Neutral Citation Number: [2022] EWCA Civ 1081

Appeal Number: CA-2021-000119
Case No: FD21P00499

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Sir Andrew McFarlane, President of the Family Division

Royal Courts of Justice, Strand
London WC2A 2LL
Date: 29/07/2022

Before:
SIR GEOFFREY VOS, MASTER OF THE ROLLS
DAME VICTORIA SHARP, PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
LADY JUSTICE KING

Re: The Will of His late Royal Highness Prince Philip, Duke of Edinburgh

B E T W E E N:

THE EXECUTOR OF HRH PRINCE PHILIP, THE DUKE OF EDINBURGH (DECEASED)

Claimant/first Respondent

and

HER MAJESTY'S ATTORNEY GENERAL

Defendant/second Respondent

and

GUARDIAN NEWS AND MEDIA

Appellant

Caoilfhionn Gallagher QC and Jude Bunting QC (instructed by **Gillian Phillips of Editorial Legal Services**) appeared on behalf of the **Appellant** (GNM).

Jonathan Crow QC and Adam Speker QC (instructed by **Farrer & Co**) appeared on behalf of the **first Respondent** (The Executor)

Sir James Eadie QC and W H Henderson (instructed by Government Legal Department) appeared on behalf of the **second Respondent** (the Attorney General)

Hearing dates: 20 and 21 July 2022

JUDGMENT

Sir Geoffrey Vos, Master of the Rolls, and Dame Victoria Sharp, President of the Queen's Bench Division:

Introduction

1. His Royal Highness Prince Philip, Duke of Edinburgh (Prince Philip) died on 9 April 2021. Sir Andrew McFarlane, President of the Family Division (the PFD), held a hearing in private on 28 July 2021 attended only by representatives of Prince Philip's executor, Farrer and Co Trust Corporation (the Executor), and by the Attorney General. The hearing was not publicly listed. The PFD delivered a public judgment on 16 September 2021. He made an order on 12 October 2021 directing the grant of probate of Prince Philip's will dated 5 June 2013 (the Will) without a copy annexed, and directing that the Will be sealed up for 90 years and only opened in the meantime with the consent of the PFD for the time being. The PFD also determined that a list of the 33 wills of deceased members of the Royal Family,[1] which are sealed and currently held by the PFD (in addition to the Will), should be published. That has already happened. He ordered that these wills too should be sealed for 90 years.[2]

2. At the start of the hearing, the PFD determined, after submissions from only the Executor and the Attorney General, that the entire hearing should take place in private, but that the judgment should be made public. The PFD did not invite submissions from GNM or any other media organisation as to whether there should have been either a public hearing or limited press access to an otherwise private hearing.

3. Sections 124 and 125 of the Senior Courts Act 1981 provide that "[a]ll original wills which are under the control of the High Court" are to be open to inspection on payment of a fee "subject to the control of the High Court and to probate rules".[3] The PFD was dealing with an application under rule 58 of the Non-Contentious Probate Rules 1987 (the NCPR), which provides that "[a]n original will … shall not be open to inspection if, in the opinion of [the court], such inspection would be undesirable or inappropriate". The PFD decided at [51]-[52] that what was in the public interest was likely to be determinative of whether it was undesirable or inappropriate that the Will should be open to public inspection. Those terms were to be given their ordinary meanings, and the hurdle established by rule 58: "whilst requiring an applicant to make out a clear case for departing from the normal rule, [was] not an especially high one".

4. The PFD concluded at [53] that the Attorney General's role in the proceedings was important, because: "[a]s a matter of public law, the Attorney General [was] uniquely entitled to represent the public interest". As a result, the "Attorney General's statement that the public interest strongly [favoured] not permitting publication of the will" was to be regarded as compelling evidence of great weight on the question. That made it "effectively inevitable that the application must succeed". The PFD's own assessment of the relevant factors at [54] led him also to conclude that "it was both undesirable and inappropriate for the will and accompanying documents to be open to public inspection". As regards the role of the Attorney General on the publicity issue, the PFD said at [64] that he had accepted the argument that only he (the then Attorney General)

[1] It may be that some of the persons involved were not, in fact, members of the Royal Family.
[2] A lesser period than that suggested by the parties.
[3] It may be noted that the Sovereign's will is or may be in a different position under the Crown Private Estates Act 1862.

could speak, as a matter of public law, to the public interest, so that "there was, legally, … no role" for media representatives "to put forward any contrary view of the public interest".

