter – would be significantly undermined.

(ii) The Judge describes at J/[84] certain assertions in the witness statement made by one of the authors of the Book (Mr Scobie) which support the Claimant's case as "plausible", but makes no reference to the Defendant's pleaded case as to the Claimant's intentions in writing the Letter based on Mr Scobie's television interviews in which he stated that she had written it "*with the public in mind, she very much wanted to set the record straight*".

(iii) The Judge also contradicts himself by saying at J/[84] that there is a triable factual issue as to whether the authors of the Book were given a copy of the Letter, but then stating at J/[99] that "*The prospects of the Defendant obtaining evidence to support the hearsay evidence of Mr Verity and contradict Mr Scobie's witness statement on this issue seem to me to be remote, for all manner of reasons. I would class the notion as fanciful*."

GROUND 6 – The Judge erred in his assessment of what further evidence was likely to be available at trial and its significance.

6. The Judge wrongly failed to consider what evidence might reasonably be expected to be available to the Defendant by the time of trial and proceeded on the assumption that nothing of significance would emerge, despite uncontested evidence explaining that the available materials would be added to or altered at trial. Consequently, he carried out the balancing

exercise on a partial and limited view of the facts, whilst disregarding the real possibility that the factual picture would change by the time of trial. It was unreasonable for the Judge to assume that nothing of significance would emerge, because:-

(i) Contrary to the Judge's statement in J/[27] that the process of disclosure was "fairly well advanced", no disclosure of any kind (other than media articles and the ED) had yet been given by the Claimant, in circumstances where many of the key facts of the case (including her purpose and intentions in writing the Letter, and the extent of her disclosures of information about the Letter to the authors of the Book and People Magazine and to friends for that purpose) were peculiarly within her knowledge, and documents relating to them in her possession.

(ii) The Defendant had not yet made its intended applications for Third Party disclosure.

(iii) The Judge failed to take account of the fact that the Claimant's case had shifted in significant respects in her recent Re-Amended Reply where she had for the first time, and contrary to her previous denials, admitted that she had authorised an unidentified person to provide information about the Letter to the authors of the Book. This shifting case cried out for investigation at trial through cross-examination of the Claimant, and was the subject of an extensive RFI.

(iv) The Judge was aware from Mr Verity's evidence that the Defendant had a number of confidential sources for its statements of case, and that the Defendant intended to issue witness summonses for those sources to give evidence at trial and that evidence from these sources would be available at trial.

(v) Importantly, the Judge disregarded the potential significance of the letter from Addleshaw Goddard on behalf of four members of Palace staff, which was volunteered by them and explicitly promised the provision of relevant material, by means of oral and documentary evidence, for the purposes of trial. The Judge failed even to mention the letter in his analysis of the privacy claim (it is referred to only in the context of the copyright defence at J/[163]– [164]), despite the fact that the second and third issues on which the Palace Four stated they could "shed light" are plainly relevant to the Defendant's case on Stage 1 and 2. It was wrong for the Judge to dismiss the Addleshaw Goddard letter on the basis that it did not state that the information the Palace Four could provide would affect the outcome of the case

or be favourable to the Defendant (see J/[164]), since that is not a fair reading of the letter and in any event those matters are for the Court and not for a potential witness/es to determine.

COPYRIGHT

GROUND 7 – the Judge erred in purporting to make findings which are, or which ought to be, specific to identified copyrights.

7. The Judge correctly recognised at J/[167] that the issues of authorship and whether one or more separate copyrights (including the impact of crown copyright provisions) were all matters for trial. He referred to those issues collectively as 'ownership' of any copyright or copyrights that subsist in the Electronic Draft.

8. Accordingly, the Judge was unable at this stage to identify the specific copyright or copyrights that arose, what their scope or subject matter was, or who owned them whether solely or jointly, nor did the Judge purport to do so.

9. However, the Judge erred in nevertheless purporting to make findings which are, or which ought to be, specific to particular copyrights. In particular
    a. The Judge held that he could, and at J/[139] –[149] proceeded to, decide that the Claimant succeeded on the issue of originality in respect of a right or rights that have not yet been identified.
    b. The Judge further erred at J/[150]-[152] in holding that he could summarily assess the issue of whether the Defendant had reproduced a substantial part of the Claimant's copyright or copyrights.
    c. To the extent that the reference in J/[169] to 'subsistence' is intended to be different from the issue of 'originality', the Judge also purported to make a finding of subsistence in relation to a right or rights that have not yet been identified.

