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Case No: IL-2019-000110

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

Royal Courts of Justice
Strand, London, WC2A 2LL

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Date: 05/03/2021

Before:

THE RT HON. LORD JUSTICE WARBY
Sitting as a Judge of the High Court

Between:

HRH The Duchess of Sussex	<u>Claimant</u>
- and -	
Associated Newspapers Limited	<u>Defendant</u>

Ian Mill QC, Justin Rushbrooke QC, Jane Phillips and Jessie Bowhill (instructed by **Schillings International LLP**) for the **Claimant**
Antony White QC, Adrian Speck QC, Alexandra Marzec, Isabel Jamal and Gervase de Wilde (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing date: 2 March 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Lord Justice Warby :

Introduction

1. This is a claim for misuse of private information, breach of data protection rights, and copyright infringement. Details of the claims are contained in previous judgments of mine and need not be rehearsed here.
2. This judgment deals with matters consequential on my judgment on the claimant's application for summary judgment on her claims in misuse of private information and infringement of copyright. I heard argument on that application on 19 and 20 January 2021. On 11 February 2021 I handed down my reserved judgment ("the Summary Judgment" [2021] EWHC 273 (Ch)) and made an order that summary judgment should be entered for the claimant on liability for misuse of private information and, to the extent indicated in the Summary Judgment, on liability for copyright infringement.
3. This process was carried out remotely, without attendance from the parties. A date had already been fixed to deal with consequential matters, whatever the outcome of the application. The hearing was fixed for Tuesday 2 March 2021, with a provisional time estimate of 1 hour. Again, this was a remote hearing.
4. The written skeleton arguments were filed on Monday 1 March 2021. They made clear that this was to be a hearing involving a good deal more than the usual argument on costs and permission to appeal. An email from the defendant's solicitors suggested that in the light of this, as much as half a day might be needed. I agreed to allow half a day, to include time for judgment. There was still some room for manoeuvre, as my next appointment was not before 3.30pm.
5. In the event, the hearing ended at 3.25pm. It had lasted for a full 4 hours, of which 3 ½ were taken up by Counsel's arguments. There was enough time for me to announce my decisions, and to give some reasons. But it proved necessary to reserve my decisions on some of the detail, and my reasons on some of the issues. Hence this judgment.

The Summary Judgment

6. The Summary Judgment is detailed, and runs to some 29,000 words, but in short I found that (1) the claimant was entitled to summary judgment on liability for misuse of private information; the defendant had no real prospect of successfully defending that claim, and there was no other compelling reason for a trial of that claim; (2) the claimant was entitled to summary judgment on the issues of subsistence and infringement of copyright, though some issues remained to be tried.
7. Those remaining issues arose from the defendant's contention that the claimant is not, or might not be, the sole owner of any copyright that subsisted in the Electronic Draft of the letter which is the subject of the claim. The putative co-author was Jason Knauf, of the Kensington Palace Communications Team, who was said to have been "involved" in the drafting process. The possibility was raised that this, coupled with his official role, might mean that there was a separate Crown copyright. I said this (at [166] and [168]):

“The defendant’s factual and legal case on this issue both seem to me to occupy the shadowland between improbability and unreality. The case is contingent, inferential and imprecise. It cannot be described as convincing, and seems improbable. It lacks any direct evidence to support it, and it is far from clear that any such evidence will become available. It is not possible to envisage a Court concluding that Mr Knauf’s contribution to the work as a whole was more than modest. The suggestion that his contribution generated a separate copyright, as opposed to a joint one is, in my judgment at the very outer margins of what is realistic.

...

I am not, however, persuaded that the need to try these issues carries with it the need for a trial of all the issues, notwithstanding the conclusions I have already expressed. That would not be consistent with the overriding objective. The trial will be the trial of limited issues within the copyright infringement claim, not a trial of the whole claim. The outcome could have consequences as to the extent to which the claimant can establish infringement of her copyright, and the remedies she can recover. But these in substance and reality are matters that go only to remedies, and are capable of resolution by case management. They are not a compelling reason for a trial of other issues on liability in this part of the claim. There is no room for doubt that the defendant’s conduct involved an infringement of copyright in the Electronic Draft of which the claimant was the owner or, at worst, a co-owner.”

8. I summarised my overall conclusions on the copyright aspect in this way (at [169]):

“The claimant is entitled to summary judgment on the issues of subsistence and infringement. She is bound to prove that she was the or an owner of the or a copyright in the literary form of the Electronic Draft which copyright was infringed by the defendant, and the defences advanced would be bound to fail. There remain for resolution by way of a trial the issues - of minor significance in the overall context - as to whether the claimant was the sole author or whether the involvement of Mr Knauf - whatever it proves to have been – made him a co-author; and if so, what consequences that has as on the extent of the infringement of which the claimant may complain, and on the remedies available.”

The consequential issues

9. I read and heard argument on four main issues.

(1) What are the remaining issues in the action, and what is the most appropriate procedural mechanism for dealing with them?

- (2) What remedies are appropriate at this stage? This issue raised a number of sub-issues. These are whether the claimant is entitled to:
- (i) a declaration as to her rights;
 - (ii) injunctive relief to restrain repetition of the acts complained of;
 - (iii) an order for publication and dissemination pursuant to Article 15 of the Enforcement Directive and PD63;
 - (iv) an order for delivery up and/or destruction of infringing copies of the Electronic Draft;
 - (v) an account of profits for copyright infringement; and/or
 - (vi) damages for misuse of private information.
- (3) What order should be made as to costs.
- (4) Whether the defendant should be granted permission to appeal.

