Neutral Citation Number: [2020] EWHC 3222 (Ch)

Case No: IL-2019-000110

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**INTELLECTUAL PROPERTY LIST**
**(via Cloud Video Platform)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date of hearing: 29th October 2020
Start Time: 11.48 Finish Time: 13.04

**Before**:

**MR JUSTICE WARBY**

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**Between:**

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| **HRH THE DUCHESS OF SUSSEX** | **Claimant/ Respondent** |
| **- and -** | |
| **ASSOCIATED NEWSPAPERS LTD** | **Defendant/ Applicant** |

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**IAN MILL QC**, **JESSIE BOWHILL** and **JANE PHILLIPS** (instructed by **Schillings International LLP**) for the **Claimant**
**ANTONY WHITE QC** and **ALEXANDRA MARZEC** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

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# APPROVED JUDGMENT

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Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

**MR JUSTICE WARBY :**

1. This is the fourth case management hearing in this case brought by the Duchess of Sussex against the publishers of the Mail on Sunday and MailOnline. I have heard this morning in private one application, and I will say more about that shortly, but first I need to say a few words of introduction.

2. The hearing is being conducted remotely using the Cloud Video Platform. I am sitting in court 13 at the Royal Courts of Justice. But apart from two or three court staff, all the other participants and all the observers are joining online. This is a relatively new way of conducting a court hearing, although we are becoming much more familiar with it. But I know there are some people attending who are not familiar with it, and it is for that reason - without wanting to insult any of those present in court today - that I need to explain some ground rules.

3. First, this is a formal process, and the normal expectations apply to everyone who is a participant and an observer. Secondly, I have made an order reflecting the position in law which says this: "It is an offence and may amount to a contempt of court to make or attempt to make an unauthorised recording or transmission of an image or sound made or transmitted during remote proceedings" which these are. That means that no one must make, and no one must publish, a visual or a sound recording, and that includes a screen shot or a photograph of the proceedings. Thirdly, that does not prohibit representatives of the media or legal commentators from providing live text-based reporting using Twitter or any other written medium in accordance with the practice direction that governs that. But no one else is entitled to text or tweet about the hearing during the hearing without the court's permission. Fourthly, I said I held a hearing in private. There are restrictions on the information that was discussed in that hearing that was confidential, and I direct that there shall be no publication of any of the confidential material that is in the court papers. That means that it will be a contempt of court to do so. If accidentally there is any mention of any of that information, that order will apply; and there will be a reminder of it, I am sure, if that happens.

4. I am now going to explain what happened during the private hearing and my decision on the application that I heard.

5. The trial of this action is currently listed to begin on 11 January 2021 with a time estimate of seven to 10 days. By an application notice dated 20 October 2020, the claimant applies for an order vacating the trial date and adjourning the trial to a date much later next year, and this is my judgment on that application. The first ground relied on - which has been described as the primary basis for the application - is a confidential ground, the merits of which have been examined in the course of the private hearing that started before me at 10.00 this morning. Hearings in private are an exception, as the Civil Procedure Rules make clear, but the evidence and arguments satisfied me that it was necessary to hear that part of the case in private in order to avoid damaging the confidentiality of the information and evidence relied on by the claimant, and in that way to protect the due administration of justice.

6. There are other applications before me today, most of them made by the claimant. Two of the claimant's other applications were at one stage relied on as further

grounds for adjourning the trial, or at least matters that supported the application. Neither of those involves any confidential information.

7. The first is that the claimants wish to appeal against the order of Master Kaye dated 29 September 2020, by which she granted the defendant permission to expand its case by amendment, to allege that the claimant had authorised the disclosure of various pieces of information about her private life in a biographical work about her and Prince Harry written by Omid Scobie and Carolyn Durand and entitled "Finding Freedom". On 20 October 2020 the claimant filed an application for permission to appeal. The application for permission is before me today, but there is no suggestion that, if I give permission, I should hear the appeal now. What was suggested in the evidence filed in support of the adjournment application was that permission for this appeal should be granted, and that time would not allow the parties to prepare and conduct both the appeal and the trial if the trial date was kept, so that the timetable should be put back.

8. The other matter is that the claimant has filed an application for summary judgment on her privacy and copyright claims. She maintains that the defendant has no real prospect of successfully defending those claims and that there is no other compelling reason for a trial. The basis for the application is that even if the defendants proved all the facts alleged by way of defence, including those which have been added by way of amendment, it would still not in law provide them with any arguable defence. That application and the supporting evidence were filed very recently on 23 October 2020. The application notice also seeks in the alternative an order striking out the defence on the grounds that it discloses no reasonable defence to the claim. That application is not before the court for decision today, either. It was only filed four working days ago. It would need more time than that for the parties and the court to prepare. The date suggested for the hearing of this application is January 2021, so what was being suggested until recently was that the trial should be vacated and adjourned in order to allow time for that application to be heard and determined, which would take two days rather than the 7 to 10 days set aside for the full trial.