GROUND 8 – the Judge erred by treating the issues of originality, substantial part (infringement) and ownership/authorship as issues which could be determined independently of each other and independently of identifying the copyrights (including whether there was one or several copyrights).

10. The Judge fell into further error by (wrongly) treating the issues of originality, substantial part (infringement) and ownership/authorship as issues which can be assessed in

independent silos. Such an approach resulted in the Judge failing to appreciate the significance of the fact that, if the outcome of the issues he held were for trial was that there are separate copyrights in the Electronic Draft owned by different authors, then the scope of protection of those separate rights would only relate to the aspects contributed by the relevant author in the creation of those rights.

11. The Judge further erred in failing to have regard to the fact that the issues of originality, substantial part (infringement) and ownership/authorship interrelate, because each involve questions of degree, and the assessment (as a matter of degree) on one issue has an impact on the assessment of the others. For example, the Judge's rejection of the Defendant's argument as to originality failed to have regard to the fact that the argument would have an effect on the extent to which any copyright work was original, as would the issue of what intellectually creative work was attributable to a specific identified copyright. Both of these issues are, in turn, factors that go to the issue of reproduction of a substantial part of a specific identified copyright.

12. The Judge should have recognised that it is impossible to assess whether what has been taken constitutes a substantial part of that which is original to the Claimant, i.e. the Claimant's own intellectual creation, without first establishing the issue of the scope of protection of the Claimant's copyright or copyrights in the Electronic Draft. Had the Judge not made that error, then he would have recognised that the question of whether or not a substantial part of the Claimant's copyright had been taken could not be determined summarily given the outstanding triable issue on the scope of protection of the Claimant's copyright.

GROUND 9 – incorrect approach to the Article 10 defence.

13. The Judge further erred in his approach to the Article 10 defence. He dealt with it in just 2 paragraphs J/[157] to [158]. The Judge failed to follow the correct approach in cases involving competing fundamental rights – that of an intense focus on the individual rights in the circumstances of the case as set out in in *Re S (a child)* [2004] UKHL 47. Instead, he approached the issue on the basis that only in rare cases would the Article 10 right prevail: see J/[157]. That is to approach the issue with the scales tipped very firmly in favour of copyright before any analysis even starts and is an error of principle.

14. Had the judge approached the Article 10 defence properly he would have realised that the exercise was inappropriate for summary assessment, particularly where it involved not just

the Defendant's Article 10 rights and those of its readers but also those of Thomas Markle and, moreover that it would have been affected by the issues he held were for trial. The Judge cannot properly have conducted a balancing of fundamental rights when the scope of the right relied upon by the Claimant (copyright) had yet to be identified, let alone the extent to which a substantial part of that which is original in the Claimant's particular right or rights had been taken had not been determined. These are all matters that go to the weight of the Claimant's copyright in the balance of fundamental rights.

15. The Judge further erred in his approach to the Article 10 defence in treating it as not significantly extending beyond the fair dealing defence (see J/[157]). Without prejudice to the generality of the foregoing, in doing so the Judge failed to recognise that Article 10 is of general applicability, whereas the fair dealing defence is specific to reporting current events (a reason the Judge gave for rejecting it in this case; see J/[156]). The practical effect of what the Judge did was also indirectly to put the Claimant's privacy right in the balance on her copyright claim, because a reason for rejecting the fair dealing defence was the Judge's conclusion on privacy (see J/[155]). Such an approach is wrong in principle. Article 10 is of general applicability and the Judge should have approached the question using the approach set out by the House of Lords in *Re S (a child)* [2004] UKHL 47, not by adopting *dicta* of the earlier Court of Appeal case of *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142.

GROUND 10 – incorrect approach to the fair dealing defence

16. The Judge erred in his approach to the fair dealing defence, where he relied upon his previous analysis in respect of privacy. Hereunder, the Defendant relies upon the grounds advanced in respect of the privacy claim.

17. Further the Judge also took an unduly narrow view of what a current event may be: see J/[156]. Had the Judge had regard to *Pro Sieben Media v Carlton Television* [1998] EWCA Civ 2001, he would have concluded that the term should be interpreted broadly, and he should have concluded that reporting Mr. Markle's reaction to the People article, including his decision that he wished to publish parts of the letter, was both fair and within the fair dealing defence.

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