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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: 12 May 2021

Before :

LORD JUSTICE WARBY
sitting as a Judge of the High Court

Between :

HRH The Duchess of Sussex

Claimant

- and -

Associated Newspapers Limited

Defendant

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

Andrew Caldecott QC, Alexandra Marzec, and Isabel Jamal (instructed by Reynolds Porter Chamberlain LLP) for the **Defendant**

Hearing date: 5 May 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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

LORD JUSTICE WARBY:

1. This is my eighth judgment in this case, in which the Duchess of Sussex sues the owners of the *Mail on Sunday* and *MailOnline* for publishing substantial extracts from a private letter she wrote to her father (“the Letter”).
2. The claims are for misuse of her private information, breach of her data protection rights, and infringement of her copyright. The details of the case are explained in previous judgments, most fully in the one I handed down on 11 February 2021, granting the claimant’s application for summary judgment on the issue of liability for misuse of private information and on the issues of subsistence and infringement of copyright ([2021] EWHC 273 (Ch), “the Summary Judgment”).
3. Since then, I have delivered two further judgments, one dealing with matters consequential on the grant of summary judgment ([2021] EWHC 510 (Ch), “the Consequential Judgment”), and the second on matters of detail relating to remedies ([2021] EWHC 669 (Ch), “the Remedies Judgment”).
4. I have now heard further argument, at a hearing to fix directions for the remaining stages of the case. I have ordered that summary judgment be entered in favour of the claimant on all issues of liability for copyright infringement. I have made a number of further orders, mainly consequential on that decision. And I have given directions for the steps to be taken in preparation for the account of profits to which the claimant is entitled. This judgment explains what I have done and why.

A final summary judgment on copyright infringement

5. The copyright claim became a claim for infringement of copyright in a draft of the Letter created on the claimant’s phone (“the Electronic Draft”). The claimant’s case was, and is, that she was the sole author of the Electronic Draft, and the sole owner of copyright. The defendant disputed the subsistence and the claimant’s ownership of copyright in the work and argued, in the alternative, that it had defences of fair dealing and/or public interest. I found that the defendant had no real prospect of success on any of those points. I held that the claimant was bound to prove at trial that she was an author of the Electronic Draft, who owned copyright in that work, and that her copyright had been infringed. The defences had no real prospect of success, and there was no other compelling reason for a trial of any of these issues.
6. I was narrowly persuaded, however, that I could not rule out the possibility that the claimant might not be the sole author of the work. Relying on information from an unidentified source and a letter dated 21 December 2020 from Addleshaw Goddard

LLP, solicitors for four members of the Kensington Palace Communications Team (the so-called “Palace Four”), the defendant suggested that Jason Knauf, of that team, may have been involved in the creation of the Electronic Draft in such a way that he or the Crown might own a share in any copyright that subsisted, or a separate copyright in some part of the Electronic Draft.

7. I viewed this as a shadowy case and could not see any real prospect that the court would find Mr Knauf’s contribution to be more than modest, but I could not say it was fanciful. So, I directed a trial of two issues: (1) whether the claimant was the sole author or whether the involvement of Mr Knauf made him a co-author; and (2) if the latter, the impact on the extent of the infringement of which the claimant could complain, and the remedies available (together, “the Ownership Issues”).
8. To ensure that everyone who might be entitled to a remedy in respect of the alleged infringement had an opportunity to appear before the court, I directed the defendant to serve a formal statement of its case as to ownership on each person it maintained might be an owner of any copyright in the Electronic Draft, notifying that person of their right to apply to be joined as a claimant or defendant to this action.
9. On 9 March 2021, the defendant served a statement of its case, contending that, “by virtue of Jason Knauf’s involvement such as to make him an author”, the Crown and Mr Knauf were or might be the owner of copyright or copyrights generated by the process by which the text of the Electronic Draft was arrived at. By letter dated 6 April 2021, Addleshaw Goddard responded, on behalf of Mr Knauf. The letter endorsed the account set out in the claimant’s Re-Amended Reply. The solicitors stated that Mr Knauf did not claim to own any copyright in the Electronic Draft; it had never been his belief that he was the author or a joint author of the work, nor had he ever suggested as much to anybody. They said that, having taken Leading Counsel’s advice, Mr Knauf did not consider that he was an author of the Electronic Draft, or that he owned any copyright in that work. He had made only a very minor suggestion on the text, namely that a reference to Mr Markle’s ill-health be included. This advice was accepted, but Mr Knauf did not suggest any specific wording. In conclusion,

“Mr Knauf did not draft, and has never claimed to have drafted, any parts of the Electronic Draft or the Letter and would never have asserted copyright over any of their content. In our client’s view, it was the Duchess’s letter alone.”

Mr Knauf therefore had no wish to be joined.

10. By letter dated 9 April 2021, it was confirmed by Farrer & Co that the Crown made no claim to copyright either. The solicitors were acting for the Keeper of the Privy Purse on behalf of Her Majesty the Queen. They made clear that Mr Knauf was not a servant of the Crown.