Some context

10. The claimant sought all the remedies I have listed at 9(2) above. She made clear that she was willing to waive her right to disclosure before making an election between damages and an account of profits for copyright infringement. Her position in relation to damages for misuse of private information was that, subject to certain conditions, she would agree to accept an award of nominal damages. She describes this as setting a “cap” on her damages. The claimant seeks directions that this matter be dealt with at the further hearing which all agree is required. This was presented by the defendant as the claimant effectively abandoning all her pleaded claims of damage.
11. This is a familiar posture, often adopted by publishers in defamation cases where the claimant offers to accept an apology and costs, or modest damages, in order to compromise a claim. I do not see it that way. Of course, the claimant cannot adopt this position and seek findings of fact in respect of any of the matters she has pleaded in support of her case on harm. But that is not the same as accepting that the pleaded case on harm is untrue. I accept the explanation provided on the claimant’s behalf: that she is seeking to adopt a sensible and proportionate approach to the next stages of this case. The defendant’s submission on this point does not seem to me to belong to the real world of this litigation.
12. That brings me to the conditions under which the claimant stated she was willing to accept only nominal damages for misuse of private information. These were two: that an order was made for an account of profits for copyright infringement, and that there should be no successful appeal against my decision. The defendant’s position was that the claimant’s reduced claim for damages should be assessed forthwith. It was then argued that it was not permissible for the claimant to seek simultaneously both damages (even nominal damages) and an account of profits, as to do so would violate the principle against approbating and reprobating the same act. I was referred to *Ramzan v Brookwide Ltd* [2011] EWCA Civ 985 [2011] 2 P & C R 22. That is a case aptly described by Arden LJ as “a remarkable case which involves the assessment of damages

and interest resulting from the misappropriation by the appellant ... of a room forming part of a property owned by Mr Ramzan, then a bankrupt.” One of the issues was whether the judge had been inconsistent in awarding the claimant compensatory damages for the profits he would have made from the use of the room, and damages for breach of trust. The Court concluded that there was a single wrong, and hence the dual award was internally inconsistent: see [49-57].

13. All of this conjured up the possibility that the defendant might escape liability for an account of profits by submitting to a damages award of a few pounds or a few hundreds of pounds, which it would then portray as a climb-down by the claimant, and a win for the defendant, or at best a Pyrrhic victory for the claimant. Mr Mill QC for the claimant was undeterred. He stood his ground in relation to damages for misuse, and pressed on with the application for an account of profits, submitting that *Ramzan* was of no assistance here. In this case, he argued, the defendants committed two separate wrongs and there is nothing inconsistent in awarding damages for the one, and an account of profits for the other.
14. I could see no reason why the claimant should not be entitled to opt for an account of profits as her remedy of choice in respect of the copyright infringement, and I so ordered. Whilst I can see the force of Mr Mill’s submission on the inconsistency issue, my conclusion was that this potentially difficult question did not require resolution at the present stage. It would be better to defer it. One reason for that is the complexities arising from the claimant’s second condition.
15. I do not consider that an appeal would have any real prospect of success and for that reason I have refused the defendant’s application for permission to appeal. But of course, this is not my decision alone. The defendant is entitled to seek permission from the Court of Appeal, which may take a different view. If there is an appeal, it is entirely possible that the outcome will remain unknown by the time this case completes its further stages, unless those stages are held in abeyance meanwhile. I do not consider that they should be. An appeal does not operate as a stay, and I see no good or sufficient reason to impose one. On the contrary, it is desirable for this case to proceed with greater speed than it has to date.
16. That leaves me unclear as to how the question of damages for misuse of private information can properly be dealt with if the claimant maintains her current position and – as is entirely possible – uncertainty persists as to whether there will be an appeal and, if so, what the outcome will be. It is of course desirable that a decision on permission be made promptly. I can and will indicate as much in the form refusing permission that I have to complete. But I have granted an extension of time for filing papers with the Court of Appeal. The workload of the Court of Appeal means that these matters do take time in any event. And the outcome cannot be predicted. In the meantime, questions will arise (for instance) about what, if any, disclosure should be given in respect of damages. I do not think the damages issue can be left in abeyance indefinitely. If the question of an appeal remains live then, at some stage, it seems to me, the claimant will have to make a definitive decision.
17. Before the hearing, the claimant also made clear that she did not seek to pursue the two remaining aspects of her pleaded claims for liability in copyright infringement: her claim in respect of the Letter, as opposed to the Electronic Draft, and for infringement by authorising acts of reproduction by third parties. This stance was unconditional. At

the hearing, Mr Speck QC argued that the claimant could not do this. Neither Mr Mill QC nor I could identify any reason of principle why the claimant should not decide to drop aspects of her claim. Mr Mill, on her behalf, offered to amend the claim by deletion if necessary. That, in my judgment, is how the matters should be dealt with.

18. The claimant's Skeleton Argument set out her position in respect of the data protection claim. This was that she was prepared in principle not to pursue that either, and she offered an undertaking not to do so. Her contention was, and is, that the claim would be bound to succeed, and in any case would add nothing to the misuse claim. But the defendant was not prepared to accept that position. It called on the claimant to discontinue the claim (with the usual costs consequences) or to pursue it.
19. Mr White QC submitted that this was not just shadow boxing as a cover for points about costs. He said that the data protection claim includes a claim for substantial compensation which would be affected by the claimant's contingent reduction of her damages claim. And there is a claim for cessation of processing. For these reasons, he submits, it is not just the mirror of the privacy claim. These did not strike me as obviously powerful points. But the upshot was that the claimant withdrew her proposed abandonment of the data protection claim. She proposed to seek summary judgment on that claim also. In the circumstances, all that I was required to do was to lay down an appropriate procedural regime.

