[GB] The Daily Mail’s defence against HRH Duchess of Sussex right to privacy claim summarily struck out by the High Court

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The Honourable Mr Justice Warby of the High Court of Justice upheld a summary judgment application against Associated Newspapers Limited (ANL), according to which the publisher of the *Mail on Sunday* newspaper, had misused HRH The Duchess of Sussex (Meghan Markle) private information by publishing a private letter addressed to her father.

HRH applied to the court under rules 3.4(2)(a) and 24.2 of the Civil Procedure Rules to have ANL’s defence struck out. Rule 3.4(2(a) allows the court to strike out a defence or part of it “if it appears to the court … that the statement of case discloses no reasonable grounds for.. defending the claim.”

HRH had sued ANL for publishing a letter she had written to her father which he disclosed to the publisher after reading an article in a US magazine, *People*, bearing the headline "The Truth about Meghan. Her best friends break their silence." The article refers to the content of HRH’s letter. Her father considered the *People* article had misrepresented his conduct and the content of letters between him and HRH.

On 9th February 2019 the *Mail on Sunday* published an article including one online. The headline said: "Revealed: the letter showing true tragedy of Meghan’s rift with her father she says has ‘broken her heart into a million pieces.’"

HRH claimed damages for breach of privacy, breach of copyright and data protection issues. ANL defence included HRH had no expectation of privacy given her prominent profile. Also, ANL’s argued that her letter had been co-authored by a member of the royal household staff and HRH did not have sole authorship.

HRH sought a summary judgment arguing that the defence showed no realistic prospect of success at the final trial.

Regarding privacy the court had to consider a two part test. Did HRH enjoy a reasonable expectation of privacy in respect of the information in question? The court had to consider various factors, namely the attributes of the claimant; the nature of of the activity in which the claimant was engaged; the place at which it was happening; the nature and purpose of the intrusion; the absence of consent

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whether it was known or could be inferred; the effect on the claimant; and the circumstances in which and the purposes for which the information came into the hands of the publisher.

The second criteria was whether in all the circumstances the privacy rights of the claimant must yield to the imperatives of the freedom of expression.

ANL's arguments included that the letter was already in the public domain by virtue of the references in the *People* article, albeit the letter's content was not published. ANL's article gave HRH's father opportunity to set the record straight and deal with any misconceptions arising from the *People* article. HRH's father asserted he would have kept the letter private but this changed when HRH's friends "attacked" him in the People*People* article.

The court considered that HRH had not lost her right to keep the letter private; she had written a very personal letter to her father who had originally intended to keep it private until changing his mind. Whilst the *People* article referred to the letter it included no actual extracts from the letter nor was there evidence of HRH contributing or encouraging the article. ANL had not contacted HRH before publication although the article made substantial references to the letter. ANL contended the letter helped vindicate HRH's father; the court considered at best only a fraction of the letter helped the father. Furthermore, because the father volunteered the letter to ANL that neither ".. defeats or overrides the claimant's presumptive right to keep the contents of her (HRH) Letter private."

Whilst the *People* article referred to the letter, it did not of itself create public domain in the letter. "The short point is that disclosure of information about the existence of the Letter and a description of its contents is not at all the same thing as disclosure of the detailed content. The distinction between fact and detail is an obvious and well-established feature of this branch of the law, vividly illustrated by this case."

In this case the court considered that the interference with freedom of expression was a necessary and proportionate means of protecting HRH's privacy.

Regarding breach of copyright, including fair dealing, a separate hearing would determine whether the letter was jointly owned copyright or whether the letter was an original literary work for the purposes of the Part 1 of the Copyright, Designs and Patents Act 1988.

The High Court refused ANL leave to appeal and they would need to seek permission of the Court of Appeal for any appeal.

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HRH The Duchess of Sussex v Associated Newspapers Limited in the High Court of Justice, Chancery Division, Business and Property Courts-Intellectual Property List [2021]EWHC 273 (Ch). Date of Judgement 11th February 2021

https://www.judiciary.uk/wp-content/uploads/2021/02/Duchess-of-Sussex-v-Associated-2021-EWCH-273-Ch.pdf

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