11. By letter dated 12 April 2021, the claimant’s solicitors asserted that these letters on behalf of the other putative copyright owners made it clear that the defendant had no real prospect of success on the Ownership Issues. They invited the defendant to consent to an immediate final judgment in the claimant’s favour. The defendant took time to respond and, when it did, on 22 April 2021, it made clear that it declined to consent. So, an application notice seeking summary judgment was filed and served by the claimant on 26 April 2021.
12. By letter dated 27 April 2021, the defendant’s solicitors confirmed that, in light of the new information, the defendant no longer pursued its challenge to the claimant’s ownership of copyright. The letter did not consent to judgment. The defendant continues to maintain that it was wrong to grant summary judgment at all, and wishes to appeal my decision; but it has accepted that final judgment on the copyright claim was “the logical conclusion” of the Summary Judgment and the new information from Addleshaw Goddard.
13. Mr Knauf’s position, as stated by Addleshaw Goddard, is unequivocal and definitive, not uncertain or provisional. It is buttressed by expert legal advice. The defendant has not advanced any reasoned basis for supposing that a different conclusion might be arrived at after a trial. The defendant’s pleaded case is reduced to a speculative hypothesis, founded on hearsay from an unknown source, which lacks corroboration and is contradicted by both the key individuals. Mr Mill QC submits, on the claimant’s behalf, that it is fanciful to suppose that there could be any other source of information to support that case. In all these circumstances, I find that there is no longer any realistic prospect that the claimant would fail to prove her full case on the issue of liability at a trial. She would be bound to establish that she was the sole author of, and exclusive owner of copyright in, the Electronic Draft. There is no reason, compelling or otherwise, for this issue to go to trial. I have therefore now directed that an unqualified summary judgment on liability for copyright infringement be entered for the claimant.

Injunctions and other consequential orders

14. The defendant’s initial, limited success on the issue of summary judgment in copyright had an impact on remedies.

A “discursive” order

15. One of the consequential orders I made was a limited order under PD63 para 26.2 requiring the defendant to publish in the newspaper, and on *MailOnline*, a short report of my decision that the defendant had infringed the claimant’s copyright: see the Consequential Judgment [67-70] and the Remedies Judgment [10-18]. The wording I arrived at reflected the fact that, at the time, the Ownership Issues remained outstanding. I stayed that order to give the defendant an opportunity to seek permission to appeal from the Court of Appeal. That application is still pending. So, there has not yet been any publication of the report. Now that unqualified summary judgment has been entered, it is appropriate to vary the wording of the Notice and

Online Notice. I have done so by deleting reference to a trial of the issue of whether the claimant “is the exclusive owner of copyright in all parts of the letter, or whether any other person owns a share”, adding a reference to this hearing and, in the Online Notice, a link to this judgment.

Injunctions to restrain repetition

16. When dealing with other consequential matters, I granted an injunction to restrain misuse of private information, but I was persuaded that I should not grant any injunction to restrain infringement of copyright until after judgment on the Ownership Issues: see the Consequentials Judgment [21(3)-(4)], [41-45]. I was also persuaded that I should not make any order for delivery up or destruction at that stage: *ibid.* [21(6)], [71-72]. Now that the Ownership Issues have been resolved, the claimant seeks injunctions and orders for delivery up or destruction.
17. The injunctions sought are to restrain the defendant from reproducing, or issuing or communicating to the public, the Electronic Draft or any substantial part thereof; or possessing in the course of business the Letter or any copies thereof; or otherwise infringing copyright, or authorising or procuring any of these acts. The only issue raised by the defendant in relation to this head of relief related to the prohibition on continued possession. But there were also issues – first raised at the hearing on 2 March – about the nature and scope of the orders sought for delivery up and destruction, and some exceptions.

Delivery up and destruction

18. The claimant originally sought delivery up of “all copies” of the Electronic Draft, and deletion of “all electronic copies” of that draft, within 14 days, with a witness statement to verify compliance to be served within 21 days. “Copies” meant hard copies, and the term was defined so as to include any notes of the work. “Electronic copies” were defined so as to include “electronic notes recording the content of the Electronic Draft”. This wording would capture all copies of the articles complained of but it would also cover any hard copy or electronic document containing any note of any part of the Electronic Draft.
19. The defendant raised three main objections. (1) It pointed out that delivery up is a discretionary remedy, not granted as a matter of course but only to the extent that other remedies, such as a prohibitory injunction, do not afford the claimant adequate protection. It was submitted that the proposed orders were overbroad, difficult to comply with, and disproportionate to any legitimate objective. The defendant put forward alternative, more limited, proposals. (2) The defendant sought carve-outs for copies contained in legally privileged documents and archives, and for communications for the purposes of legal advice and legal proceedings. (3) The defendant pointed to a number of practical obstacles to compliance within the timescale proposed and sought more time. In addition, the defendant sought a stay pending its proposed appeal to the Court of Appeal against the entry of summary judgment.