My conclusions

Procedural matters

20. The conclusions that I announced at the hearing are, in summary, as follows:
 - (1) There should be a hearing ("the Further Hearing") on a date to be fixed, to determine the remaining issues of copyright ownership, the profits to which the claimant is entitled for the defendant's acts of infringement, and what order should be made for payment of the sum found due on taking such an account. The Further Hearing would also determine, to the extent these issues remain live, (a) what if any financial remedies should be granted to the claimant in respect of her claim for misuse of private information and (b) the data protection claim.
 - (2) In case they can be used for the purposes of the Further Hearing, the dates in October 2021 that are currently fixed for the trial of the action will be retained with the time estimate reduced to 7 days.
 - (3) A hearing will take place to determine what directions should be given to ensure the case is ready for the Further Hearing. That hearing ("the Directions Hearing") will be on a date to be fixed between 20 April and 21 May 2021, with a provisional time estimate of 2 hours. The parties must keep that estimate under review and advise the Court as soon as they consider it to be inadequate.
 - (4) At the Directions Hearing the Court will address, in particular, (a) the question of what form of financial remedy for misuse of private information may be pursued by the claimant at the Further Hearing; (b) the future management of the remaining issues in the copyright claim; (c) the further conduct of the data protection claim, including any application for summary judgment; and (d) the timing and time

estimate for the Further Hearing, including the question of whether the October 2021 dates are suitable for that purpose.

- (5) In the meantime, (a) the defendant must state its case on the issue of ownership, and provision will be made for the notification and joinder of any person alleged to be an owner or co-owner of copyright in the Electronic Draft; the directions to this end are agreed; (b) any application by the claimant for summary judgment on the data protection claim must be filed and served promptly, and in any event by no later than 4pm on 16 March 2021; and (c) by no later than 4pm on 23 March 2021, the claimant must re-state her position in respect of the financial remedies she wishes to pursue in respect of misuse of private information (it being understood that she may simply reiterate her present stance).
- (6) The Anonymity Application (that is to say, the defendant's application to vary my order granting anonymity to the Five Friends) is stayed with liberty to apply in the event of a successful appeal.
- (7) I also resolved a dispute about the wording to be used in the recitals to the order.

Relief

21. In addition to my order for an account of profits and related directions, I made the following decisions:
 - (1) I should grant a declaration in the form sought or substantially that form.
 - (2) I should grant a final injunction to restrain misuse of private information. This will have a limited public domain carve-out to ensure that it does not prohibit publication of a fair and accurate report of the judgment (or for that matter commentary on the judgment).
 - (3) I should not at this stage grant a final injunction to restrain infringement of copyright in the Electronic Draft. The issue is reserved until after judgment on the remaining copyright issues.
 - (4) I should not grant an interim injunction against infringement of copyright in the Electronic Draft.
 - (5) I should make a limited order for publication and dissemination pursuant to the Part 63 PD, the detail and the reasons to be given in the reserved judgment.
 - (6) I should not make any order for delivery up or destruction at this stage. The issue may be revived at the Directions Hearing if the parties have not by then agreed; and, for that purpose, this aspect of the application is adjourned.

Costs

22. The argument proceeded on the shared assumption that no change would be made to the allocation of costs that had already been the subject of an order. I determined that the claimant should recover:
 - (1) her costs of the Anonymity Application;

- (2) 90% of her costs of the summary judgment application, the allocation of the remaining 10% to be reserved to await the determination of the remaining copyright issues following the Further Hearing;
 - (3) her costs of the liability issues in the misuse claim, with the exception of those relating to the issue raised by paragraph 9(9) of the Particulars of Claim (an allegation that was not pursued for the purposes of summary judgment); the costs of quantum issues in respect of misuse of private information are reserved, in accordance with my reservation of the issue of what the damages claim is going to be; and
 - (4) her costs to date of the liability issues in respect of copyright, with the exception of the following, as to which the order will be costs reserved (a) any costs relating exclusively to copyright in the Letter, as opposed to the Electronic Draft; and (b) any costs relating to the possibility that one or more persons other than the claimant is a joint or concurrent owner of the or a copyright in the Electronic Draft.
23. I ordered the defendant to make a payment on account of the costs identified in paragraph 22 above, in the sum of £450,000, within 14 days.

Permission to appeal

24. The defendant submitted a ten-page document containing ten grounds of appeal, with succinct argument in support. As already indicated, I refused permission. I did so because I did not consider that there is any real prospect that the Court of Appeal would reach a different conclusion as to the outcome of the claim for misuse of private information, or as to the issues I decided in the copyright claim. It was not suggested that there was or could be any other compelling reason for an appeal, and I could not identify one.

Reasons

25. As just indicated, I gave some reasons for some of the decisions I have listed above, and I consider those reasons to be sufficient to enable the parties and the public to understand my thinking on those issues. That applies to most of the procedural decisions, and to my decisions on costs and permission to appeal. What follows are reasons for those decisions that I do not see as falling into that category. Some supplementary reasons for refusing permission to appeal will be given in the form that I have to complete for that purpose, which will be filed at the same time as this judgment is handed down.

The Anonymity Application

26. The purpose of this application was to enable the defendant to seek third-party disclosure in the United States, in support of its case that the Five Friends were authorised by the claimant to make disclosures to and in People magazine. On 7 December 2020, I made an order adjourning the application until after judgment on the summary judgment application, observing that if the application was successful the Anonymity Application would “fall away – at least unless and until an appeal has been brought and upheld”.

27. At the hearing on 2 March 2021, the defendant latched onto those final words and suggested that there should be no order on the application, with permission for the defendant to re-apply should it be successful in an appeal against the entry of summary judgment. The claimant's position was that I should dismiss the application, arguing that "an appeal does not operate as a stay and the court manages proceedings before it on the basis of the rulings it has made, not on the basis of hypothetical outcomes."
28. I viewed these rival contentions as essentially to do with costs, and it seemed to me that the costs outcome would be the same whatever means I adopted of disposing of the application itself. The Anonymity Application was part of the defendant's procedural approach to defending what I have held to be the indefensible. It was inevitable that it must pay the costs. But I concluded that the appropriate course was the stay I have identified. The application became pointless and redundant in the light of my decision, but I had not adjudicated on its merits. The defendant can embrace complaint about this in its appeal papers, if so advised.