5. The PFD's reasons for his decision to seal the Will were, in summary, as follows. First, the exception from the ordinary rule as to the publication of wills was rooted in the unique status of the Sovereign and Head of State. Secondly, there was an inherent public interest in protecting the dignity of the Sovereign and the close members of Her family in order to preserve their position and allow them to fulfil their constitutional roles. Thirdly, there was real constitutional importance in maintaining the dignity of the monarchy, and a public interest in protecting the private rights of the Sovereign and close members of the Royal Family. Fourthly, none of the factors that might support the principle that wills should be open (for example, the avoidance of fraud or alerting potential third party claimants) was likely to apply to senior members of the Royal Family. Fifthly, whilst there might be public curiosity as to the private provisions in the Will, there was no true public interest in the public knowing such wholly private information. Moreover, the media's interest was commercial, and the likely degree of publicity was contrary to the maintenance of the dignity of the Sovereign. Finally, since the convention in favour of sealing Royal wills had been in place for over a century, Prince Philip was likely to have made the Will on the understanding that it was not going to be made public.

6. The PFD also concluded that both the argument about the privacy of the hearing and the hearing itself should be in private. He did so, contrary to his initial view, "[f]or essentially the same reasons that justified granting the substantive applications". Whilst the CPR was not strictly applicable to the application because of CPR Part 2.1(2), CPR Part 39.2 was "plainly relevant to this issue". CPR Part 39.2(3)(a), (c), (f) and (g) were particularly in point. They provided that a hearing must be held in private if it were necessary to do so to secure the proper administration of justice **and** either: (a) publicity would defeat the object of the hearing, (c) the hearing involved confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality, (f) the hearing involved uncontentious matters arising in the administration of a deceased person's estate, **or** (g) the court for any other reason considered a private hearing necessary to secure the proper administration of justice.

7. The PFD's essential reasons for deciding to hold an entirely private hearing were as follows: first, a series of announcements, hearings and a judgment would be likely to generate significant publicity and conjecture over an extended period, which would be "contrary to the need to preserve the dignity of the Sovereign and protect the privacy surrounding genuinely private matters". The publicity would, therefore, in part, defeat the core purpose of the application. Secondly, since only the Attorney General could speak, as a matter of public law, to the public interest, there was, legally, no role for those who might represent the media at a public or private hearing in putting forward any contrary view of the public interest. Importantly, the PFD accepted the Executor's submissions at [32] as follows:

> " … for the court to announce that an application had been made, that a hearing was subsequently going to be held to determine whether the substantive hearing should be in public or in private, for the court then to hold that hearing and, potentially, adjourn the substantive hearing to yet a further occasion followed, after a pause, by the handing down of judgment would create four or more occasions,

> spread out over a number of weeks, when the topic of the sealing of the will would be run and rerun extensively in the national and international media. News of the application and of the hearing(s) might generate wholly unfounded conjecture of a type that might be deeply intrusive to Her Majesty The Queen and Her Family. In contrast, a hearing conducted in private, but with a full public judgment, would allow the court to control the process and limit the publicity to one single event, namely the publication of the judgment".

8. Against that background, Lady Justice King granted GNM permission to raise three grounds of appeal against the PFD's order. We raised the question at the start of the hearing as to GNM's status to appeal the PFD's order. We were satisfied, however, by GNM's submissions to the effect that there had been jurisdiction to entertain an appeal by GNM.[4]

9. We have changed the order of GNM's grounds of appeal as follows: (1) the PFD had been wrong to hold that only the Attorney General could speak, as a matter of law, to the public interest on both media attendance at the hearing and the substantive issues. (2) The PFD had been wrong in law to deny the media an opportunity to make submissions on whether the substantive hearing should be in private. (3) The PFD wrongly failed to consider any lesser interference with open justice than a private hearing excluding all press representatives.

10. GNM submitted first that the PFD had misapplied *Gouriet v. Union of Post Office Workers* [1978] AC 435 (*Gouriet*). The case did not decide that only the Attorney General was recognised by public law as being entitled to represent the public interest. Secondly, the court should not have interfered with open justice or the media's rights under article 10 of the European Convention on Human Rights (article 10) without allowing it to make submissions. That was a serious breach of accepted standards of procedural fairness (see Lord Reed at [66]-[67] in *A v. BBC* [2015] AC 588 (*A v. BBC*)). Thirdly, the PFD applied too high a threshold to the question of whether to hold the hearing entirely in private. The decision was disproportionate and unjustified. The PFD ought instead to have adopted the kind of practice adopted by the Family Division generally allowing the press to attend but not to report specific facts. Fundamentally, GNM relied on three main public interests as follows: (i) the public interest in open justice in all court contexts, with derogations only in exceptional circumstances, (ii) the public interest in the role of the monarchy on the premise that the ordinary law applies to the Royal Family, (iii) the public interest in the way in which the assets of the Royal Family are distributed on the premise that a perceived lack of transparency is a matter of legitimate public debate.

