Neutral Citation Number: [2021] EWHC 77 (Fam)

Case No: FD21P00449

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/09/2021

Before :

The PRESIDENT OF THE FAMILY DIVISION
Sir Andrew McFarlane

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Re: The Will of His late Royal Highness The Prince Philip, Duke of Edinburgh

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Jonathan Crow QC (instructed by **Farrer & Co LLP**) for the **Claimant**
HM Attorney General (The Rt Hon Michael Ellis QC MP) and Christopher Buckley for the **Defendant**

Hearing dates: Wednesday 28th July 2021

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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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THE PRESIDENT OF THE FAMILY DIVISION

Sir Andrew McFarlane:

1. The Executor of HRH The Prince Philip, Duke of Edinburgh (deceased) has applied for an order that His late Royal Highness' will, executed on 5 June 2013, be sealed up and that no copy of the will should be made for the record or kept on the court file. The application also seeks a direction to exclude the value of the estate from the grant of probate.

2. Her Majesty's Attorney General for England and Wales is the sole defendant to the summons. The Attorney General's role is to represent the public interest.

3. At a hearing in private on 28 July 2021, having heard submissions from Mr Jonathan Crow QC for the Executor and from the Attorney General, leading Mr Christopher Buckley, I determined, firstly, that the hearing should proceed in private. Having heard further submissions, and following time for consideration, I announced my decision which was that the Executor's applications should be granted.

4. During the course of over a century, it has become the convention that, following the death of a senior member of the Royal Family, an application to seal their will is made to the President of the Family Division (as head of Probate). Prior to 1971 the applications were made to the President of the Probate, Admiralty and Divorce Division (as predecessor of the Family Division). It appears that such applications have always been heard in private and have invariably been granted. No known record exists of any judgment or statement of reasons that may have been given by my predecessors on previous occasions.

5. The purpose of this open and public judgment is to describe the legal and historical context from which the conventional practice that I have described developed and within which the present application is made. The judgment will move on to set out the factors that I have regarded as relevant and determinative with respect to the application before turning, finally, to deal with a number of short matters including whether there should be a time limit upon the period to be covered by an order providing for the sealing of a Royal will.

The Legal Context

6. By statute, when a grant of probate is made with respect to a deceased's estate, any wills or other documents that are relevant to that grant must be open to inspection. The current statutory provision is in the Senior Courts Act 1981, s 124 ('SCA 1981'):

> "All original wills and other documents which are under the control of the High Court in the Principal Registry or in any district probate registry shall be deposited and preserved in such places as may be provided for in directions given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005; and any wills or other documents so deposited shall, subject to the control of the High Court and to probate rules, be open to inspection."

7. SCA 1981, s 125 further provides:

> "An office copy, or a sealed and certified copy, of any will or part of a will open to inspection under section 124 or of any grant may, on payment of the fee prescribed by an order under section 92 of the Courts Act 2003 (fees), be obtained—
>
> (a) from the registry in which in accordance with section 124 the will or documents relating to the grant are preserved; or
>
> (b) where in accordance with that section the will or such documents are preserved in some place other than a registry, from the Principal Registry; or
>
> (c) subject to the approval of the Senior Registrar of the Family Division, from the Principal Registry in any case where the will was proved in or the grant was issued from a district probate registry."

8. The default position, therefore, is that when any person dies, if they have left a will which has formed the basis of a grant of probate, that will must be open to public inspection.

9. The Non-Contentious Probate Rules 1987 ('NCPR') govern the operation of the probate system. NCPR, r 58 provides that:

> "An original will or document referred to in section 124 of the [Senior Courts] Act shall not be open to inspection if, in the opinion of a District Judge or Registrar, such inspection would be undesirable or inappropriate."

Thus, if a judge considers that it is 'undesirable or otherwise inappropriate', the default position in favour of public inspection can be disapplied.

10. It has long been established that the Sovereign's will does not need to be proved by a grant of probate (see *In the Goods of His late Majesty King George III, deceased* (1822) 1 ADD 255, 162 ER 89 and *In the Goods of His late Majesty King George III* (1862) 3 SW & TR 199, 164 ER 1250). This does not apply to any other member of the Royal Family, whose estates fall to be administered in accordance with the ordinary probate rules, including the court's power under NCPR, r 58 to direct that the will or other document filed with the grant of probate shall not be open to inspection.