20. There was a good deal of force in much of this. Any order should be proportionate to the legitimate aim of ensuring that the means of infringement are removed and put out of harm's way, and to the scale of the risk. It would be wrong to impose onerous obligations for no good reason, and particularly inappropriate to do so in an order that carries with it a threat of proceedings for contempt of court. The order should be tailored to ensure that it does not infringe legal privilege or create a significant obstacle to seeking or obtaining legal advice, or to the pursuit or defence of legal proceedings. And the terms of the order must of course be clear, and easy to understand and apply.
21. Some of the defendant's points had been conceded by the claimant by the time the hearing began. In the course of argument, and in discussions over the short adjournment, all the remaining issues and another one raised by me were resolved by agreement – with give and take on each side. The order that I am now invited by both parties to make is one that removes any need for a stay. It does not involve immediate destruction but provides for the defendant to use its best endeavours to deliver up to its own solicitors all hard and soft copies of the offending articles and all complete copies of the Electronic Draft or the Letter. The documents are to be held and destroyed at the end of the action, so long as the claimant ultimately succeeds. These obligations are subject to four agreed carve-outs for archiving and record-keeping, legal professional privilege, and use in litigation.

Financial remedies

22. Following the Summary Judgment, the claimant elected to pursue an account of profits, rather than damages for copyright infringement. She made that decision without first requiring the standard form of disclosure to facilitate an informed decision on which remedy to choose, known as *Island Records v Tring* disclosure (after the decision of Lightman J reported at [1996] 1 WLR 1256). I made an order for an account of profits in respect of the defendant's acts of infringement. At the time, the defendant objected to this as premature, but now the Ownership Issues have been resolved that objection (whatever its merits might have been) falls away. I shall come back to the directions for taking the account.
23. On the claim for misuse, I adjourned the question of financial remedies. The claimant had indicated that, subject to certain conditions, she would be content with nominal damages. That gave rise to potential complexities (see the Consequential Judgment at [10-16]). My order directed the claimant to serve a re-statement of her position on that issue by 23 March 2021, and provided that this hearing would address the question of what form of financial remedy she could pursue at the Further Hearing, fixed for October 2021.
24. On 23 March 2021, the claimant's solicitors gave notice that she would seek an account of profits for misuse of private information. They said this meant that there was no issue for resolution at this hearing, as the defendant had previously stated that the claimant was entitled to an account of profits or "gain-based damages" in respect of both causes of action. That was based on the defendant's skeleton argument for the

hearing on consequential damages. This had argued that the Court should forthwith assess the nominal damages for misuse of private information, and then hold that the claimant was debarred from seeking an account of profits for copyright infringement. Paragraph 28(ii) of the skeleton argument said this:

“A Claimant cannot have both damages and an account of profits in respect of the same acts. One cannot get around that by claiming damages under one cause of action and an account of profits under another. If those two causes of action in substance relate to a single wrong, then the Claimant must elect whether to seek compensatory or gain-based damages for that wrong – see *Ramzan v Brookwide* [2011] 2 P & CR at [56]-[59] and [63]. In this case the two causes of action relate to the same wrongful act – namely publishing the Articles. In those circumstances the Claimant can either claim compensatory damages for both causes of action or seek gain-based damages in respect of both.”

25. That certainly can be read as a suggestion that the claimant would have been entitled to opt for an account of profits for misusing her private information. But, in oral argument at the consequential damages hearing, Mr White QC indicated that this was not how the defendant saw the matter. He alluded to doctrinal difficulties, and the absence of authority on the point. And on Thursday 29 April 2021, the defendant made clear that it objects to the claimant’s approach on these and other grounds. The doctrinal difficulties are said to be fundamental. It is also said that there is no pleaded claim for an account of profits for misuse of private information; that PD24 does not allow such an order in those circumstances; that no such remedy was sought at the consequential damages hearing; that there is no formal application even now; and that it would be disproportionate and contrary to the overriding objective to make such an order, when an account of profits has already been ordered in the copyright claim.
26. The initial response from the claimant’s side was that this all took them by surprise. They had assumed there was no objection to their proposal, and were in no position to argue the issue at such short notice. So, they said that the only sensible course would be to lay down a mechanism to resolve the issue on some future occasion, as a preliminary issue, with a time estimate of 1 day.
27. The defendant objected to that approach, for all the reasons I have sought to summarise, and on grounds of case management. They said it could only add to the costs and time expended on a remedy, the availability of which in copyright is uncontroversial. To bolster this argument the defendant made an important concession, or point. It said that although there was not a complete overlap in the Summary Judgment between the words which constitute private information and those which involve an infringement of copyright “D does not dispute that the account for infringement of copyright should be taken in respect of the profit arising from the publication of the Articles as a whole” (emphasis in original). So, an account in misuse (assuming it was even available in principle) would add no material benefit.