11. At the start of oral submissions, we pressed Ms Caoilfhionn Gallagher QC, leading counsel for GNM, on the relief that GNM was seeking. She made it clear that GNM was seeking the orders in their Notice of Appeal that the PFD's order should be set aside, and that the matter should be remitted for fresh determination with GNM present as an intervenor. GNM wanted to make submissions on four substantive issues: (i) whether the Will should be sealed, (ii) the order that no copy of the value of Prince

[4] See RSC 1965 order 59 rule 3, and the commentary in the RSC 1999, and *In re Securities Insurance Company* [1894] 2 Ch 410, per Lindley MR at page 413, and *MA Holdings Ltd. v. George Wimpey UK Ltd. and Tewkesbury Borough Council* [2008] 1 WLR 1649 at [10]-[28]. The normal course would have been to apply to the judge below as soon as GNM became aware of the case, rather than immediately to appeal.

Philip's estate should be made or kept on the court file, (iii) the process to be followed in the case of an application to unseal the Will, (iv) the overall process to be followed in respect of the wills of members of the Royal Family. GNM could not decide precisely what submissions it might make until it had been provided with the relevant documents and evidence.

12. The Executor and the Attorney General submitted that the PFD had made no legal error. He exercised his discretion on the correct principles, and his decisions should, therefore, be upheld. They point to the fact that this was not adversarial litigation but an application under the NCPR. The PFD's detailed reasoning was published in his judgment, so the public knew precisely what occurred. The context was critical, in that there was an inherent public interest both in protecting the dignity of the Sovereign and Her close family and in respecting the privacy of the Royal Family in matters which are truly private. On a proper analysis, the PFD had not considered himself bound by the Attorney General's views. He had tested them against his own analysis.

13. In these circumstances, we intend to proceed to consider each of the three grounds of appeal in turn. We do not repeat the PFD's recitation of the history and background, which we commend to the interested reader.

Issue 1: Was the PFD wrong to hold that only the Attorney General could speak, as a matter of law, to the public interest on both media attendance at the hearing and the substantive issues?

14. As we have said, the PFD actually said two critical things about the role of the Attorney General. At [53], the PFD said that "[a]s a matter of public law, the Attorney General [was] uniquely entitled to represent the public interest". At [64] he said that there was, legally, no role for those who might represent the media at a hearing in putting forward any contrary view of the public interest, because only the Attorney General could speak to it, as a matter of public law.

15. The Executor did not ultimately defend that latter statement contained in the final sentence of [64]. He submitted that it had to be read in the context of [53] and, in that way, it was qualified and correct. We think that the passage in [64], in its context of whether the hearing should have been in private or not, was not correct. It was wrong to suggest that only the Attorney General is able to speak to the public interest in open justice as a matter of public law.[5] It is true that, even in this area, the Attorney General's views on where the public interest lies are of great weight, but all other things being equal, the court can receive submissions from the media as to whether a specific hearing should be in public or in private or somewhere in between. *Gouriet* was not dealing with that issue at all.

16. We take the law to be clear as to the role of the media at hearings in which they are not parties, but which engage article 10 and section 12 of the Human Rights Act 1998. As Lord Reed said in *A v. BBC* at [66]-[67]:

> 66. … There is therefore no obligation under section 12(2) of the Human Rights Act to allow the media an opportunity to be heard before such an order [withholding the name of a case, which was what was in issue there] can be granted.

[5] This was, in effect, the submission made by the Executor to the PFD as recorded at [35].

> 67. The Lord President (Gill) observed 2013 SC 533, para 39 that, even if the media were not entitled to be heard by virtue of section 12(2) of the Human Rights Act, they were entitled to be heard as a matter of fairness, although there was a question as to the stage at which the opportunity to be heard should be given. I agree. There are many situations in which courts make orders without having heard the persons who may be affected by them, usually because it is impractical, for one reason or another, to afford a hearing to those persons in advance of the making of the order. In such circumstances, fairness is secured by enabling any person affected to seek the recall of the order promptly at a hearing inter partes. In principle, an order under section 11 of the [Contempt of Court Act 1981] falls within the ambit of that approach. It would be impractical to afford a hearing to all those who might be affected by a section 11 order (including bloggers, social media users and internet-based organisations) before such an order was made; but fairness requires that they should be able to seek the recall of the order promptly at a hearing inter partes. Article 13 of the Convention also requires that the media should have an effective remedy for any violation of their article 10 rights. That requirement is capable of being fulfilled, where a section 11 order has been made ex parte, provided its recall can be sought promptly at a hearing at which the media are able to make representations (cf *Mackay and BBC Scotland v. United Kingdom* (2010) 53 EHRR 671, para 32).