Declaration

29. The claimant applied for a declaration in the following terms:-

"The Defendant has misused the Claimant's private information and infringed her copyright in the Electronic Draft by publishing the extracts of the Letter that it did in The Mail on Sunday and in Mail Online."

30. A declaration is a discretionary remedy which has been described by Birss J (as he then was) as "an important part of the court's armoury of powers to do justice between the parties to a dispute": *Samsung Electronics (UK) Ltd v Apple Inc* [2012] EWHC 2049 (Pat) [9]. It is a remedy that can be convenient as a clear and authoritative distillation of what the court has decided, to be elaborated or explained, if necessary, by reference to the Court's judgment. But the Court will not make orders that are pointless, or which may lead to complications that would not otherwise arise.
31. For the claimant it was argued that the defendant's behaviour since judgment was handed down makes it important to have a formal statement from the court that is succinct and incapable of misinterpretation. The behaviour relied on includes what the claimant describes as a refusal to accept that she has succeeded in her claims, and the continued publication of the articles complained of. The defendant continued publishing these on *MailOnline* despite the hand-down of the Summary Judgment. It continued doing so until shortly before the hearing, a period of over two weeks. All that was said about that decision, when it was communicated to the claimant's side by email at 17:18 on Monday 1 March 2021 is that "As part of its consideration of the position following the judgment" the defendant had decided it should take the articles offline "pending either the trial of the remaining copyright issues or the outcome of an appeal (if permission is given)". I am invited to infer that this belated action is merely strategic, designed to bolster the defendant's position at this hearing. Mr Mill and Mr Rushbrooke also pointed to the way in which the Summary Judgment has been reported by the defendant and others, suggesting that this has been to an extent inaccurate and misleading.

32. The defendant objected to the grant of a declaration, submitting that it was contrary to principle, procedurally inappropriate, and unnecessary. Mr Speck advanced a general argument against the grant of this, or any, final relief at the present stage. He pointed out that I have not granted summary judgment on the copyright *claim* but only on *issues* within that claim, and he submitted that there is a very real difference between the two. For that reason, he argued, it is wrong in principle to grant any remedies at this stage; the stage for doing that is in the future. More generally, he submitted that there is a fundamental difficulty in granting relief or remedies in copyright unless and until you have identified what is or are the copyright work or works to be enforced. He pointed out that I have concluded that the proposition that there are or may be separate and distinct copyrights is not fanciful.
33. Further, submitted the defendant, there is no pleaded claim for a declaration. Moreover, the claimant is not now pursuing substantial damages, and it is hard to see what useful purpose could be served by such relief, in particular given the fact that the outcome has been widely reported. That submission about useful purpose stems from and reflects the words of Neuberger J in *FSA v Rourke* [2001] EWHC 704 (Ch) [2001] C P Rep 14:
- “... when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.”
34. I do not believe the defendant’s formal objection has any weight. If necessary, I will grant permission to amend the claim form to add a claim for this relief, which does not involve a separate cause of action and raises no issues about limitation. As a matter of substance, the defendant had ample notice of the claim and has been able to present full argument in response.
35. In my judgment, there is no real room for doubt or reasonable debate about the substance of the outcome here. But the Summary Judgment is long, and detailed. Court judgments, as opposed to summaries provided by reporters and others, are not often read in full by ordinary newspaper readers. I doubt that Mr White is right to submit that the Summary Judgment is “one of the most widely read public judgments of recent years”. But wherever it stands in that league table, the figures provided to me for hits on the judiciary website tell me that on the day it was handed down and posted on the judiciary website there were 4,652 overall views of the judgment, and a Judicial Office tweet sharing the link was retweeted 121 times. It goes without saying that these figures pale by comparison with the readership of the *Mail on Sunday* and *MailOnline*, and other media outlets that covered the story.
36. The reality is that what the vast majority of people learn about judgments comes (understandably) from whatever news sources they choose to use. For most people those news sources do not include the judiciary website devoted to the full text of the Court’s reasoned decision, or www.bailii.org, where the full text of judgments is published by the British and Irish Legal Information Institute. Indeed, although practice appears to be developing in this respect, it is by no means standard practice for online news reports to provide readers with even a link to the text of the judgment that is being reported or commented upon. In these circumstances, I see the force of the submission

that there is real value in a short and pithy formal summary of its effect, which carries the authority of the court, and is not open to misinterpretation.