9. By the time the written skeleton arguments of the parties came to be filed yesterday morning, things had moved on in two respects. First, the claimant no longer relied on the proposed appeal or the summary judgment and strike out application as matters that justified or supported the application to adjourn. Secondly, the defendant - having reviewed the confidential information and considered it in the light of advice - had decided not to oppose the application to adjourn on the first, confidential ground.

10. In my judgment, the claimant's advisers were right on reflection to abandon reliance on the appeal and summary judgment application as grounds for adjourning the trial. Neither would have supported that application. Both matters could have been accommodated in the time available, whatever view I took on the merits of the possible appeal. I would certainly not have allowed the summary judgment application to derail the trial timetable. It comes very late indeed in the proceedings. If the claimant's argument is sound, it could have been put forward at any time since this case began. Although a summary judgment application can in principle be made at any time - there is no rule preventing a late application - the parties to litigation are obliged to co-operate with one another and the court to ensure the case is dealt with in an orderly way. The only explanation offered for the lateness is that new counsel

have given new advice. That would not have been enough to justify losing a trial date.

11. As for the confidential ground, first, as both parties acknowledge, decisions on the adjournment of trials are for the court. The mere fact that one party seeks it and the other does not resist is not enough. I therefore considered with care the evidence and the arguments advanced by the claimant, and the evidence and critical analysis submitted on behalf of the defendant. The well-settled principles to be applied when making such a decision are identified in authorities cited by the parties. Applying those principles to the facts as I assess them, my conclusion is that the right decision in all the circumstances is to grant the application to adjourn. That means that the trial date of 11 January 2021 will be vacated, and the trial will be refixed for a new date in the autumn, that date to be fixed hereafter.

12. The application was for the date to be not before 15 October 2021. There has been some debate about whether that is a feasible date. I am confident that we will be able to find a time in the autumn in October or November in which the trial can be accommodated.

13. I will provide detailed reasoning behind my conclusion on the adjournment application in a short written private judgment addressing the confidential matters that will be circulated to the parties in confidence as soon as it is ready, but we will now continue with the public aspect of the hearing.

**(See separate transcript for continuation of proceedings)**

**MR JUSTICE WARBY:**

14. This claim is about a letter written by the claimant to her father in August 2018 and a series of articles published on 10 February 2019 which contained information from and about that letter. The claimant's case is that by publishing the contents of her letter, the defendant misused her private information and her personal data, and infringed her copyright. The defendants maintain that publication was lawful.

15. In summary, the defendant's case in answer to the privacy claim is that the claimant had no reasonable expectation that her letter would remain private or, if she did, her own behaviour was such as to forfeit her privacy rights, or to weaken them so much that they are outweighed by the rights of others to freedom of expression.

16. Earlier this year, a book entitled "Finding Freedom" was published with the subtitle "Harry and Meghan and the Making of a Modern Royal Family". Thereafter, the defendants applied to amend their defence by adding a series of allegations arising from the contents of that book. Put very broadly, the allegations were that the claimant had approved the book and provided information for it, and that her conduct in doing so - coupled with matters that were contained in the book with her alleged approval - go to support the defendant's case that it was legitimate to publish the content of the letter.

17. Master Kaye heard argument on the amendment application on 21 September 2020. On 29 September she gave her reasons for concluding that the application should succeed, and made an order granting permission to make those amendments. On

20 October 2020, the claimant's legal team filed the application for permission to appeal that is before me now.

18. The test is whether the appeal has a real prospect of success or there is some other compelling reason why an appeal should be heard. The grant of permission to appeal remains discretionary.

19. The grant or refusal of permission to amend is a case management decision against which an appeal will only succeed if it is shown that the hearing was vitiated by some procedural error, or the judge made an error of law, or reached a conclusion that was so unreasonable that it fell outside the range of reasonable conclusions open to the judge in the circumstances. Permission will not be granted unless it is arguable, or there is a real prospect of success, I should say, that the decision was wrong in one or more of those ways. The court dealing with a challenge to a case management decision may also take into account whether the issue is of sufficient significance to justify the consequences of an appeal and the procedural consequences of an appeal.

20. I have read a very careful and skilful skeleton argument submitted by leading and junior counsel in support of the application, and I have heard Miss Phillips of junior counsel today. My conclusion is that permission to appeal should be refused.

21. Not all the amendments flow from or are derived from the book, but most of them do or are. The claimant submits in writing - as was submitted before the Master - that the amendments constitute a new case. The defendant submits, and I agree, that that is a mis-characterisation of the case and the amendments. The amendments, as the Master noted in her judgment, are designed to support the case that is already pleaded as to the claimant's conduct. The Master put it this way: "It is the defendant's case that the claimant has in various ways allowed information about her private life to enter the public domain, including now in addition by use of the book." That is not an inapt summary of the overall picture. This was, on a proper analysis, an application for permission to expand the defendant's existing and largely inferential case by adding further sections relating to the book. That much is clear from paragraphs 13.7.4 and 13.8.