17. For the purposes of this issue, it is sufficient to note that the media should normally, in fairness, be able to be heard at some stage where orders are made that engage article 10. They are not entitled, as a matter of right, to be heard at the initial hearing. GNM has now been heard in this case.[6]

18. This, as it seems to us, resolves this issue. The PFD was wrong to say (if that is what he really meant) that only the Attorney General could, as a matter of public law, speak to the public interest in the proceedings being held in public. The media might, in fairness, be heard on such a question, but had no **right** to be heard before any order as to a private hearing was made. That much is also clear from CPR Part 39.2, which makes no such provision. Instead, it provides by CPR Part 39.2(5) that, unless and to the extent that the court otherwise directs, an order that a hearing should be held in private should be published on the judiciary's website. No such publication was apparently considered in this case, and CPR Part 39.2 was not strictly applicable. We shall return to further consideration of CPR Part 39.2.

19. We should also record that we think that the judge was right as to his main reason for refusing to ask for or hear such submissions, which was that the process would have generated significant publicity and conjecture over an extended period, which would have been contrary to the need to preserve the dignity of the Sovereign and to protect Her family's privacy. We will return to this point in dealing with the third ground of appeal.

20. Accordingly, it seems to us that the argument over the precise role of the Attorney General leads nowhere. A series of cases establish that the role of the Attorney General in relation to applications to seal Royal wills and a range of other matters is to represent the public interest (see, for example, *Attorney-General v. Blake* [1998] Ch 439 per Lord Woolf MR at page 459G, and *Brown v. The Executors of the Queen Mother's Estate*

[6] The usual route would be to apply to the court below once the order was publicised.

[2008] 1 WLR 2327 (*Brown*) at [37] per Lord Phillips CJ). It has not been suggested here, as it was in *Brown* at [31] and [37]- [38], that the court could only exercise its powers under section 124 of the Senior Courts Act 1981 on the application of the Attorney General.

21. The PFD correctly understood that the Attorney General was a party to these proceedings in his (or her) historic role as the guardian of the public interest. He was also right to understand that there was no requirement that the press should be allowed to attend a hearing at which an application was made that a hearing should be held in private. For completeness, we should also say that the Attorney General was indeed uniquely entitled to represent the public interest and that his view that a particular course was strongly in the public interest was to be regarded as compelling (as the PFD said at [53]), even if those views, whether as to privacy or the substantive issue, could not be determinative.

Issue 2: Was the PFD wrong in law to deny the media an opportunity to make submissions on whether the substantive hearing should be in private?

22. We should start by endorsing GNM's submissions as to the critical and constitutional importance of open justice. It is only in rare cases that it is appropriate for a court to sit in private. That is made clear by the provisions of CPR Part 39.2, to which we have already alluded. As GNM submits, the purposes of open justice include winning and retaining public confidence in the court's processes (*Scott v. Scott* [1913] AC 417 at page 463), deterring inappropriate behaviour by the court, neutralising any suggestion of a cover up, and the preservation of a free press (see Lord Steyn in *In re S* [2005] 1 AC 593 at [29]-[36]). As GNM also submits, derogations from open justice must be reserved for exceptional situations (see, by analogy, *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003 at [10]-[13]).

23. Despite what we have already said, it will already be clear that we accept the Executor's submission that GNM's argument under this head is fundamentally flawed. GNM wrongly assumes that the media has a legal right to attend and make submissions whenever a party applies for a hearing to be held in private. As we have explained at [16]-[17] above, by reference to Lord Reed's judgment in *A v. BBC*, the media has no such legal right. That does not mean that the court cannot and should not in some cases notify the media of such an application and seek submissions on the point. The question is whether this was one of those cases where such a course would have been appropriate as a matter of fairness. That question is better answered together with the issues raised under the third ground of appeal.

24. The answer to the second ground is that the PFD made no legal error in declining to give the media an opportunity to make submissions on whether the substantive hearing should be in private. They had no right to make such submissions. They were not parties.

Issue 3: Did the PFD wrongly fail to consider a lesser interference with open justice than a private hearing excluding all press representatives?

25. This is really the central issue. It can be summarised by asking whether the PFD was wrong, as a matter of fairness, either to exclude the media altogether or not to consider lesser interferences with the principles of open justice.

26. We can start by saying that we do not think there is any substance in the formal criticism that the PFD failed to consider **any** lesser interference with open justice. Whilst he did not, in fact, consider the lesser interference so commonly adopted in family proceedings under rule 27.10 of the Family Procedure Rules 2010, he did consider the possibility of the media attending with legal representation to make submissions at [35].