37. News reporting is a different thing from the writing of judgments, and it is important not to be over-critical of the way in which the media report what is said and done in court. Inevitably, this involves summary and précis. A good degree of leeway must be allowed before condemning a report as inaccurate or misleading. A great deal of latitude must be given to commentary on the merits of a decision, or on the conduct of the litigants, if based on a sufficiently accurate account of the facts. Viewed in that light, I consider the claimant's criticisms of newspaper reports and commentary about the Summary Judgment are overstated.
38. But the fact is that there has been just one short article on an inside page of the *Mail on Sunday* and two articles in *MailOnline*. There is something to be said for the claimant's argument that the coverage of the case in *MailOnline* has not been very informative about the issues in the case and how they were resolved. The coverage could be read as suggesting that judgment in the claimant's favour on privacy "WITHOUT a trial" (sic) is a startling and unusual one, and that the entire question of whether the claimant owned any copyright was to go to trial. (The article said, "Mr Justice Warby ruled the issue over ownership of copyright of the letter she wrote to Mr Markle can be decided at trial".) There was a sentence in the article inviting readers to "read the [Summary Judgment] in full [here](#)", with a link to the full text on the judiciary website. But this was far from conspicuous. It came at the very end of a long article, running to over 1,100 words, which contained reporting and criticism of the judgment, and reports on other features of the litigation. Until guided to it by Counsel, I had failed to spot the link when reading the *MailOnline* article. There was no link to the two-page summary of the Summary Judgment that I prepared, which was also on the judiciary website, the purpose of which was to help readers follow its structure and easily identify and understand my conclusions.
39. I also place some weight on the fact that the defendant saw fit to continue the publication on MailOnline of articles that I had held to be a misuse of private information and an infringement of copyright, making them accessible (so it appears) to anyone from anywhere in the world. This cannot be accidental, or an oversight. In the absence of any explanation, I am tempted to infer that it is a form of defiance. But I do not need to make a finding. Whatever the reasons, this conduct could easily suggest - certainly to the casual reader - that the Court has taken a different view from the one I expressed in the judgment. That point is given added weight by the defendant's current stance in relation to (a) the claimant's position on damages for misuse, and (b) my decision on copyright. The claimant is entitled to say that justice to her supports the conclusion that the Court should place on record in a few words the substance of the outcome of the Summary Judgement.
40. The defendant has not identified any "special reason" against the grant of a declaration. It has not pointed to any form of harm or detriment to itself or to the public interest if I grant a declaration. It is not suggested that it would be unjust to grant it. I have not identified any other legitimate interest of the defendant in resisting the grant of this relief. In my judgment, therefore, the balance comes down in favour of granting this simple and effective form of formal relief. As for the form of the declaration, it might be said that the claimant's draft is open to a criticism opposite to the one I have identified above: it could imply that the claimant has unequivocally won her copyright

claim. But in my judgment, this wording reflects the substance of my decision with greater and sufficient accuracy.

Injunctions

41. The claimant has established that the publication complained of infringed her civil right to protection against the misuse of her private information. The grant of an injunction does not follow as a matter of course; it is a matter of judgment and discretion. But in my judgment, it cannot in all the circumstances be said that damages would be a sufficient remedy. That will rarely be the case in a privacy claim, and in this one it is not an available conclusion. Nor has the defendant argued that it is. I proceed on the basis that this was a significant interference with the claimant's rights. There is also a sufficient basis for concern that, unless restrained by injunction, the defendant might further publish the information at issue, or some part of it, without the consent of the claimant. There are multiple factors which, taken together, suggest that this is a risk. Among them are the exceptionally vigorous way in which the case has been defended; the continued publication despite the terms of the judgment; the lack of any explanation for that continued publication; the absence of any offer of an undertaking; the fact that the email explaining why the articles are being taken offline implies that they could be restored after the trial of the remaining copyright issues; and the fact that at the hearing before me it was submitted for the first time that an injunction should not be granted in privacy on, as I understood it, public domain grounds.
42. Mr White made the point that the Summary Judgment contains all the words complained of, and more. That is true. It was something I considered unavoidable if my decision was to be transparent and comprehensible to those who chose to read it; and the claimant did not object when the draft was circulated. Judgments are public documents, and there is no restriction on reporting of this one. It follows that it would be wrong to grant an injunction that would have the effect of restraining reporting of the content of the Letter for the purposes of reporting the Summary Judgment. For that purpose, the carve-out I have mentioned will be necessary. That will mean that it will not be a contempt of court to publish the information in the Letter, in the context of a court report.
43. It does not follow, however, that the information in the Letter has become public domain information such that the claimant can no longer seek to protect it. It is not the case that the inclusion of text in the Summary Judgment means that the defendant or anyone else has a licence to continue publishing or to repeat the publication complained of, in whatever fashion they choose. As I said at the hearing, the carve-out will not allow snippets of the information in the Letter to be reproduced in any other context. I do not need to say more about the other exceptions proposed by the defendant, to the extent these are agreed by the time the order is drawn up. Any remaining disputes over those exceptions will be resolved at the Directions Hearing.
44. But for the issue about ownership, I would not have hesitated to grant a final injunction in copyright. The reason for not doing so is that the defendant objected to an order that restrained it from infringing copyright which may not belong to the claimant. That would not be an objection in principle if the copyright is jointly owned. It would arise only in the event of a several (ie separate) copyright. That, as I have previously stated, seems highly improbable. But it is not impossible.

45. The option of an interim injunction in copyright is one that I had contemplated, and raised with Counsel. My thinking was that even if such an order went beyond the parameters of the rights the claimant ultimately establishes, that would not be wrong in principle or otherwise objectionable. It is permissible for an injunction to go beyond the limits of the right in question, and even to restrict otherwise lawful activity, where that is necessary in order to achieve effective relief: *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 [2020] 1 WLR 2802 [78], [82(5)]. Here, it seemed arguable that this was so. It is not, after all, suggested that the defendant has the licence of the other putative copyright owner(s) to reproduce whatever part of the Electronic Draft may be their original authorial literary work. And any putative owner will be given an opportunity to be joined in the action. But Mr Speck objected to an interim order. He made two main points: there was no application and hence no preparation had been undertaken to meet such issues, and there would have to be an undertaking as to damages. Having taken instructions, Mr Mill made clear that he had no instructions to seek an interim order.

An order for publication and dissemination

46. The form of order sought by the claimant's draft order is a direction that within 7 days the defendant shall at its own expense do the following:

“(a) publish in *The Mail on Sunday*: (i) the Notice that appears at Annex B hereto on page 5, and in a font and size no smaller than appeared in the Articles defined at (1) in Annex A; and (ii) the Statement that appears at Annex B hereto on the front page of *The Mail on Sunday*, such Statement to appear in a font and size no smaller than appeared the wording “*Meghan’s shattering letter to her father*” on the front page of *The Mail on Sunday* dated 10 February 2019; and

(b) post the Notice in a font and size no smaller than Arial size 12 on the home page of the *MailOnline* for a period of not less than 6 months, together with a hyperlink to the Judgment.”

