

# COMMENTS

## Associated Newspapers Criticised by UK Court of Appeal for “Lack of Clear Focus” in Its Meghan Markle Judgment

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### Abstract

*The commentary argues that the Duchess of Sussex’s, Meghan Markle’s, privacy claim against the publishers of the Mail on Sunday and online, Associated Newspapers Ltd (ANL), was a courageous attempt to demonstrate via the courts that freedom of the press and its claim to the public interest can go too far. She was also successful in her copyright claim, in that the Mail’s misuse of private information, namely her letter to her father, Thomas Markle, in August 2018, which had largely been copied by the newspaper verbatim, breached copyright. ANL could not claim fair dealing in a publication of a letter which had been handwritten in private and sent to Meghan’s estranged father. The CA held that the original*

*trial judge, Warby J, was right in delivering a summary judgment in February 2021 and that there would be no public trial now.*

The publishers of the *Mail on Sunday* and *MailOnline*, Associated Newspapers Ltd (ANL) lost their appeal in the Court of Appeal (CA) against the Duchess of Sussex, 40, also known as Meghan Markle.<sup>1</sup>

The central question before the CA was whether the original trial judge at London’s High Court, Warby J, had been right to grant summary judgment for breach of privacy and breach of copyright to Meghan, Duchess of Sussex.<sup>2</sup>

Master of the Rolls, Sir Geoffrey Vos, ruled on Thursday 2 December 2021, that the CA had upheld the decision by the lower court, “that the Duchess had a reasonable expectation of privacy in the contents of the letter [to her father Thomas Markle]”.<sup>3</sup>

In February 2021, the Duchess had won her case against ANL over a series of articles in the *Mail on Sunday* and the *MailOnline*, that reproduced substantial parts of a letter sent by her to her father Thomas Markle in August 2018. Essentially Meghan had claimed that the contents of the letter was private; this was correspondence about her private and family life, not her public profile or her work; the letter disclosed her intimate thoughts and feelings; these were personal matters, not matters of legitimate public interest. She argued before Mr Justice (now Lord) Warby in London’s High Court that she should enjoy a reasonable expectation of privacy and that the contents of the letter would remain private and should not be published to the world at large by a national newspaper. The High Court upheld her claim in February 2021 that the defendant newspaper’s conduct in publishing the contents of the letter was a misuse of her private information.<sup>4</sup>

The Duchess had also claimed that the publication of the letter constituted an infringement of her original copyright.

ANL had denied that the letter was private, or that Meghan had a reasonable expectation of privacy in its contents. In their defence ANL relied on a number of factors to limit the Duchess’ privacy rights, including her public status—not only as the wife of Prince Harry, member of the British royal family—but also as principal actor in the US series *Suits*, her knowledge of her father’s, Thomas Markle’s, propensity to speak to the media, and her alleged intention to generate publicity about the letter and her relationship with her father.

*Mail on Sunday* (and its online edition) had initially relied on an earlier article by the US magazine *People* which had given a rather misleading account of Meghan’s relationship with her father. During the first High Court Chancery Division hearing in February 2021, Mr Justice

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<sup>1</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWCA Civ 1810; [2022] F.S.R. 7.

<sup>2</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch); [2021] 4 W.L.R. 35; [2021] E.C.D.R. 25 (on 11 February 2021).

<sup>3</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [43], [46] (Sir Geoffrey Vos MR).

<sup>4</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2021] E.C.D.R. 25 (Warby J).

Warby had described the father-daughter relationship at and after the time of the wedding rather “fractious”. Mr Markle did not attend the wedding of the Duke and the Duchess on 19 May 2018. He had been admitted to hospital in the US days beforehand for emergency heart surgery.

There were clear and substantial differences of approach to dealing with the media by Meghan and her father. Mr Markle had extensively engaged with the British media. For example, a front-page *Mail on Sunday* report on 13 May 2018 was headed: “Meghan’s Dad staged photos with the paparazzi”, reporting that Mr Markle was “colluding with the paparazzi to stage a series of lucrative photo opportunities”, for which he apologised by text to the Duchess on 14 May 2018.<sup>5</sup> Prince Harry, The Duke of Sussex, had texted Mr Markle on 17 May 2018 asking him to “stop talking to the press for your sake and hers”, and expressing concern that Mr Markle had not “returned any of our 20+ calls since we all spoke on Saturday morning”.<sup>6</sup> The judge thought that Mr Markle was well aware that the Duke and Duchess wanted him to avoid engaging with the media, and that all their correspondence was personal and private in character. Mr Markle continued, thereafter, to have dealings with the media which resulted in press articles. The articles themselves referred to “a series of damaging interviews” given by Mr Markle.<sup>7</sup>

