



[2020] EWHC 3093 (Ch)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2020

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties and their representatives by email and release to Bailii on the date shown.

Before:

THE HON. MR JUSTICE WARBY

Between:

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

Ian Mill QC, Jane Phillips and Jessie Bowhill (instructed by **Schillings International LLP**
for the **Claimant**)

Antony White QC, Alexandra Marzec and Gervase de Wilde (instructed by **Reynolds
Porter Chamberlain LLP**) for the **Defendant**

Hearing date: 29 October 2020

JUDGMENT

This is a public version of a judgment given in private on 13 November 2020. Redactions have been made to ensure that the remainder can be made public.

Mr Justice Warby:

1. On 20 October 2020, the claimant filed an application to vacate the trial date of 11 January 2021 and adjourn the trial to a date in the Autumn of 2021. She relied on a confidential ground, and two others. By the morning of Wednesday 28 October 2020, the claimant had decided not to pursue the other grounds, and the defendant had reached the view that it would not oppose the application to adjourn on the confidential ground. On the morning of Thursday 29 October 2020, I heard the application in private and, having heard argument, I granted it. I gave a short extempore judgment in private. I repeated that judgment, when the hearing moved into public session, for other matters to be addressed. I said that the parties would receive more detailed reasons in confidence, by way of a private judgment. This is that judgment.
2. [REDACTED]
3. This judgment will be short and will not set out much in the way of details of the application, the private and confidential information, or the evidence about it. It is unnecessary, and undesirable, to do so. The essential facts about the application are public. [REDACTED]
4. As I have said, the application, as presented at the hearing, rested purely on the confidential ground. There was no dispute as to the applicable principles, ... [REDACTED]
5. ...
6. ..
7. ...
- 8.
9. ... [REDACTED] ... And I do not consider that there are any countervailing factors weighty enough to justify refusal of the application.
10. It is not suggested that an adjournment would cause the defendant any significant financial prejudice. The defendant has mentioned concern about delay, and that is always undesirable. But it is necessary to identify some possible consequences, and assess the risk that these might adversely affect the due administration of justice.
11. The defence to this claim will not rely to any great extent on evidence from witnesses to particular events. In the main, it depends on allegations about the claimant's own behaviour, and documents. One matter has been identified in the evidence as potentially giving rise to a risk of prejudice to the defendant. A witness statement from the defendant's Group Editorial Legal Director, Liz Hartley, recounts what the claimant's father, Thomas Markle, has said of his own attitude to delay. Mr Markle

has been identified as a potential witness for the defendant. He has said he would prefer an early trial, because he is finding the process stressful. He is elderly and not in the best of health. Details from Ms Hartley's statement need not be recounted here. They are available to the parties. But two points deserve examination.

12. Ms Hartley describes Mr Markle as "an important witness". I had wondered quite how important Mr Markle's evidence really was to the defence case. It was not immediately obvious to me why he was considered to be important. Mr White QC accepted, in the course of his submissions, that any impression the public might have gained, from earlier reporting about this case, that it involves in substance a family battle between a daughter and her father would be inaccurate. He gave two main reasons why Mr Markle's evidence matters. First, he said that the claimant had chosen to plead that a number of the allegations in the articles, reflecting Mr Markle's version of events, are false. In addition, submits Mr White, Mr Markle's Article 10 rights require consideration, so that "his reasons for bringing the Letter to the paper and seeking to have it published" are of importance. It seems that the defendant's position is that Mr Markle's reaction to the People article, the inferences he drew, and his feelings about these matters, are relevant to an assessment of the Article 10/Article 8 balance.
13. This second strand of reasoning will need some further thought at some stage in this case. The defendant has argued, successfully, that its own state of mind and motives are wholly irrelevant to liability and damages for misuse of private information, the tests being objective. Although the defendant's motives for reproducing the Letter have been identified as a topic for disclosure, that is in relation to the fair dealing defence only. It is not immediately obvious how Mr Markle's thoughts and feelings come into play.
14. At any rate, Mr Markle's subjective thoughts and feelings do seem to be, on any objective view, a relatively minor aspect of the case overall. It is not suggested that Mr Markle's evidence on those topics is an essential component of the defence case. More importantly, as Mr Mill QC has observed, there is no suggestion that Mr Markle would not be available to give evidence later next year. There is, in particular, no medical evidence suggesting that a delay would make his availability less likely. And the defendant accepts that it has a signed statement from Mr Markle. There is, I would add, no apparent impediment to the defendant taking a deposition or other form of independently recorded statement from Mr Markle in advance of the revised trial date, or to his giving evidence by video-link if not well enough to travel.
15. Secondly, the evidence before me included not only an account of Mr Markle's situation and health but also an account of his views and feelings about a possible delay to the trial. But it was not suggested that his feelings on that matter should guide my decision. Rightly so, and particularly so when – as Ms Hartley makes clear – he has (quite rightly) not been told the confidential basis for the adjournment application.