47. “The Notice” and “the Statement” are defined terms, and Annex B reads as follows:

“The Notice

‘Notice

Following a hearing on 19-20 January 2021, the Court has given judgment for The Duchess of Sussex on her claims for misuse of private information and copyright infringement arising out of articles published in *The Mail on Sunday* and posted on *Mail Online*. The Court found that Associated Newspapers misused her private information and infringed her copyright by publishing extracts of her private handwritten letter to her father in *The Mail on Sunday* and on *Mail Online*’.

The Statement

‘The Duchess of Sussex wins her legal case for breach of privacy and copyright against Associated Newspapers for articles published in *The Mail on Sunday* and posted on *Mail Online* – see page 5.’”

48. The relevant law is contained in Directive 2004/48/EC (“the Enforcement Directive”) and in the Part 63 Practice Direction. Article 15 of the Enforcement Directive provides as follows:-

“Publication of judicial decisions

Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part. Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising.”

49. It is common ground that this must be interpreted and applied in the light of the policy objectives recorded in Recital 27, which states:

“To act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions in intellectual property infringement cases.”

50. Paragraph 26.2 of PD63 provides as follows:-

“Where the court finds that an intellectual property right has been infringed, the court may, at the request of the applicant, order appropriate measures for the dissemination and publication of the judgment to be taken at the expense of the infringer.”

51. This wording indicates that where the Enforcement Directive applies, the court has a discretion to grant this form of relief. I have been referred to authorities on how the Court should approach the exercise of this discretionary power (*Guccio Gucci SpA v Dune* [2010] EWHC 153 (Ch), (Norris J), cited with approval in *32Red Plc v WHG* [2011] EWHC 665 (Ch) [31-32], [35] (Henderson J), and to illustrative examples of the exercise of this jurisdiction (in addition to the above, *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2010] FSR 2 [114], *Samsung Electronics (UK) Ltd v Apple Inc* [2012] EWCA Civ 1339, [2013] ECDR 2 [50-51], [69], [71], [83-84], *Cosmetic Warriors Ltd v Amazon.co.uk Ltd* [2014] EWHC 1315 (Ch) [30-41] and *Enterprise Holdings Inc v Europcar Group UK Ltd* [2015] EWHC 300 (Ch) [42-46]).

52. These authorities indicate that it is common practice to make such orders in IP litigation, and that policy favours doing so, in view of the difficulties which owners of IP rights face in identifying and successfully pursuing infringers. The court will take account of

all the circumstances, but the following factors may count in favour of making such an order: (a) deterrence of the infringing defendant; (b) that publication of the result would be a deterrent to other infringers. Factors that may count against the grant of such an order include the strength of the policy grounds on the particular facts of the case, and any procedural or practical obstacles to making an effective and proportionate order. The applicant will need to present the court with a precise form of order, and a workable solution. The solution will need to identify appropriate platforms or publications for the notice. It may include a notice, with a hyperlink to the main judgment.

53. The case for the claimant is that the order sought would (1) act as a deterrent to future infringers; and (2) contribute to public awareness, and in particular awareness among readers of the *Mail on Sunday* and *MailOnline*. It is submitted that these considerations are bolstered by the prominence and sensationalist terms of the infringing Articles; the fact that the defendant failed to take the articles down until weeks after the Summary Judgment; the extensive publication by the defendant about this litigation; the limited and in some respects unsatisfactory terms of the articles published about the Summary Judgment. It is also submitted that it would not be difficult for the defendant to comply. This is not a case in which the defendant needs to secure third-party co-operation to achieve what is sought; it owns the mechanism required to make the publication.
54. For the defendant, Mr Speck argued that the application for such an order is wrong in principle, as it goes beyond the copyright claim. In relation to that claim, he relied on the general objections to relief at this stage that I have summarised above. He argued that the application is premature, because (as demonstrated by the wording of the relief sought), it is based on the false premise that the claimant has succeeded on the claim, as opposed to issues within the claim for copyright infringement. Mr Speck further submitted that it is clear from Article 27 that there are only two legitimate purposes for which such an order may be made: (1) as a “supplementary” deterrent to future infringers and (2) to contribute to the awareness of the public at large. Neither purpose applied here. There is no need for the former, and the latter is amply satisfied by the publicity already given to the Summary Judgment.
55. Mr Speck argued, in addition, that the real purpose of Article 15 is to facilitate effective relief in claims for the infringement of commercially valuable IP rights. It is not apt for deployment in a media context such as the present. Media litigation such as this is “not what these orders are about”, he argued. Discursive remedies of any kind are unusual in defamation and privacy actions. I should at the very least approach the application with considerable caution. He drew attention to the observations of Nicklin J in *Monir v Wood* [2018] EWHC 3525 (QB) [239-240], about the care required in the exercise of the jurisdiction conferred by s 12 of the Defamation Act 2013, which allows the court to order publication of a summary of its judgment. Nicklin J pointed out that orders under that section are “not to be made as any sort of punishment of the defendant”, and involve an interference with Convention rights, requiring justification. Counsel went so far as to suggest in writing that in this case this remedy is “intended more as a species of punishment or retribution, rather than as a necessary and proportionate measure in the interests of the claimant or the public”. The submission was repeated in oral argument.
56. I accept of course that this remedy should not be granted as a punitive measure, or with a view to humiliating a defendant. I would not do so. I do not consider that the defendant is justified in suggesting that this application is motivated by punitive considerations.