22. An allegation is made in paragraph 15.2A of the amended material that the claimant has "compromised" any expectation of privacy she might otherwise have had by her conduct in - as the defendant alleges - permitting information about her private life to enter the public domain via the book. That is a new formulation, but it is no more than a modification of the case that was already pleaded that any privacy interest she had was slight.

23. At the permission stage, the court is not deciding whether the proposed amendments are likely to be established, or likely to result in judgment for the defendant if they are established. The court is applying a filter to ensure that time is not taken up at trial and in trial preparation by allegations that are on analysis unarguable or untenable, or irrelevant, or too vague and ill-defined, or in some other way an abuse of the court's process. An application for permission is not or should not be a form of minitrial. The tasks of deciding whether the pleaded case should be accepted and upheld and, if so, what legal consequences follow are normally to be carried out at a full trial after reading and hearing full evidence and argument.

24. In this case it was suggested that the Master did not allow sufficient time for argument before her. That is untenable. The claimant's lawyers sought and indeed came close to demanding that a full day be set aside for the hearing of the amendment application, but the Master declined to do that. She made that decision to reflect the fact the court has many demands on its time and resources, both of which are limited and have to be allocated between cases. The Master read and listened to the arguments for devoting more time to the application, and took a legitimate view on how to deal with it. The assertion in the evidence of Miss Afia that the pleas of the claimant's lawyers for a full day "fell on deaf ears", is manifestly unfounded and that sentence should not have been written. To be fair to counsel, that line of argument has not been pressed before me today.

25. The Master identified the applicable criteria by which to decide the application, and it is accepted that she identified them correctly. The submission is that she failed to apply them. The submission is far too subtle. It depends on a semantic analysis of later passages in the judgment, which I consider were no more than shorthand for the test correctly identified at the outset.

26. The Master was entitled to take the view that the draft amendments are formally acceptable. I agree that the pleading is imperfect (for instance, including pleading by way of example). But I do not consider it so deficient that the Master was obliged to reject it on formal grounds, nor do I think that proposition is arguable. I have taken careful note of paragraph 15.2D and the surrounding paragraphs where, for instance, matters are identified as being relied on "without prejudice to the defendant's reliance on the whole of the book". That is obviously unsatisfactory. But my clear view is that pleadings such as this cannot be used as a means of smuggling in additional, unpleaded instances. I would not permit that, and I do not consider any judge could properly do so.

27. I am not satisfied, either, that the Master was bound to conclude that the primary factual allegations contained in the amendments were manifestly untenable and bound to fail at trial, or that the inferences invited were impossible. Those seem to me to be over-ambitious submissions which do not deserve an airing on appeal. Although the claimant's counsel were entitled to submit that the pleaded case appeared factually weak and unlikely to succeed and that some of the inferences invited were at the more speculative end of the scale, and all those propositions might have been accepted, I am not persuaded that this is a "stab in the dark" to adopt the phrase used by Eady J in *Clyde & Co v New Look* in 2009. The Master was entitled to conclude there were triable issues of fact. It is a rare case in which an amendment can be refused on the basis that a witness statement asserts that the pleaded case is false and no countervailing witness statement is produced. I do not consider that this is a case where that is arguable.

28. I refuse permission also because I do not consider that the costs that an appeal would involve would be proportionate to the significance of these issues in the context of this case. I add in that context that the submission that the alleged facts were not capable of supporting the pleaded defence, as well as the submission that the defence itself as previously pleaded was not a sustainable answer to the claim, are both matters that will be in issue on the claimant's summary judgment application if I permit that to go ahead.

29. The central issue raised by the amendments is whether the claimant co-operated with the authors of the book. Her case is that she did not. I am not persuaded that the burden of disclosure on this issue is a heavy one. If there is a trial, the claimant will seemingly have the benefit of evidence from one of the authors at least; she will be able to give evidence herself; and the best way to resolve the issues raised on her behalf may be to hear and determine the summary judgment application or, if that does not succeed or does not proceed, to try the legal and factual issues at a full trial later in 2021.

**(See separate transcript for continuation of proceedings)**

**MR JUSTICE WARBY:**

30. In my judgment, the claimant should serve the Re-Amended Reply which was due for service on 21 October 2020, the very date on which the application for a stay of that aspect of the procedural timetable was issued. I am not persuaded by any of the arguments that have been advanced against complying with that aspect of the pre-existing trial preparation timetable. In my judgment, it would be most unsatisfactory for this case to reach a summary judgment application - which is the assumption on which we are working at the moment - with the statements of case incomplete. I am not persuaded that there is a great deal of work to be done on this pleading still. There certainly should not be. I am not convinced by the suggestion that the task of answering the pleaded case is as burdensome as suggested, or that it involves such intrusions into privacy that it should not be permitted. I bear in mind the lateness of this application and the fact that these points have been made at such a late stage. In all the circumstances, it seems to me that this aspect of the procedural timetable should be adhered to, with a new date obviously, but not at a date very far into the future. So let us set a date.

**(See separate transcript for continuation of proceedings)**

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**This Judgment has been approved by Warby J.**