In a summary judgment in February 2021, Warby J ruled that the disclosures from Meghan’s letter to her father, Thomas Markle, were “manifestly excessive and hence unlawful” and breached her copyright.<sup>8</sup> The summary judgment meant that not only would there not be a full trial (most likely a relief to Buckingham Palace), but also that Meghan’s girlfriends, her father and key palace aides would not have to give evidence in the witness box to reveal what they knew. For example, the Sussex’s former Communications Secretary, Jason Knauf.

In a witness statement to the Court of Appeal, Mr Knauf claimed that Meghan wrote the letter with the understanding that it could be leaked. He said she sent him an early draft of the letter and had written: “Obviously everything I have drafted is with the understanding that it could be leaked so I have been meticulous in my word choice, but please do let me know if anything stands out for you as a liability.”<sup>9</sup> The CA also heard that Mr Knauf provided information to the authors of the biography *Finding Freedom*—Omid Scobie and Carolyn Durand—leading to Meghan apologising for misleading the court about whether he had given information. In further texts released by the court, the

Duchess expressed her frustration about the response of the royal family, describing them as “constantly berating” Harry.<sup>10</sup>

At the three-day appeal hearing (9–11 November 2021), three of the most senior judges heard the case: Sir Geoffrey Vos MR, the President of the Queen’s Bench Division, Dame Victoria Sharp and Bean LJ. Associated Newspapers (ANL) argued once again that an earlier article about the Duchess in the *People* magazine misled the public about Mr Markle’s behaviour and the contents of Meghan’s letter to him.

Andrew Caldecott QC, representing the publishers ANL, argued that Mr Knauf’s evidence cast doubt on the basis of the original judge’s ruling in the High Court. Caldecott added that Meghan “made no effort to correct” an article in the *People* magazine in the US, which featured an interview with five friends of the Duchess of Sussex, adding that Mr Markle had “considered the article to be a serious attack on him”.<sup>11</sup> The barrister also said ANL’s defence to Meghan’s privacy claim was arguable and should have gone to a trial.

Sir Geoffrey Vos MR in his leading judgment from the CA noted that despite “prompting from the bench”,<sup>12</sup> Associated Newspapers had not, even after a 2½ day hearing, clearly identified the triable issues nor had they identified any new factual issues which could have been heard by witnesses in an open trial which would have defeated the summary judgment by Warby J at the original hearing. Vos also noted that both parties had complicated and elaborated the relatively simple issues raised by the appeal and that extraordinary sums of money had been spent by both sides to bring and defend this claim.<sup>13</sup>

The Court of Appeal decision of Thursday 2 December 2021 means that the case will not proceed to trial and that Meghan Markle can now expect to receive substantial financial damages from the newspaper group, plus a public apology printed on the front page of the *Mail on Sunday* and the homepage of the *Mail Online*. The High Court had already ordered in March 2021 that the *Mail* print a statement on the front page and a notice on page three of the paper, apologising to the Duchess and stating the outcome of the judgment from the High Court in February 2021. At that point Warby J had ruled that the font size of the statement should be no smaller than the front-page headline of 10 February 2019 when the paper wrote: “Meghan’s shattering letter to her father”<sup>14</sup> which the *Mail* argues was seriously infringing on press freedom and freedom of expression under art.10 European Convention on Human Rights (ECHR).

<sup>5</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [15].

<sup>6</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [15].

<sup>7</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2021] E.C.D.R. 25 at [37]–[63].

<sup>8</sup> Summary judgment under Civil Procedure Rules CPR r.24.2.

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<sup>10</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [3]–[5].

<sup>11</sup> Michelle Tauber, “Meghan Markle’s Best Friends Break Their Silence: ‘We Want to Speak the Truth’”, *People*, 6 February 2019 available at: <https://people.com/royals/meghan-markles-best-friends-break-their-silence-we-want-to-speak-the-truth/> [Accessed 5 January 2022].

<sup>12</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [67].

<sup>13</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [67] (Sir Geoffrey Vos MR).

<sup>14</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [25].