Two points are relied on to justify the inference that this is the position: “the invasive nature of the remedy itself and the lack of any proper justification put forward for the making of the Order in the Claimant’s evidence”. The use of the term “invasive” is unusual. The notion of invading someone’s private life is well understood; but I have not previously come across a complaint by a publisher that a court order giving effect to a judgment is “invasive”. I take it to be a way of saying that – as I accept - a discursive remedy of this kind is an interference with the defendant’s autonomous control over what it puts in the *Mail on Sunday* and *MailOnline*.

57. I also accept, as is obvious, that such an order represents an interference with freedom of expression which requires to be justified as a measure that is in accordance with law, and necessary and proportionate in pursuit of a legitimate aim. Here, the legitimate aim is plain and obvious: it is the protection and vindication of the rights of the claimant, whose civil rights have been infringed by the defendant’s publication. That is a compensatory aim. There can be no doubt that interferences with freedom of expression for such a purpose *can* be justified. Otherwise, provisions such as Article 15 of the Enforcement Directive and s 12 of the 2013 Act would be incompatible with the Convention. That this is not so is clear from Strasbourg authorities such as *Wegrzynowski v Poland* Application no 33846/07, Judgment of 16 August 2013 [59], [66]. Also relevant is the Editors’ Code of Conduct, to which the defendant is a subscriber (“the Code”). This contains an “invasive” provision that., by clause 1(iv), subject to some immaterial exceptions, “A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party ...”
58. The real issues for consideration are twofold. First, whether the interference is prescribed by law and secondly, whether on the particular facts of this case it is necessary and proportionate.
59. The first issue is my way of framing the question of whether the remedy can lawfully be applied to a claim in misuse of private information. That seems to me to be debatable. I doubt that such a claim falls within the scope of the term “intellectual property” in the Enforcement Directive or PD63. That leaves open the question of whether the court nonetheless has a discretion, where breach of an IP right has been established, to grant an order that includes wording such as that which I have quoted above. That, in my view, is arguable.
60. If the power does extend that far, I can see good arguments for being ready to use it in media cases, where appropriate, and with due caution. The grant of discursive remedies has so far been relatively unusual in this category of litigation, and there is no coherent scheme governing their availability. But there are some powers, they have been used, and they are not inherently inappropriate. In my judgment, they can be a valuable tool. The editors of *Gatley on Libel and Slander* 5th edition say this about s 12 of the 2013 Act: “orders under s 12 may be expected to become standard when judgment is given in favour of the claimant” (para 9.46). That has yet to happen, but in *Shakil-Ur-Rahman v Ary Network Ltd* [2016] EWHC 3570 (QB) Sir David Eady granted a s 12 order, observing that many of viewers of the defendant’s TV output would not otherwise know what had actually happened in the case. There are powers in the data protection legislation that allow the court to grant similar relief, where appropriate: see the discussion in *Aven and ors v Orbis Business Intelligence Ltd* [2020] EWHC 1812 (QB) [188-190]. It would seem anomalous if claims for misuse of private information should be the exception to the rule.

61. The different nature of the causes of action may mean that different considerations apply. Most privacy claims relate to information that has not been published, or which has received limited publication, and publicity for the outcome may not be helpful. Even so, since 2011 the Part 53 Practice Direction has made provision for public statements in open court, where a claim in misuse of private information has settled, and the norm appears to be that permission should be granted for such a statement, if sought: *Webb v Lewis Silkin LLP* [2016] EWHC 1225 (Ch), *Richard v BBC* [2017] EWHC 1648 (Ch) [2017] EMLR 25, *Hemsworth v Department for Work and Pensions* [2018] EWHC 1998 (QB) [41-42]. In *Hemsworth*, I said at [43] that “where private information about an individual has been widely publicised, in the media or otherwise ... it would be understandable for a claimant to want publicity for his victory, and one can see that a SIOC would be fitting”.
62. Factors that might carry weight, in some instances, include the fact that many newspapers’ internet archives - and indeed some other newspaper archives - are readily accessible sources of information for members of the public. More generally, there is often an inequality of power over the means of publication. In a sense, anyone can be a publisher now. But it remains the case that commercial publishers have greater access and greater influence than most. And where the wrong consists of publication to the public at large in a newspaper or online medium, redress via the same medium and to the same audience appears intrinsically appropriate. The discussion above makes clear that it is not, in itself, an objectionable or disproportionate interference with free speech to require a newspaper that has made a wrongful publication to publish a supplementary statement, be it a correction or a reference to the court’s judgment. A publication requirement that imposed a disproportionate financial burden would be impermissible (see *Kurski v Poland*, Application no 26115/10, Judgment of 5 July 2016 [57]) but that is not likely to be an issue when it comes to major national newspaper publishers such as the defendant in this case.
63. It is unnecessary for me to resolve the question of principle on this occasion, as Mr Mill has indicated that his client would be content with lesser versions of the Notice and Statement, limited in scope, as follows:

“Following a hearing on 10-20 January 2021, the Court has given judgment for The Duchess of Sussex on her claim for copyright infringement. The Court found that Associated Newspapers infringed her copyright by publishing extracts of her handwritten letter to her father in *The Mail on Sunday* and in *Mail Online*”.

“The Duchess of Sussex wins her legal case for copyright infringement against Associated Newspapers for articles published in *The Mail on Sunday* and posted on *Mail Online* – see page 4”.
64. I think this is a preferable approach, given my reservations about the scope of the powers that have been invoked. It also seems to me more targeted and better fitted to the circumstances of the case. There is some force in the defendant’s contention that the media coverage of the case (copies of which are before me in the hearing bundle) has given wide publicity to the claimant’s unequivocal success on the privacy claim. The criticisms of the defendant’s own coverage relate to what it has said or not said

about the copyright claim. Further, the reality is that anyone who followed the link to the judgment to find out more would swiftly learn about the privacy claim and its fate.