11. By the Supreme Court of Judicature Act 1873, s 34, all causes and matters which would have been in the exclusive jurisdiction of the Court of Probate were assigned to the Probate, Divorce and Admiralty Division of the High Court and, by the Administration of Justice Act 1970, s 1, the Probate, Divorce and Admiralty Division was renamed the Family Division. Non-contentious probate business remains assigned to the Family Division, but all other probate business (i.e contentious business) is now assigned to the Chancery Division. The President of the Family Division therefore retains jurisdiction with respect to non-contentious probate matters.

12. It is well settled that the Attorney General is the only person who is recognised by public law as being entitled to represent the public interest in a court of justice (*Gouriet v Union of Post Office Workers* [1978] AC 435).

The Historical Context

13. It is understood that the first member of the Royal Family whose will was sealed on the direction of the President of the Probate, Admiralty and Divorce Division was His Serene Highness Prince Francis of Teck. Prince Francis was the younger brother of Princess Mary of Teck who, upon her marriage to King George V, became Queen Mary in 1910. Later that same year, at the age of 40 years, Prince Francis died. An application was made for the will to be sealed and not published. The application was granted.

14. As President of the Family Division I am now custodian of a safe in which there are over thirty envelopes, each of which purports to contain the sealed will of a deceased member of the Royal Family. I can confirm that the earliest such envelope is labelled as containing the will of Prince Francis of Teck. The most recent additions were made in 2002 and are, respectively, the wills of Her late Majesty Queen Elizabeth, The Queen Mother and Her late Royal Highness The Princess Margaret, Countess of Snowdon.

15. For reasons which I will set down later (paragraph 77), I propose to publish, as an annex to this judgment, a complete list of the sealed Royal wills of which the President of the Family Division is currently custodian. This Court has been informed that in recent times the definition of the members of the Royal Family whose executors might, as a matter of course, apply to have the will sealed up has been limited to the children of the Sovereign or a former Sovereign, the Consort of the Sovereign or former Sovereign, and a member of the Royal Family who at the time of death was first or second in line of succession to the throne or the child of such a person. In addition, the wills of other, less senior, members of the Royal Family may have been sealed for specific reasons, or, as the list of names suggests, a wider definition of "Royal Family" may have been applied in this context in earlier times.

Recent case law concerning sealed Royal Wills

16. In 2007, the then President of the Family Division, Sir Mark Potter, determined an application by Robert Andrew Brown who sought a direction for the unsealing of the wills of the late Queen Elizabeth, the Queen Mother and the late Princess Margaret, Countess of Snowdon. Mr Brown claimed to be the illegitimate child of Princess Margaret and asserted that he had an interest in unsealing and inspecting the wills in order to advance and/or establish that claim. Neither the President, nor the Court of Appeal, who considered the case subsequently, accepted the factual basis of Mr Brown's claim. Indeed, Lord Phillips of Worth Matravers LCJ said that Mr Brown's "belief is without any foundation and is irrational".

17. Although, in the event, Sir Mark Potter struck Mr Brown's claim out as "vexatious and an abuse of process", he nevertheless delivered a full judgment which helpfully sets out the wider arguments made with respect to the sealing of Royal wills and is informative in that it describes the knowledge, or more accurately lack of knowledge, as to the process that had been adopted by his predecessor prior to directing that the two Royal wills in question should be sealed [*Brown v Executors of the Estates of HM Queen Elizabeth, the Queen Mother and Executors of HRH the Princess Margaret, Countess of Snowdon* [2007] EWHC 1607 (Fam)].

18. Mr Brown's appeal to the Court of Appeal was allowed, not on the basis that his factual claim had any validity, which the court held it did not, but on the basis that the President

should have permitted Mr Brown to raise a number of general issues of public importance relating to the original process by which the wills had been sealed ([2008] EWCA Civ 56). The appeal was therefore allowed in the expectation that the important issues that had been identified would then be heard by the President at first instance. However, it seems that at that point Mr Brown withdrew from the court process and, as I shall explain (paragraph 22), thereafter he pursued disclosure of material under the Freedom of Information Act 2000.