28. That seemed at first to loop us back to the supposed dilemma with which the defendant confronted the claimant at the consequential hearing. But the defendant has since had further thoughts on the issue of election. It is put this way, in the skeleton argument for this hearing:-

“At the consequential hearing on 2 March, C’s position was that she might seek nominal damages (subject to the conditions referred to above). D submitted that C cannot have both an account of profits and damages in respect of the same wrong ... However, double recovery is not an issue of substance where the claimant seeks nominal damages only. D has also noted and had due regard to the observations made at paragraph 11 of the Judgment of [5th] March. Were the C to revert to this position, D would not oppose the making of a nominal award now.”

29. The final twist (so far) in this tortuous story was the claimant’s response. This was to propose that the whole question be adjourned off until after the Court of Appeal has determined the defendant’s application for permission to appeal, with liberty to restore. The reasons are obvious, on reflection. In theory, the claimant might lose an appeal against summary judgment on copyright and then lose her copyright claim at a trial. She might be left with only nominal damages for misuse of private information. Views may differ on how realistic this prospect is, but I could see the claimant’s point. On this analysis, the defendant’s proposal was less a solution than a variant of the original dilemma.
30. My conclusion was that the claimant’s proposal was an appropriate one, at this stage. Adjourning an issue is never attractive, but although it appears vanishingly unimportant in practice (except perhaps in respect of costs), this is a big issue of principle. Mr Caldecott raised the spectre of an expensive and pointless hearing on the issue later on, but that could be dealt with by an appropriate order as to costs; the twists and turns meant the issue really was not ripe for decision; and by the time we reached this issue this hearing – like the last one – had already run well over its time estimate.

Other directions

31. In the light of the above, I can and do discharge a number of the directions I gave on 22 March 2021, thereby reducing the range of issues to be decided at the Further Hearing listed for October 2021. I can also reduce the time estimate for the Further Hearing. I had allowed up to 7 days for a trial on the Ownership Issues and remedies. The time estimate is now 5 days, to include a day of reading. That seems adequate for the taking of an account of profits for copyright infringement. It would cater for an account of profits for misuse, if any such order is later made.
32. The steps that need to be taken to prepare for that hearing are the service of statements of case, disclosure, and the service of witness statements and expert reports. The skeleton arguments indicated a gulf between the parties’ positions on

how this process should be conducted. At the hearing Mr Mill suggested, rightly in my view, that there was one main issue for resolution: whether the onus lies on the defendant, which has been ordered to account, to go first and provide the claimant with adequate information and documentation, along the lines of *Island Records v Tring* disclosure. Clearly, it was for the defendant to go first. These are the defendant's profits, and only it has access to all the relevant information. But the defendant's proposals fell short of what is appropriate.

33. The defendant's proposal was that it should do no more, at first, than file a witness statement setting out "general information" about how it makes money out of the *Mail on Sunday* and *MailOnline*, and identifying the relevant "heads of costs and outgoings". From that point on, the onus would fall on the claimant to plead a case on how the relevant profits should be calculated. There would be an exchange of statements of case accompanied by initial disclosure. At that point there would be consideration of whether and to what extent Extended Disclosure should be ordered. (I use the terms of art contained in PD51U, the applicable regime for this case).
34. The problem with this regime lies at the start. The "general information" proposed would not, in my judgment, be sufficient to allow the claimant to serve a meaningful Points of Claim. The process would risk getting bogged down as a result. In argument, Mr Caldecott conceded that the defendant should start by doing something more and better than providing "general information". I understand Mr Caldecott's submission that there is much that the defendant would regard as confidential about its accounting records and processes. But that is true of many businesses, and the starting point is that the defendant has been found liable to the claimant. I accept Mr Mill's submission that a party with an obligation to account for the monies it has made from wrongful activity must do just that. It cannot be enough for the defendant merely to explain the general methods of its business operations, and then call on the claimant to make a case.
35. My conclusion was that the defendant needed to provide both (1) a general account and an account specific to the wrongful publications, of what revenues it generates what expenses it incurs and how, coupled with (2) disclosure of documents sufficient to evidence both the general and the specific. This should be done within 28 days. The process of further pleading and initial disclosure can then proceed on a reasonably informed basis, with a review of the issue of Extended Disclosure on a date in July. The details of this are to be resolved in an order which I will settle if there is disagreement over its precise terms.
36. I gave permission for expert forensic accountancy evidence to be adduced on each side, with the experts to meet and seek to agree. The issues for consideration by the experts need to be identified before they report. As it seems to me now that will need to be after the statements of case are complete.