27. It was, for that reason, that we asked counsel for submissions on whether it would have been appropriate to allow the media to attend the hearing on terms that they did not report what had occurred until the judgment was published. Such a course would have avoided the dangers that the PFD foresaw. They are described in [36] where he recorded the submissions that media interest in Royal matters was "seemingly, insatiable and highly intrusive", that media participation would "simply fuel media curiosity", and that the "benefits ordinarily gained by a public hearing would be wholly disproportionate to the degree of media curiosity and the extent of the consequent intrusion into matters which are essentially private". We suggested in argument that these disadvantages would have been avoided if the media had been admitted to the hearing under strict terms as to when they could publish anything. The hearing could not have been said, as GNM said it was, to have been "in secret". The advantage of such a course would have been that there would have been a measure of scrutiny of the hearing at which issues relating to the sealing of the Will and Royal wills in general were determined. None of the parties addressed this possibility with any great enthusiasm. GNM put it as an alternative argument, but the Executor and the Attorney General did not think it would have worked. More importantly, perhaps, they submitted that the judge made no legal error and that it was not for this court to second guess his discretion exercised on the correct principles.

28. There are four reasons why, ultimately and despite the great respect we have for the views of King LJ expressed in her additional judgment, we think that the judge cannot be criticised for failing to adopt a course of the kind we proposed in argument.

29. First, we cannot see how, in practice, the media could have been alerted, in the particular circumstances of this case, to the fact that the hearing was taking place without risking the media storm that was feared. If the hearing had been listed in the usual way, such a storm would have been inevitable. But even if the Press Association or other media body had been contacted on the basis that binding undertakings were sought before the name of the case could be revealed, it is hard to see how such undertakings could properly have been offered. Once the name was revealed without undertakings being in place, the risks feared would have inevitably followed. We would note that the position is different in family cases because the identity of the parties is very commonly withheld and is normally no part of the reason why the media wishes to attend or even report upon the hearings.

30. Our second reason is that we agree with the PFD that this was a case in which, exceptionally, open justice was adequately served by the transparency involved in publishing a full judgment as to the process he had adopted and the reasons for all his decisions. The two critically important things to protect were, as the PFD held, and as GNM ultimately agreed were important factors, the public interest in (a) protecting the dignity, and (b) protecting the private rights, of the Sovereign and the close members of Her family. The hearing was at a hugely sensitive time for the Sovereign and Her family, and those interests would not have been protected if there had been protracted

hearings reported in the press rather than a single occasion on which full reasons for what had been decided were published.[7]

31. Our third reason is also important. This was not litigation in the normal sense. It was a non-contentious probate application. Whilst the public interest in open justice applies even within that environment, the private interests of testators and their families are also important. That much is clear from CPR Part 39.2 itself, upon which the PFD founded his decision. It provides a series of exceptions, four of which are relevant in some measure here. First, publicity at the time of the hearing might well have defeated the object of the hearing, which was to ascertain whether the Will should be sealed in all the circumstances. Secondly, the hearing undoubtedly involved confidential information relating to personal financial matters, and that confidentiality would have been damaged by untimely publicity. Thirdly, whilst the matters were arguably not uncontentious (in the sense that it was always possible that press organisations might have wanted to take the points that GNM is now taking) they were private matters that arose in the administration of a deceased person's estate. Fourthly, there were other reasons we have mentioned why a private hearing was necessary to secure the proper administration of justice. Moreover, the primary determinative requirement of CPR Part 39.2 - that it was necessary to sit in private to secure the proper administration of justice - was also satisfied. We might also note that we do not think that posting the order as to privacy on the judiciary website under CPR Part 39.2(5) would have been appropriate here as it would have defeated the object of the order.

32. The fourth reason only affects the part of the hearing that concerned Royal wills generally (i.e. the other Royal wills he dealt with). We could see better arguments for the press being permitted to attend that part of the hearing. That said, the more general decisions that the PFD made flowed directly from what he had decided about the Will, and the media had the opportunity to appeal or apply to vary the general parts of the order, which has not occurred. GNM has not made any substantive submissions as to why those orders might be wrong. We understand that GNM says it needs more information before it can do so, but we do not understand that point, since the judge seems to have made those additional parts of his order on his own initiative so as to make the sealed Royal wills, more, rather than less, accessible.

33. As to the three public interests relied on by GNM, we would just say this. We agree and have taken full account of the first, namely the public interest in open justice in all court contexts, with derogations only in exceptional circumstances. These are exceptional circumstances, to which the principles in CPR Part 39.2 would apply. It is true that the law applies equally to the Royal Family, but that does not mean that the law produces the same outcomes in all situations. These circumstances are, as we have said, exceptional. We are not sure that there is a specific public interest in knowing how the assets of the Royal Family are distributed. A perceived lack of transparency might be a matter of legitimate public debate, but the NCPR allows wills and their values to be concealed from the public gaze in some cases. The judge properly applied the statutory test in this case.

[7] The Executor asked us to note that it would also have been open to GNM to apply for transcripts of the hearings after the event under CPR Part 39.9(3) and (4).