Meghan, who now lives in California with her husband, Prince Harry, and their two children, gave a statement to the media, following the CA judgment:

“This is a victory not just for me, but for anyone who has ever felt scared to stand up for what’s right. While this win is precedent setting, what matters most is that we are now collectively brave enough to reshape a tabloid industry that conditions people to be cruel, and profits from the lies and pain that they create.”<sup>15</sup>

She continued:

“From day one, I have treated this lawsuit as an important measure of right versus wrong. The defendant has treated it as a game with no rules. The longer they dragged it out, the more they could twist facts and manipulate the public (even during the appeal itself), making a straightforward case extraordinarily convoluted in order to generate more headlines and sell more newspapers—a model that rewards chaos above truth. In the nearly three years since this began, I have been patient in the face of deception, intimidation, and calculated attacks. Today, the courts ruled in my favor—again—cementing that The Mail on Sunday, owned by Lord Jonathan Rothermere, has broken the law. The courts have held the defendant to account, and my hope is that we all begin to do the same. Because as far removed as it may seem from your personal life, it’s not.”<sup>16</sup>

This is indeed a significant victory for Meghan, Duchess of Sussex. The ruling is similar to that of *von Hannover v Germany* (2004),<sup>17</sup> where the European Court of Human Rights in Strasbourg held that the German press and paparazzi had infringed Princess Caroline of Hannover’s right to privacy under art.8 of the Convention. The German courts had failed to afford her adequate protection from the publication of private photographs taken without her knowledge.

As to the copyright claim, the defendant argued that the judge had failed properly to evaluate two points: (i) the interference with art.10 ECHR and (ii) a fair dealing defence. The CA held that Warby J had *not* failed to recognise the significance of the attack on Mr Markle’s character, nor had he applied the wrong test of proportionality to Mr Markle’s right of reply. The judge said that the letter was not intended for commercial exploitation and ANL knew the letter was unpublished. Additionally, large parts of the letter had been simply copied and—as already stated—had breached the Duchess’ privacy rights. Therefore its use was not fair.

As far as the public interest test and freedom of expression (art.10 ECHR) were concerned, s.171(3) Copyright Designs and Patents Act 1988 preserved the common law defence.<sup>18</sup>

The court concluded that it would be very rare for the public interest to justify the copying of such substantial parts of a private letter to which copyright automatically attaches (citing *Ashdown* (2001)).<sup>19</sup>

Meghan Markle can also expect some privacy in spite of the fact that her life is and always will be of great public and media interest. By adopting a high risk strategy, she has demonstrated by taking on the British popular press in court that her life does not make for public property.

The Court of Appeal ruling means there will now not be a public trial, sparing her some rather awkward questions, such as having to apologise for having forgotten how information was given to authors writing a book about her and Prince Harry. The CA called this an “unfortunate lapse of memory”—though this apparently did not bear on the fundamental issues of whether a private letter to her father should have been published by the press.

Whatever one thinks of Meghan Markle, she has courageously won a substantial legal battle where no other previous royals dared to tread.

### **Timeline: particulars of Meghan Markle, the Duchess of Sussex’s claim—“the letter”**

- **August 2018:**

Meghan Markle had handwritten a private and confidential letter to her father, Thomas Markle, which detailed her intimate thoughts and feelings about her father’s health and her relationship with him at that time. During the first High Court hearing in February 2021 (Chancery Division), Mr Justice (now Lord) Warby had described the father-daughter relationship at and after the time of the wedding. Mr Markle did not attend the wedding of the Duke and the Duchess on 19 May 2018. He was admitted to hospital days beforehand for emergency heart surgery. The Duchess had supplied the court with text messages, annexed to her claim, where the Duchess’s reply made plain that, before the wedding, Mr Markle had behaved in ways which caused his daughter “concern because of the publicity they were likely to and did cause, and the impact on her, [the Duke], and [Mr

<sup>15</sup> Alice Scarsi, “Meghan Markle issues bombshell statement after court win: ‘A victory not just for me’”, *The Express*, 2 December 2021 available at: <https://www.express.co.uk/news/royal/1530286/meghan-markle-statement-court-victory-daily-mail-associated-newspapers> [Accessed 5 January 2022].

<sup>16</sup> Scarsi, “Meghan Markle issues bombshell statement after court win: ‘A victory not just for me’”, *The Express*, 2 December 2021.