Costs

37. This is the issue that took up more time than any other at the hearing.

Costs of the Ownership Issues

38. The order following the Consequentials Judgment required the defendant to pay 90% of the claimant's costs of the summary judgment application, with the allocation of the remaining 10% reserved to await the determination of the Ownership Issues. In the light of the Addleshaw Letter, and the application for final summary judgment that I have now granted, the claimant sought an order for the defendant to pay that remaining 10%, as well as any other costs she has incurred in relation to the Ownership Issues. The defendant did not resist an order that it pay those costs. It did resist the claimant's application for an order that all these costs should be assessed on the indemnity basis. I refused that application.
39. The criteria are well-established. In normal circumstances costs are to be assessed on the standard basis, but the court may order assessment on the indemnity basis if there is some conduct or circumstance which takes the case "out of the norm" so as to justify such an order: *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A Firm)* [2002] EWCA Civ 879 [19] (Lord Woolf CJ).
40. The claimant's case is that the defendant's conduct, in advancing the case that it did, was improper. More precisely, it is submitted that it is now clear that the defendant's case on ownership "was advanced without any proper evidential support and ought never to have been put on the record." As I indicated at the hearing, I do not think I would be justified in making such a finding.

The defendant's case about authorship and Mr Knauf

41. The defendant's case was pleaded in paragraphs 8, 28B and 30 of the Re-Re-Amended Defence and supplemented by some further information. At the heart of it was paragraph 28B which denied that the wording of the Electronic Draft was drafted solely by the Claimant, and put forward the positive case that:

"... the Claimant involved the Kensington Palace Communications team (including Jason Knauf) in the writing of the Letter (at which stage it was the Electronic Draft)"

42. The basis on which the defendant put forward that case was apparent at the time of the summary judgment hearing. As I have indicated, there were two main aspects to it: information from an unidentified source, and the Addleshaw Goddard letter.
43. The relevant evidence about sources came mainly from the editor, Mr Verity. He said he had received what he considered to be "high-grade information" from a "senior member of the royal household" who was "a serious individual in a position of authority and responsibility" with "direct knowledge" of the matters in question. Mr Mathieson, the defendant's solicitor, explained that it was after receiving this information that the defendant served its Re-Re-Amended Defence, containing the assertion I have quoted at [41] above. That assertion was first put on the record on 6

November 2020. Mr Mathieson signed the statement of truth, verifying the defendant's belief in what was alleged.

44. For present purposes, the key items of information identified by Mr Verity's source were that there were several drafts of the Letter; that Mr Knauf "worked on those drafts with the claimant"; and that "a lot of the tweaking of the drafts was done by electronic means of communication". Mr Mill has argued, at the first summary judgment hearing and at this one, that these three items are incapable of supporting the defendant's pleaded case. But I continue to disagree with him on that point. The language is imprecise, and certainly does not spell out that Mr Knauf had authorial involvement. But the picture presented was that the process of creating the text of the Letter was or may have been a collaborative one, lasting over the course of several drafts and – by implication – a period of time, with text passing back and forth, being "tweaked" by both parties.
45. The defendant has maintained that the reliability of its sources of information was confirmed when the claimant served her Re-Amended Reply on 17 November 2020. Reliance is placed in particular on three things said in paragraphs 12.7A(4) and (5): that Mr Knauf was aware the claimant was going to write to her father; that she shared a draft of the Electronic Draft with him; and that he provided feedback on that draft. In this respect the defendant is guilty of cherry-picking. These paragraphs of the Re-Amended Reply did say those things; but they by no means conceded that Mr Knauf was a collaborator in the creative process. Paragraph 12.7A(5) also said that (a) Mr Knauf was made aware of the Letter because he was a trusted advisor, and responsible for keeping senior people in the Royal households informed about such matters; (b) the draft was shared with him "for support"; and (c) he provided "feedback but no actual wording". The paragraph concluded by stating, for the avoidance of doubt, that the Electronic Draft and Letter were created by "the claimant, and the claimant alone"; neither Mr Knauf nor anybody else created any part of either.
46. All of that is at odds with the picture apparently painted by Mr Verity's source, and the defence hypothesis. But it does not necessarily follow that the defendant was acting improperly by advancing and maintaining the case that Mr Knauf was not just "involved" in the drafting of the letter but also creatively involved, "in wording" (see the Summary Judgment [160]). The defendant's position is that it was, at that stage, entitled to prefer the information from its sources to the account provided by the claimant.
47. The Addleshaw Goddard letter arrived some weeks later. The relevant parts of it are set out at [163] of the Summary Judgment, and discussed at [164]. It did not contain any, or any clear, support for the defendant's stance, but nor did it contradict or undermine it. It told the reader that Mr Knauf and others had knowledge of and light to shed on the process of "the creation of the Letter and the Electronic Draft". It was a carefully worded letter that appeared to me, as it still does, to be consistent with the defendant's carefully worded case.

48. That was the state of the evidence when the case came before me on the first summary judgment application. My conclusion was that the defendant's case lay between the improbable and the unreal. It was not fanciful and should not be dismissed without further enquiry. That further enquiry has now been undertaken, and the Addleshaw Goddard letter of 6 April 2021 demonstrates to my satisfaction that the defendant's case is unreal. That is the position with the benefit of hindsight. The claimant's application for indemnity costs is concerned with the position as it stood at the time the case was pleaded and when it was argued before me.