34. We have, therefore, concluded that this was not a case where fairness demanded that the media be notified of the hearing or asked to make submissions before judgment.

Conclusions

35. For the reasons we have given, we would dismiss the appeal against the order that the PFD made.

Lady Justice King:

36. I agree that the appeals on Grounds 1 and 2 should be dismissed for the reasons given by the Master of the Rolls and the President of the Queen's Bench Division. I have however had significant reservations in respect of Ground 3 and in particular whether some lesser interference with the principle of open justice could have been devised whilst maintaining the dignity of the Sovereign and the privacy of the Queen and the Royal Family as a whole.

37. In *Brown v Executors of the Estate of HM Queen Elizabeth the Queen Mother & Ors* [2008] EWCA Civ 56, [2008] 1 WLR 2327 *(Brown)* the Court of Appeal, for the first, and to date only occasion, considered the long-established practice of sealing Royal wills. It was disclosed to the Court of Appeal in *Brown* that (paragraph [28]) both before and after the death of Princess Margaret, there had been confidential discussions between the Palace, the Attorney General's Secretariat, and the Attorney General by way of a review of the practice of sealing Royal wills. The views of the President of the Family Division, Dame Elizabeth Butler-Sloss P, were also sought.

38. The resulting document was agreed and approved by Butler-Sloss P. This document set out a highly confidential process providing for the sealing of Royal wills, the primary object of which was to 'protect the privacy of the Sovereign'. As a consequence, when applications were, in due course, made for the sealing of the will of the Queen Mother and Princess Margaret respectively, Butler-Sloss P had an 'understanding of the background that she would not otherwise have had'. No public hearing took place in respect of those two applications and it was, and remains, unclear whether any hearing took place at all. Nor, said the Court of Appeal at paragraph [8], was it clear whether or not Butler-Sloss P had provided reasons for making the orders and certainly had she done so, they had not been made public.

39. The question which arose in *Brown* was as to whether the claimant who asserted that he was the illegitimate child of Princess Margaret should be permitted to challenge the order made by Butler-Sloss P sealing the will of Princess Margaret. Sir Mark Potter P who had heard the application to unseal the will of Princess Margaret at first instance, was unaware of either the discussions or the existence of the document which had guided Butler-Sloss P when making the original order.

40. Lord Phillips said at [37]:

> "Had those orders been made by a transparent process according to identified criteria in which the Attorney General had been joined to represent the public interest, there might have been force in the argument that no challenge based simply on the public's right to inspect the wills should be permitted. The

> principle in *Gouriet* case [1978] AC435 might have been applicable and the analogy with judicial review apt. The problem is, however, that the process under which the late President made the orders was not transparent, nor the criteria applied by the former President plain."

41. Lord Phillips identified 5 issues which he said were raised by the application at [39]:

> "i) What principle underlies the exposure of wills to public inspection on the terms of sections 124 and 125 of the 1981 Act?
>
> ii) What considerations are relevant to the question of whether inspection would be 'undesirable or otherwise inappropriate' under Rule 58?
>
> iii) Where a will is 'sealed' pursuant to Rule 58, what is the nature of the interest that an applicant must show in order to be permitted to inspect that will?
>
> iv) Is it appropriate to have a special practice in relation to royal wills? If so:
>
> v) What, if any, information about that practice should be made public?"

42. In allowing the appeal, Lord Phillips acknowledged at paragraph [47], that there may well be a good reason for the procedure apparently agreed and that he would not himself dissent from the reference of Potter P to the "seemingly insatiable curiosity about the private lives, friendships and affections of members of the royal family and their circle" which might justify special treatment for Royal wills. Lord Philips, however, considered that the questions he had posed should properly be explored with knowledge of the material facts. The appeal was therefore allowed, and it was anticipated that the five questions set out above would be determined by Potter P at first instance. In the event the appellant did not pursue this litigation any further and so the proper approach to the sealing of Royal wills was not considered until the death of Prince Philip on 9 April 2021.

43. The Executors of Prince Philip made an application by summons on 8 July 2021 for an order sealing the last will and testament of Prince Philip.

44. No formal case management orders were thereafter made, although the Attorney General was quite properly invited to represent the public interest in relation to the application.

45. On 26 July 2021, skeleton arguments were filed respectively by Mr Jonathan Crow QC on behalf of the Executors and the Right Honourable Michael Ellis QC MP who was then the Attorney General and his junior, Mr Christopher Buckley. The copies of the submissions available to this court are substantially redacted, in particular in relation to the skeleton argument filed on behalf of the Attorney General. The skeleton argument on behalf of the Executors however is, as was accepted by Mr Crow in argument, almost entirely directed to the issue as to whether or not the substantive matter that should be

heard in private, that is to say, in the absence of the public and the media. Mr Crow accepted that the question of whether the application could be heard in private was the substantial focus of his skeleton argument and further that it was recognised by both the Executors and the Attorney General that subject to the President's view, there may well have had to be a second hearing at which the media, in some form, would attend either to make submissions as to whether the case should be heard in private, or to listen to the substantive arguments in relation to the application itself and to the determination of Lord Phillips' five questions.

