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Interim injunction granted to stop publication of confidential schedule (HRH The Duchess of Sussex v Associated Newspapers Ltd)

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Information Law analysis: The claimant, HRH The Duchess of Sussex, is suing Associated Newspapers Ltd (ANL) over the publication of articles containing extracts from a letter that Ms Markle wrote to her father. The court granted Ms Markle's interim application to stop ANL from publishing the names of her friends who gave anonymous interviews about her to an American magazine, which were included in a confidential schedule to one of Ms Markle's responses in the claim. Mr Justice Warby made clear that the position on confidentiality may change as the case progresses. However, his ruling sets an important precedent with respect to confidentiality of sources who may also be key witnesses in a claim. His judgment also raises important questions about whether it is appropriate for the parties to a claim to publicise details of court papers outside of the courtroom.

HRH The Duchess of Sussex v Associated Newspapers Ltd [\[2020\] EWHC 2160 \(Ch\)](#)

What are the practical implications of this case?

This case highlights the issues faced by parties involved in high-profile proceedings, where there are confidential elements involved. This case in particular involves a number of confidential sources who are also private individuals.

In all media cases, the concept of open justice must be at the forefront. However, particularly in privacy cases, there is a balance to be struck between confidentiality and open justice. As such, and as has been demonstrated in this case, it is important for practitioners to consider carefully whether placing information in a confidential schedule to a statement of case is necessary in the interests of the administration of justice, since it will be open to scrutiny. In addition, in respect of those wishing to publish confidential information, practitioners should consider whether that information, if published, would properly enable and enhance the due administration of justice and the fairness and transparency of the court process.

It is of particular relevance in this case that Ms Markle was seeking to maintain the anonymity of her friends, because it is likely that one or more of them will be called as witnesses at full trial. However, given that this case has been the subject of intense media scrutiny, the publication of the names of the friends could have a number of adverse effects, not only for the friends themselves, but also for the fairness of the trial.

What was the background?

Ms Markle is suing ANL for misuse of private information, breach of duty under the General Data Protection [Regulation \(EU\) 2016/679](#) and copyright infringement. These causes of action arise from ANL publishing articles in the *Mail on Sunday* and *MailOnline* on 10 February 2019 in which, without Ms Markle's consent, ANL reported the contents of, and reproduced extracts from, a letter Ms Markle had sent her father in August 2018. Most recently in this case, ANL succeeded in having parts of the claimant's statement of case struck out in a judgment given on 1 May 2020.

At the time of the strike-out and in relation to the misuse of private information, ANL's case was that:

- the letter was neither private nor confidential
- Ms Markle's conduct meant that her expectation of privacy was at the least weakened, and
- in any case, its publication was justified in pursuit of the protection of freedom of expression

To strengthen its argument, ANL referred to an article published in the American magazine *People* on 6 February 2019, in which five friends gave anonymous interviews about Ms Markle, one of

whom referred to the letter itself. ANL's defence argues that the publication of the article and its widespread publication was something which Ms Markle 'sought and intended'.

Ms Markle refutes this and states that she only became aware of the article upon its publication and it was only after this that a number of her close friends had, without her knowledge, offered and agreed to give anonymous interviews, in support of her, to the magazine. In particular, she refers to the reference and contents of the letter—not only was the provided summary of its contents wrong, but it was done so without her permission.

Since the strike-out, ANL has made various requests of Ms Markle. Its request on 3 June 2020 asked that Ms Markle identify the friends who had provided the interviews to *People*. Ms Markle duly provided her response, signed with a statement of truth, and within it identified the individuals in a confidential schedule. They were also referred to as 'Friends B to E' in the body of the text. ANL widely published the contents of the response and then on 6 July 2020 wrote to Ms Markle's solicitors stating that the use of the confidential schedule was illegitimate and unless Ms Markle applied for an injunction by 9 July 2020, ANL would assume that Ms Markle was not persisting in her belief that it was confidential. It is for this reason that Ms Markle's application came before the court and sought an order pursuant to [CPR 18.2](#) and [CPR 5.4C\(4\)](#).

What did the court decide?

Warby J, soon to be sitting in the Court of Appeal, granted the interim injunction 'for the time being at least' in favour of Ms Markle against ANL. Giving his decision, he explained his reasoning in relation to both the substantive and procedural matters at issue.

As to the question of the competing demands of open justice and confidentiality, Warby J found that the parties' previous conduct in publishing aspects of the case to the media to suit their respective aims was relevant. Despite ANL's argument that the disclosure of the friends' names would uphold open justice, Warby J found that ANL's previous publications regarding this matter had very little to do with enabling public scrutiny of the legal process and that ANL's sensational reporting was not designed to enhance the understanding of the legal process.

He found that public identification of the individuals would have 'very limited if any value' at this stage to the principle of open justice. He also found that, on the evidence of Friend B and Ms Markle, it was a credible argument that identification of the friends would risk harm to each of them.

In addition, the judge felt that it was important to uphold the agreement that the friends made with *People* and their reasonable expectation that they would remain anonymous. Moreover, given the intense public interest in this case, he held that the friends should be protected from the 'glare of publicity', at least for the time being, in order to prevent any undesirable pressure that they, as potential witnesses, may face and to maintain fairness and due process.

Case details:

- Court: Chancery Division
- Judge: Warby J
- Date of judgment: 5 August 2020

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