The application

49. The application relies on some hitherto unseen emails sent by the defendant's solicitors, RPC, to Addleshaw Goddard in early November 2020, shortly before the pleading of the Re-Re-Amended Defence. The documents have come to light because they were attached to a querulous letter of recrimination that RPC sent to Addleshaw Goddard on 8 April 2021, in response to the new information in the letter dated 6 April 2021, and copied to Schillings, the solicitors for the claimant. It is said that this was done by mistake, but the defendant does not suggest that the evidence is inadmissible. The claimant also relies on Addleshaw Goddard's letter of 16 April 2021 in which, responding to RPC's complaints, it described some telephone exchanges of November 2020.
50. The most significant features of these documents, on the claimant's case, are these:
- (1) In an email, dated 2 November 2020 from RPC (Mr Mathieson) to Addleshaw Goddard (David Engel), Mr Mathieson sought assistance from Mr Knauf, referred to the defendant being "hamstrung in pleading this point further", and said that the defendant did not want to put on the record a case that was incorrect. No assistance was provided. Nothing transpired to improve the defendant's position.
 - (2) An email from Mathieson to Mr Engel of 5 November 2020 (the eve of service of the Re-Re-Amended Defence), is said to confirm that the defendant "simply did not know whether or not Mr Knauf had helped with the drafting of the Letter".
 - (3) Addleshaw Goddard's letter to RPC of 16 April 2021 is said to show that, in a phone call following the 5 November email, Mr Engel told Mr Mathieson that it was "unlikely" Mr Knauf would be willing to support the defendant in pleading to the copyright claim.
 - (4) An email from Mr Mathieson to Mr Engel of 20 November 2020 is said to reveal the defendant's desperation. It refers to voicemail messages of 19 and 20 November which had evidently not been answered. Mr Mathieson drew attention to the deadline of 4 December 2020 for evidence in response to the claimant's summary judgment application and asked for an update, and "when we will be receiving from you an indication of your client's evidence and/or relevant documents".

Claimant's submissions

51. For the claimant, it is submitted that these documents, taken together, reveal that when the defendant pleaded its case it knew “that it did not have the material it needed to make the assertion that anyone other than the claimant was involved in drafting the text of the Electronic Draft or the Letter.” At one level, the criticism is that the defendant did not have sufficient evidence to plead such a case. But the claimants’ submissions go further. They include an allegation that Mr Mathieson did not have “grounds for an honest belief that Mr Knauf was involved in drafting the Letter”. Mr Mill goes so far as to say that “it follows inexorably” from the 2 November email that “the defendant had no honest belief that Mr Knauf did actually contribute to the drafting of the Letter.”
52. Mr Mill submits that the applicable principles are to be found in the decision of Patten J in *Clarke v Marlborough Fine Art (London) Ltd* [2002] 1 WLR 1731 at [19-21]. He places particular reliance on two passages. In the first, at [19], Patten J noted that the requirement to support a case with a statement of truth was “simply to exclude factual allegations which to the knowledge of the claimant or other party are untrue or which the party putting forward the pleading to the court is unable to say are true.” In the second passage, at [21], it was said that the purpose of CPR 22 was “to discourage the pleading of cases which when settled were unsupported by evidence and which were put forward in the hope that something might turn up on disclosure or at trial”. Mr Mill also relies on *Esure Services v Quarcoo* [2009] EWCA Civ 595 for the proposition that indemnity costs can be ordered where there is “something outside the ordinary and reasonable conduct of proceedings”.
53. The claimant submits, further, that the defendant’s approach was all of a piece with its established policy of using the formal statements of case as a springboard for reporting on this legal action in a sensational but misleading fashion. Counsel points to a *MailOnline* article of 16 November 2020 headed “*Meghan Markle ‘had help from Palace aides’ to write letter she sent to her father court documents claim*” and an article published on the front page of the *Daily Mail* for 17 November 2020, and in *MailOnline*, reporting on allegations made by the defendant’s lawyers in “court filings made public yesterday”. The “court filings” were the Re-Re-Amended Defence. This article was headed “*Palace press officer ‘helped Meghan write THAT letter to dad’*”.

Defendant’s submissions

54. Mr Caldecott QC, for the defendant, takes issue with the claimant’s legal analysis, and strong objection to the way the case is put on the facts. He submits that there was no procedural impropriety. He readily accepts that it is improper for a party to advance a factual case which that party does not believe to be true. But he submits that *Clarke* is not authority, still less a detailed analysis, as to what evidential basis is required before a pleading is placed on the record. The best source of authority on the overall requirements is the decision of the Court of Appeal in *McDonalds Corp. v Steel* [1995] EMLR 527. That was a libel action, but the relevant procedural requirements are or should be the same, or at least no more onerous, than those for placing a plea of truth on the record in a libel case. In *McDonalds* it was held that a defendant does not need to have sufficient evidence to prove its case in its possession at the time of

pleading. It is entitled to gather such evidence through the litigation process. It must (1) believe the assertion to be true; (2) intend to support it with evidence at trial; and (3) either have reasonable evidence for the assertion or a reasonable basis for a belief that the evidence will be available at trial.