46. In the event, as is recorded by the President in his judgment at paragraph [63], his preliminary view that the application should have been publicised and the hearing should have then been made public was not maintained in the light of the arguments of Mr Crow and the Attorney General. I have set out again for convenience the judge's analysis [at 64]:

> "In short, I accepted that to have a series of announcements, hearings and then a judgment would be likely to generate very significant publicity and conjecture over an extended period, and that this would be entirely contrary to the need to preserve the dignity of the Sovereign and protect the privacy surrounding genuinely private matters. The publicity would, therefore, in part, defeat the core purpose of the application. I also accepted the argument that only the Attorney General can speak, as a matter of public law, to the public interest, and that there was, legally, therefore no role for those who might represent the media at a hearing (public or private) in putting forward any contrary view of the public interest."

47. The President accepted the submissions to this effect which had been made by Mr Crow, whose submission is recorded at paragraph [32] that a 'hearing conducted in private, but with a full public judgment, would allow the court to control the process and limit the publicity to one single event, namely the publication of the judgment'.

48. It can be seen therefore that the privacy of the Royal Family and the dignity of the Sovereign were critical to the judge's decision to hear the case in private and for his conclusion that the public interest could be satisfied through the vehicle of a public judgment. Ms Gallagher QC, on behalf of the Guardian, does not dispute the relevance and importance to the judge's decision of either the dignity of the Sovereign or the protection of her privacy.

What this case was about

49. In considering whether in my judgment, the President was in error in wholly excluding the press from the hearing of the application to seal the will of Prince Philip, I have found it helpful to put the application in context. For decades, applications to seal a Royal will had been dealt with by the then President of the Family Division with little or no formality. A measure of confidential procedural formality was introduced following the negotiations prior to and immediately after the death of Princess Margaret which had resulted in the lengthy document referred to above and of which Potter P was unaware when he sealed the wills of the Queen Mother and Princess Margaret. The Court of Appeal in *Brown* recognised the importance of there being a transparent

process in accordance with identified criteria when determining an application for the sealing of a Royal will, to which end they identified the five questions, the answers to which remained outstanding at the date of Prince Philip's death.

50. The matter, therefore, came before the President in circumstances where the need for a transparent process, according to identified criteria, had been identified some years previously.

51. The application to seal the will of Prince Philip was therefore made against the backdrop of (i) the judgments in *Brown* and the outstanding need to resolve the issues identified by Lord Phillips in that case; and (ii) the requirement for open justice. In this respect, I note the observation of Lord Reed at paragraph [40] of *A v BBC* that "the application of the principle of open justice may change in response to changes in society and in the administration of justice."; and (iii) that the arguments before McFarlane P were issues of pure law.

52. Whilst the mere fact of a hearing subject to any media reporting can be regarded as an invasion of the privacy of those involved, the specific erosion of privacy which would be incurred by press attendance (in whatever form) in this case would be the reporting of any legal argument in relation to the procedure to be followed when an application is made to seal a Royal will and its application to the will of Prince Philip. There was not, and is not, any question that the intensely private matter as to the dispositions made by Prince Philip in his will, or the value of his estate on probate would be made public. No one other than the Executors, including the President and the Attorney General, are aware of the content of Prince Philip's will.

53. The question for me therefore is whether the publication of the President's judgment represented a proportionate restriction to the principle of open justice or whether the President fell into error in adopting a wholesale exclusion of the press in circumstances where he was, for the first time, to consider the proper approach to the sealing of Royal wills.

54. The principles of open justice are well known and have been well rehearsed during the course of this hearing. At paragraph [27] onwards of *A v BBC* Lord Reed discussed exceptions to the principle of open justice ranging from the year 1693 through to *Bank Mellat v HM Treasury (Liberty Intervening)* [2013] UKSC 38, [2014] AC 700. At paragraph [29], Lord Reed set out Lord Neuberger's description in *Bank Mellat* of the principle as "fundamental to the dispensation of justice in a modern, democratic society". Lord Neuberger had gone on to say that the use by a court of its inherent power to exclude the press should only be taken if "(i) it was strictly necessary to have a private hearing in order to achieve absolute justice between the parties, and (ii) if the degree of privacy was kept to an absolute minimum".