65. A decision on whether to grant this remedy, and in what terms, is one that engages not only Article 10 of the Convention but also section 12 of the Human Rights Act 1998. I was not addressed specifically on this, but I remind myself that s 12(4) requires that I should have particular regard to three matters: the extent to which information is or is about to enter the public domain; the extent to which it would be in the public interest; and “any relevant privacy code” – in this case, the Code. In *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB) [68]ff I considered s 12(4), albeit in a different context. In the present case the main points that emerge seem to me to be that I must pay particular attention to the extent of the publicity that the Summary Judgment has already received. I should bear in mind that the defendant has reported the outcome of this case, although the Code does not require this. I should also have particular regard to whether there is any public interest in the publication by the defendant of a further statement, and if so the weight of that public interest.
66. I do not consider I should attach any great weight to the absence from the Code of any provision requiring the publication of a fair and accurate account of the outcome of a privacy action, or claim in copyright, or harassment, or data protection. I do not believe this is the result of a conscious policy decision. The provisions of what is now para 1(iv) have been in place for a very long time; I believe they were in the original Editors’ Code in the time of the Press Complaints Commission, before the Human Rights Act 1998. Over the intervening years, the landscape of media litigation has changed. The tort of misuse of private information has emerged and other torts I have mentioned have gained prominence. I do attach real weight to the fact that the defendant has published reports of the outcome of the case. But among the other factors that come into play here are those I have discussed at [60-62] above.
67. In my judgment it is appropriate in all the circumstances of this case to make an order pursuant to PD63 that reflects the claimant’s success on the specific issues in the copyright claim that I have resolved in her favour. It would have a genuine utility. I consider that the revised form of order sought falls within the scope of Article 15, which refers to the court’s “decision”. I also consider that it falls within the scope of the Part 63 PD, which may be more limited as it refers to a situation where “the court finds that an intellectual property right has been infringed.” Such an order would serve both of the purposes identified by Mr Speck. It would also tend to deter the defendant itself, which I consider to be a purpose firmly within the scope of Article 27 and thus Article 15. I do not accept that the limited publication by the defendant itself renders this process unnecessary or superfluous.
68. As to proportionality, the defendant devoted a very considerable amount of space to the infringing articles, which it continued to publish for over 2 years. It has devoted a very considerable number of further column inches, and many hundreds if not thousands of words, to coverage of earlier stages of this litigation and commentary upon them. The wording sought is modest by comparison, and factual in nature.
69. But I am not persuaded of the case for prolonged publication, nor am I persuaded that all the detail of what is proposed is necessary and proportionate. There is some force in Mr Speck’s submission that the form of relief sought does not reflect what the Court has actually decided. There is room for some refinement and adjustment of the detail,

and I have given the defendant time to put in representations about practicalities. But the form of order I intend to make is for the following publication:

- (1) In the hard copy *Mail on Sunday*, on a single occasion: a Statement on the front page in the revised terms proposed by Mr Mill, save that it refers to page 3. The Notice will appear above the fold on page 3, in these terms.

“The Duchess of Sussex

Following a hearing on 10-20 January 2021, the Court has given judgment for The Duchess of Sussex on her claim for copyright infringement. The Court found that Associated Newspapers infringed her copyright by publishing extracts of her handwritten letter to her father in *The Mail on Sunday* and in *Mail Online*.

There will be a trial of the remedies to which the Duchess is entitled, at which the court will decide whether the Duchess is the exclusive owner of copyright in all parts of the letter, or whether any other person owns a share.”

- (2) The order will make provision as to the font size of the Notice and Statement, by specific reference to a previously published article in *The Mail on Sunday*.
 - (3) On *MailOnline*, for a period of one week, a Notice in the above terms, but with these additional words at the end of the first paragraph, hyperlinked to the judgment and summary: “The full judgment and the Court’s summary of it can be found [here](#).”
 - (4) The order will make specific provision as to the format of this version of the Notice, appropriate to the online medium and the particular context.
70. In my judgment these are measured incursions into the defendant’s freedom to decide what it publishes and does not publish, that are justified in pursuit of the legitimate aim I have identified, and proportionate to that aim. They will involve little if any additional expense, and certainly nothing approaching the scale of the expense that has been lavished on this litigation.

Delivery up or destruction

71. It seems very likely that the claimant will prove to be entitled to an order for delivery up of infringing copies of the Electronic Draft, subject to certain exceptions. But the defendant resisted this on the basis I have already identified: that it is premature to make orders predicated on copyright ownership, when the scope of those rights has yet to be finally determined. As indicated, I accept the force of that, in some contexts. I do not see a reason why it should inhibit the taking of an account of profits, as the process depends on what the defendant made out of exploitation of the Electronic Draft. It will be the same or substantially the same whether or not there is a co-owner or a separate copyright. It is, as I have said before, essentially a matter of case management. But in the context of injunctions and in the present context, the complexities of orders that might go beyond the scope of the claimant’s rights are sufficient to put me off, for the time being. With some regret, I accept Mr Speck’s submission that this remedy should not be granted at this stage. I will adjourn that issue.

72. That makes it unnecessary to address the defendant's case as to some exceptions that should be made to any delivery up order, such as retention of copies for the purposes of litigation and redaction of privileged material. I believe the parties were close to agreement on the scope of such exceptions and they may in future reach agreement. But the issue is not ripe for determination.

The form of order

73. I make clear that although I have decided the issues of principle, some matters of drafting remain to be completed. The orders I have identified will not take effect until they have been reduced to writing in final form and issued by way of a formal order of the Court.

A footnote: the data protection claim

74. While this judgment was under preparation, the parties agreed informed the Court that they had agreed that claimant's data protection claim could be dealt with in the manner originally suggested by her draft Order. Accordingly, the claimant will not be making an application for summary judgment, and the order will not need to contain the related directions referred to at [20] above.