55. These conditions, submits Mr Caldecott, were satisfied in this case. The claimant is making an allegation of dishonesty without being clear about exactly what the allegation is or about the identity of the targets, other than Mr Mathieson. But, whomever might be the target, the evidence falls short of making it good. Mr Caldecott argues that the claimant's approach to the RPC/Addleshaw Goddard correspondence ignores some key contextual features, and does not stand up to careful scrutiny. RPC were seeking to elicit support from a third-party witness, and the wording of the correspondence would inevitably reflect that fact. The wording does not, in any event, support the interpretation advanced by Mr Mill. Mr Caldecott submits it was proper to make the case that was pleaded, on the basis of what Mr Verity had learned from his source; and it was proper to persist in that case pending further information, including disclosure from the claimant and/or other sources as to exactly how the copyright works came to be written.

Assessment

56. I approach this application on the basis of the words of CPR 44.3 and the guidance in *Excelsior. Esure* provides a helpful gloss, explaining the word "norm". It holds that a party does not escape an order for indemnity costs on the basis that the kind of impropriety that they engaged in is relatively common, and in that sense "normal". The case is not authority that indemnity costs are appropriate when a party engages in litigation conduct that is not "reasonable".
57. I do not really understand the claimant's reliance on the *Daily Mail* and *MailOnline* coverage of the pleadings. I agree that the reporting relied on goes beyond the careful formulation in the Re-Re-Amended Defence. As Mr Mill points out, the parties' approach to evidence and to reporting on this case has been a matter of concern to me, but that has been for specific reasons, in particular its potential to pollute the legal process and to make it harder for the public to understand what is really going on in the case. Here, the suggestion appeared, at first, to be that the pleading was driven by the defendant's desire to report it in the newspaper. But I could not reach that conclusion on the evidence before me, and Mr Mill made clear that this was not how the claimant was putting her case. I do not see that this reporting can be relevant for any other reason.
58. I do not accept that the evidence relied on establishes that the defendant, or any of the lawyers involved, advanced the pleaded case without an honest belief in its truth. The defendant is a corporate body and in principle the onus is on a party alleging dishonesty to identify the individual who acted dishonestly, and for whose conduct the defendant is said to be responsible. Mr Mill's argument failed, in my judgment, to grapple appropriately with the need to identify the person or persons being accused of dishonesty. But the language of Mr Mathieson's emails does not, in my judgment,

support the interpretation advanced by the claimant, in his case or that of any the other individuals concerned. Read in context, and in the light of all the other evidence, the better interpretation is that Mr Mathieson believed the defendant had already pleaded a case that the claimant was not the sole author of the work at issue, and that Mr Knauf had been involved in writing it; he believed that case to be one that might succeed at trial; but the defendant wanted to go further now that it had to deal with her amended case. It wanted Mr Knauf's help for that purpose.

59. Mr Mathieson's email of 2 November 2020 told Addleshaw Goddard that the defendant's pleaded response to the previous version of the Particulars of Claim was "to admit that the claimant sent the Letter to her father but otherwise to deny what the claimant said about the letter". As Mr Mill points out, this was mistaken: the Defence as it stood at the time admitted the claimant's authorship. But this seems to me to help the defendant, not the claimant. It is in this context that Mr Mathieson's reference to being "hamstrung in pleading this point further" must be read. The deadline for service of the Re-re-Amended Defence was looming. One possibility is that Mr Mathieson was erroneously referring to a draft amended pleading. At all events, the context clearly suggests that on 2 November 2020 Mr Mathieson believed that the defendant already had sufficient grounds to deny sole authorship.
60. By this time Mr Verity had received information from his source. The emails did not mention that . But I am unpersuaded by Mr Mill's argument that this shows that Mr Mathieson, or anyone else, had assessed the information provided by the source and found it wanting. For all manner of reasons, it is easy to understand why Mr Mathieson should not wish to deploy information received in confidence from a senior member of the royal household, when seeking to coax Mr Knauf into giving more help to the defendant. A much more persuasive interpretation of events is that the information from the source was believed to be credible and to support what was eventually alleged by way of amendment.
61. The account of the Mathieson/Engel telephone conversation does not get the claimant over the line. Mr Engel's account is that what he said was that as Mr Knauf wanted to stay neutral in relation to the dispute, it was "unlikely that he would be willing to support your client *in pleading to the claimant's amended copyright claim*". He went on to make clear that "this did not detract from the fact that Mr Knauf was potentially willing to provide evidence and/or documents at trial, but on the basis that it was provided to both parties". A fair reading of the conversation, on this account, is that Mr Knauf's position was being presented in a studiously neutral fashion. He was not expressing a reluctance to support the defendant's *case*; he was saying that his evidence (if provided) would support or undermine either the case for the claimant or the case for the defendant.
62. The case of *Clarke* is of no great assistance here. The focus of the cited observations was on "dishonest or opportunistic claims" and the functions of CPR 22 in excluding these (see [30]). It is common ground that it would have been improper for the defendant to verify the pleaded case without believing in its truth. The actual decision in *Clarke* was that the claimant, the executor of Francis Bacon, could advance against

the late artist's gallery an allegation of actual undue influence which was inconsistent with a case he was simultaneously advancing of presumed undue influence. The *ratio* was that it can be proper to plead alternative cases where the party has no personal knowledge of the relevant events, and the available evidence does not point clearly to any single factual possibility. To that extent, the decision seems to me to lend some support to the defendant's case. *McDonalds*, which was not cited to Patten J, is more directly in point.