<sup>17</sup> *Von Hannover v Germany* (59320/00) [2004] E.M.L.R. 21; (2005) 40 E.H.R.R. 1 ECHR.

<sup>18</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [62]–[64].

<sup>19</sup> *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142; [2002] E.C.C. 19.

Markle]’.<sup>20</sup> It had become clear to the court that the run-up to the wedding was fractious, revealing substantial differences of approach to dealing with the media. Mr Markle, however, *did* engage with the media (e.g. a front-page *Mail on Sunday* report on 13 May 2018 was headed “Meghan’s Dad staged photos with the paparazzi” and reported that Mr Markle was “colluding with the paparazzi to stage a series of lucrative photo opportunities”, for which he apologised by text to the Duchess on 14 May 2018).<sup>21</sup> The Duke texted Mr Markle on 17 May 2018 asking him to “stop talking to the press for your sake and hers”, and expressing concern that Mr Markle had not “returned any of our 20+ calls since we all spoke on Saturday morning”.<sup>22</sup> The judge thought that Mr Markle was well aware that the Duke and Duchess wanted him to avoid engaging with the media, and that all their correspondence was personal and private in character. Mr Markle continued, thereafter, to have dealings with the media which resulted in press articles. The articles themselves referred to “a series of damaging interviews” given by Mr Markle.<sup>23</sup>

- **27 August 2018:**

Meghan sent the letter to her father. The court set out details of the letter, published in the articles, setting these in context of M’s claim (bold text identifies words published in the articles; italics the judge’s interpolations).<sup>24</sup>

“Daddy,

[1] It is with a heavy heart that I write this, not understanding why you have chosen to take this path, turning a blind eye to the pain you’re causing. The last time we spoke was 7 days before our wedding when Harry and I called you. This was followed by a turbulent and confusing week where we called you multiple times a day to try to understand what was happening.

[2] From my phone alone, I called you over 20 times and you ignored my calls, opting instead to solely speak to tabloids—leaving me in the days before our wedding worried, confused, shocked, and absolutely blindsided.

[3] Post wedding you then made a choice to begin an onslaught of media interviews, which are still ongoing. Your actions have broken my heart into a million pieces—not simply because you have manufactured such unnecessary and unwarranted pain, but by making the choice to not tell the truth as you are puppeteered in this. Something I will never understand.

[4] You’ve told the press that you called me to say you weren’t coming to the wedding—that didn’t happen because you never called. You’ve said I’ve never helped you financially and you’ve never asked me for help which is also untrue; you sent me an email last October that said, ‘if I’ve depended too much on you for financial help then I’m sorry but please if you could help me more, not as a bargaining chip for my loyalty.’ You already have that whether you realize it or not.

[5] And while I still refuse to read any press, it was shared with me what you said about ... [*Here, C complained that her father had been unjust in what he wrote about a relative, and the claimant’s behaviour towards that relative. She provided a detailed rebuttal.*]

<sup>20</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [14].

<sup>21</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [15].

<sup>22</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [15].

<sup>23</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2021] E.C.D.R. 25 at [37]–[63].

<sup>24</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [18].

- [6] I have only ever loved, protected, and defended you, offering whatever financial support I could, worrying about your health be it your ... [*Here, C referred to a number of health problems encountered by her father*] ..., and always asking how I could help.
- [7] So the week of the wedding to hear about you having a heart attack through a tabloid was horrifying. I called and texted you and desperately tried to find out about the medical treatment you would need and where you would be. I begged you to accept help—we sent someone to your home, tried to have them drive you to the hospital, to get the best care and protection for you, and instead of speaking to me to accept this or any help, you stopped answering your phone and chose to only speak to tabloids. I will never understand why especially with you knowing I have always looked out for your health. ... [*Here, C wrote about the nature and content of conversations with her father over the past 10 years*]
- [8] ... in the last two years your obsession with tabloid media only exacerbated my worry for you, which is why I pleaded with you to stop reading the tabloids. On a daily basis you fixated and clicked on the lies they were writing about me, especially those manufactured by your other daughter, who I barely know. ...
- [9] [*C wrote about her upbringing, her half-sister and their relationship*] ... Though you feel you did your best to stop her while you watched me silently suffer at the hand of her vicious lies, I crumbled inside. ... [*...C described her feelings about her father's health ...*] ...
- [10] I ... urged you day after day to stop reading the tabloids. But you couldn't and your fascination grew into paranoia (and then rage) of how you were being portrayed. You know how much anguish tabloid press has caused—lies simply for click bait. So to suffer through this media circus created by you is all the more devastating. You continue to be manipulated by the press, who are likely promising you the world to keep churning out these fictitious stories, yet still ridiculing you. The lies you have been paid to share about me, about our help for you, ... [*Reference was made to support C says her father received*] ... is staggering and confusing. [*... Reference was made to the contents of correspondence sent by Mr Markle ...*]
- [11] We all rallied around to support and protect you from day one and this you know. So to hear about the attacks you've made at Harry in press, who was nothing but patient, kind, and understanding with you is perhaps the most painful of all. I will truly never understand it.
- [12] For some reason you choose to continue fabricating these stories, manufacturing this fictitious narrative, and entrenching yourself deeper into this web you've spun. The only thing that helps me sleep at night is the faith and knowing that a lie can't live forever.
- [13] My hope is that you can take a moment to reflect on this. To remember our conversation seven days before the wedding when we asked you if the claims of you working with the