55. This need for there to be a compelling justification to infringe the principle of open justice is reflected in the wording of CPR r. 39.2(3) which permits a hearing to be in private "if and only to the extent that… it is necessary to sit in private to secure the proper administration of justice."

56. The President at paragraph [63] set out his initial view that "the application should have been published and the hearing(s) been in public". Mr Crow had rejected the President's suggestion that the press should attend to make submissions in favour of publicity.

57. In relation to Ground 3, for my part I accept the submission by Ms Gallagher that the President did not consider a lesser interference, for example permitting accredited member of the press to attend subject to restrictions as regards what could be reported about the hearing. Ms Gallagher referred by way of example to the approach taken in the Family Division and to similar restrictions in cases such as *Manchester City Football Club v Football Association Premier League Ltd* [2021] EWCA Civ 1110, [2021] 1 WLR 5513 at [29], *Guardian News and Media v Incedal* [2015] 1 Cr App R 4 and in the Manchester Arena Inquiry.

58. Whilst the circumstances in each of Ms Gallagher's examples are very different from the present situation where there is no litigation, what they do demonstrate is the courts' ability to think creatively in order to devise a structure whereby justice is served in such a way that the interference with the principle of open justice is compromised to the minimum possible extent.

59. In the present case it was clearly anticipated that there may have to be more than one hearing of the application, the first being in order to decide the issue of privacy and, in the event that the press were not wholly to be excluded at a second hearing, where the substantive application would be determined, to put in train such lesser alternative which the judge in his discretion had devised.

60. One such alternative to be considered may have been to make an order permitting only accredited members of the press to attend an otherwise private hearing with an order that there could be no reporting until judgment was handed down. Such an order would be part of the listing of the hearing. Such an outcome would have avoided a "series of announcement hearings and then a judgment" as it would have involved the press attending on one occasion only on strict terms in order to hear the legal submissions and to scrutinise the judicial process whereby decisions were to be reached, not only as to whether the will of Prince Philip was to be sealed, but as to the way such applications were to be treated and the length of time the wills were to be sealed in future.

61. I am well aware of the complications in this or any other structure which a court may seek to devise in order to minimise the impact upon the open justice principle whilst recognising the need for privacy in certain circumstances. The challenges and complications are greater than they have ever been given the difficulties in identifying the 'accredited press', the proliferation of legal bloggers and the ability for information instantaneously to be transmitted across the globe via the internet. In my view however absent careful consideration by the court of various options, the logistical challenges should not of themselves serve as a justification for a hearing to be wholly private when the interests of justice would be served by the media being present upon terms.

62. In *F v Cumbria County Council & M (Fact Finding No 2)* [2016] EWHC 14 (Fam), the Poppi Worthington case, a careful structure was put together by Peter Jackson J which prevented reporting until the end of each day so allowing the court to impose restrictions if necessary, in the light of the day's evidence. Certain members of the press declined to give the undertakings required if they were to be allowed to attend the hearing. That was a matter for them. Certain other members of the press were content to give the undertakings and to report on the trial in accordance with the protective measures for the children the judge had put in place for the children.

63. The President, in his discretion, decided that the publication of a full judgment met the needs of the case. He decided that such a course preserved the dignity of the Sovereign and protected "the privacy surrounding genuinely private matters" (paragraph [64]) whilst taking account of the principles of CPR r.39.2. I have in mind also that the Attorney General who represents the public interest regarded the course adopted by the President as both proportionate and appropriate.

64. For my own part I believe I would have tried to find a route which would have enabled the media to be present to hear and scrutinise the substantive proceedings. I have however reminded myself of the President's own observations in *Re W (Children)* [2016] EWCA Civ 113, [2016] 4 WLR 39, the appeal hearing in the Poppi Worthington case at paragraph [37] that "In the present case, Jackson J used the power available to him to move from the default position so as to allow a controlled degree of publicity. This was a matter for the judge's discretion" and at paragraph [56] "In circumstances where, as the Appellants have accepted, the final judgment will be published in due course, the issue of daily reporting relates to the quantity and timing of reporting rather than to reporting the facts of this case as such in principle. It is a matter that calls for a proportionate approach, over which a trial judge is entitled to exercise a wide margin of discretion".

65. In the final analysis, notwithstanding my reservations about the hearing having been heard in private, I am conscious that the Supreme Court reemphasised in *R (AR) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079, at paragraph [64] quoting *R (C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47, [2016] PTSR 1344 at [34] that an appellate court "does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision below was wrong".

66. At the end of the day in my judgment, the safeguards in the form of the full and open judgment and the presence of the Attorney General as guardian of the public interest together lead me to conclude that I cannot in the end say that the President was wrong in taking the course that he did.

67. Accordingly for these reasons, I would agree with the Master of the Rolls and the President of the Queen's Bench Division that the appeal should be dismissed on all grounds.