63. *McDonalds* was a libel case, and the fact that freedom of expression was at stake was a factor in the reasoning of Neill LJ. But a copyright claim also engages Article 10. I am not persuaded, either, that these principles apply only in cases of that category. Another important strand in the reasoning of the Court in *McDonalds* was that pleadings in libel actions had, appropriately, come to be treated "in the same way as pleadings in other types of litigation". In that context Neill LJ (with whom Steyn and Peter Gibson LJJ agreed), said it was "instructive" to refer to a short passage in the judgment of May LJ in the case of *Steamship Mutual Underwriting Associated Ltd v Trollop & Colls (City) Ltd* (1986) 33 BLR 77. On an application by a firm of structural engineers that a claim against them should be struck out, May LJ said:

"In my opinion, to issue a writ against a party ... when it is not intended to serve a statement of claim, and where one has *no reasonable evidence or grounds* on which to serve a statement of claim against that particular party, is an abuse of the process of the court."

(The emphasis is mine.)

64. In my judgment, it is appropriate in this case to test the conduct of the defendant and its representatives against the three criteria identified by the Court of Appeal in *McDonalds v Steel*. For the reasons I have given I do not accept that the evidence justifies a finding that the defendant fell short of the first requirement. Nor do I find that the defendant placed these allegations on the record with no intention of supporting them with evidence at a trial, or that it lacked a reasonable basis for believing that such evidence would become available.
65. The evidence available when the case was pleaded was certainly thin. It seems to have consisted of the hearsay from Mr Verity's source. It would have been very optimistic at best to suppose the case could be established on the back of that. The first Addleshaw Goddard letter was not evidence of any relevant fact. But each of these two strands of evidence provided a platform for believing that some additional supportive evidence would become available in the future. And in my judgment the probability is that this is how the defendant and its lawyers saw the matter. I do not believe that viewpoint should be categorised as unreasonable. They may have been over-optimistic in their assessment of how likely that was, but that is a different matter. If the right interpretation of the source's information was that there had been a process of collaborative writing, involving electronic communication, the documents

would exist and be disclosable, and Mr Knauf's evidence – if he gave it – would tend to support the defence case.

Costs of the second summary judgment application

66. What I do find is that the defendant conducted itself in a way that is outside the norm, and justifies indemnity costs, in refusing for very nearly three weeks to accept that the Addleshaw Goddard letter of 6 April 2021 put paid to its remaining case on ownership of copyright. As it is put by Counsel for the claimant, the defendant has refused to face up to its obvious implications. It would have been reasonable to take a little time to absorb what had happened, and work out the consequences. But the defendant could and should have achieved all of that in the 6 days that passed between the Addleshaw Goddard letter and the letter from Schillings inviting the defendant to concede the issues. Instead, the defendant took up time on other matters – including the long letter of complaint it sent to Addleshaw Goddard on 8 April. It took another 19 days for the defendant to see the light. When it did so, on 27 April, the costs of the application had been incurred.
67. Accordingly, I order that the defendant must pay the costs of and caused by the present summary judgment application, to be assessed on the indemnity basis. The defendant must pay the remaining 10% of the costs of the first summary judgment application on the standard basis, and any other costs of and caused by the Ownership Issues on the standard basis.

Other costs

68. That does not deal with all the costs incurred.
69. The costs I have ordered to be paid on the indemnity basis are those incurred in preparing and pursuing the application for summary judgment on liability for copyright infringement: paragraph 1 of my order. The costs of arguing out what remedies should be granted consequent on the entry of a final and comprehensive summary judgment on liability are not part of those costs. So, my indemnity costs order does not cover the costs of arguing for injunctions, delivery up, or destruction. Nor does it cover the costs of reformulating the discursive order. But looked at in the round those are all costs consequential on the defendant maintaining that it had an arguable defence to the copyright claim, that might succeed at a trial. The claimant has obtained remedies. She has not obtained all that she wanted in these respects, but she has not acted unreasonably. I award the costs of all those aspects of this application to the claimant, to be assessed on the standard basis.
70. The costs of arguing out the issue about the basis of assessment are also separate and distinct. The claimant largely lost that argument. The costs order should fairly reflect that. I do not propose to depart from the normal practice of reflecting an issues-based costs order by awarding a percentage of costs.

71. My overall decision, based on my best estimates of the proportion of the costs as a whole that can reasonably be attributed to the different issues argued out on this application, is that the claimant should recover 60% of her remaining costs of the applications I have now determined.