paparazzi and press were true and told you if we tried to protect you from the story running (something we've never attempted to do for anyone—ourselves included) that we wouldn't be able to use that strength to protect our own children one day. Even knowing that, you said it wasn't true.

[14] I believed you, trusted you, and told you I loved you. The next morning the CCTV footage came out. You haven't reached out to me since the week of our wedding, and while you claim you have no way of contacting me, my number has remained the same. This you know. No texts, no missed calls, no outreach from you—just more global interviews you're being paid to do to say harmful and hurtful things that are untrue.

[15] If you love me, as you tell the press you do, please stop. Please allow us to live our lives in peace. Please stop lying, please stop creating so much pain, please stop exploiting my relationship with my husband, and please stop taking the bait from the press. I realize you are so far down this rabbit hole that you feel (or may feel) there is no way out, but if you take a moment to pause I think you'll see that being able to live with a clear conscience is more valuable than any payment in the world. I ask for nothing other than peace, and I wish the same for you.

Meg”

Mr Markle replied to the Duchess in September 2018. Some of his reply was published in the Articles. It ended: “I wish we could get together and take a photo for the whole world to see. If you and Harry don't like it? Fake it for one photo and maybe some of the press will shut up”.<sup>25</sup>

- **29 September 2019:**

Meghan issues claim form to the High Court, London (“Particulars of Claim”).

- **11 November 2019:**

response filed by defendant (ANL).

- **9 December 2019:**

response is filed by claimant (Meghan).

- **14 January 2020:**

ANL file application to strike down “Particulars of Claim”.

- **17 April 2020:**

Meghan files “Reply to the Defence”.

- **11 February 2021:**

*HRH Duchess of Sussex v Associated Newspapers Ltd* High Court summary judgment for the claimant, Duchess of Sussex, by Warby J.<sup>26</sup>

- **2 March 2021:**

consequential judgment [2021] EWHC 510 (Ch); [2021] E.M.L.R. 15 Lord Warby (*Mail on Sunday* must publish front page apology and judgment also on p.3).

- **22 March 2021:**

[2021] EWHC 669 (Ch); [2021] F.S.R. 17, Lord Warby refuses ANL's application for permission to appeal against Summary Judgment.

- **1 May 2021:**

*HRH The Duchess of Sussex v Associated Newspapers Ltd* [2020] EWHC 1058 (Ch); [2020] E.M.L.R. 21 High Court of Justice Business and Property Courts Intellectual Property List; The Rt Hon. Lord Justice Warby (sitting as a judge of the High Court). Application by ANL to strike out some of the allegations in the claimant's Particulars of Claim for misuse of private information and breach of data protection rights.

- **2 December 2021:**

Court of Appeal judgment *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWCA Civ 1810; [2022] F.S.R. 7 on appeal from the High Court of Justice Business and Property Courts of England and Wales Intellectual Property List Lord Warby; 2

<sup>25</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2022] F.S.R. 7 at [19].

<sup>26</sup> *HRH Duchess of Sussex v Associated Newspapers Ltd* [2020] EWHC 1058 (Ch); [2020] E.M.L.R. 21.

December 2021. Hearing dates: 9–11  
November 2021. Before: Sir Geoffrey Vos  
MR, Dame Victoria Sharp, President of the  
Queen’s Bench Division and Bean LJ.