19. The issues of public importance identified by the Court of Appeal as needing to be addressed were as follows:

i) What principle underlies the exposure of wills to public inspection on the terms of sections 124 and 125 of the 1981 Act?

ii) What considerations are relevant to the question of whether inspection would be 'undesirable or otherwise inappropriate' under Rule 58?

iii) Where a will is 'sealed' pursuant to Rule 58, what is the nature of the interest that an applicant must show in order to be permitted to inspect that will?

iv) Is it appropriate to have a special practice in relation to Royal wills? If so:

v) What, if any, information about that practice should be made public?

20. In the course of the Court of Appeal proceedings information came to light relating to arrangements that had been made between Buckingham Palace, the Queen's solicitors and the Attorney General's secretariat regarding the applications to seal the wills. The arrangements had, apparently, been approved by the 'former President' (a reference to Dame Elizabeth Butler-Sloss P). Lord Phillips describes those arrangements in these terms at paragraph 28:

> "Before and after the death of Princess Margaret there were discussions between the Palace, Farrers, the Attorney General's Secretariat, and the Attorney General and the court which reviewed what Mr Hinks described as the practice of sealing royal wills. The Senior District Judge was involved who sought the views of the former President. Ultimately 'a quite lengthy document' was agreed that was reviewed and approved by the former President. The process that this contained involved a system of 'checks and balances' that was highly confidential. The primary object of the process was to protect the privacy of the Sovereign. Thus when the two applications came before the former President she had an understanding of the background that she would not otherwise have had."

At the conclusion of his judgment on the appeal, Lord Phillips made the following observations:

> "47. There may well be good reason for the procedure apparently agreed between the Palace and the Attorney General, with the approval of the former President, in relation to the treatment to be given to royal wills. It appears that, before this procedure was agreed, a practice had long existed under which royal wills would be sealed up – see the extracts from *Tristram & Coote's Probate Practice* (30th Ed) and *Williams, Mortimer & Sunnucks* cited by the President in paragraph 9 of his

judgment. We would not dissent from the President's reference in paragraph 50 of his judgment to the "seemingly insatiable curiosity about the private lives, friendships and affections of members of the royal family and their circle" and this may justify special treatment for royal wills. We consider, however, that these are questions that should properly be explored by the President with knowledge of the material facts.

48. It does not necessarily follow that all the details of the negotiations that led to the special procedure, or even all the details of that procedure, must be brought within the public domain. That will be a matter for the President to consider after he has, himself, had sight of the relevant material.

49. It is unfortunate that the important issues to which we have drawn attention should be raised by an application made by a person motivated by a belief that is both irrational and scandalous. We have, however, concluded that the appellant was and is entitled to have a substantive hearing of his claim to inspect the wills. For these reasons this appeal is allowed."

21. The judgments given at first instance and on appeal in the case of *Brown* represent the only substantial consideration that has been given by the court to the topic of the sealing of Royal wills in recent times. For completeness I simply record that the topic was also considered by the then President, Sir James Munby P, in a series of short judgments on successive unmeritorious applications in the Spring of 2017 [*Re Benmusa* [2017] EWHC 494 (Fam); *Re Benmusa (No 2)* [2017] EWHC 785 (Fam) and *Re Benmusa (No 3)* [2017] EWHC 966 (Fam)] and in *Re His Royal Highness the Duke of Windsor (deceased)* [2017] EWHC 2887 (Fam)].

22. Following the Court of Appeal process, Mr Brown made a request under the Freedom of Information Act 2000 for the document referred to in paragraph 28 of Lord Phillips' judgment describing the practice of the sealing of Royal wills. The application was eventually determined by Mr Justice Charles sitting in the Upper Tribunal (Administrative Appeals Chamber) - [2015] UKUT 393 (AAC). In the event, prior to the hearing in the Upper Tribunal, the Attorney General had decided to disclose the confidential note (subject to some element of gisting) and the two annexes. The disclosed material is reproduced at the conclusion of Charles J's judgment. Charles J refused Mr Brown's renewed request for full disclosure of the gisted confidential note.

23. The confidential note that was disclosed and is attached to Charles J's judgment contains an interesting account of the development of the practice of sealing Royal wills during the last century. That note provided that, in particular, the practice of applying to the Family Division applied, as a matter of course, to 'senior members of the Royal Family' who were defined as:

- The Consort of a Sovereign or former Sovereign;
- The child of a Sovereign or former Sovereign; and
- A member of the Royal Family who, at the time of His/or Her death, is first or second in line of succession to the throne or the child of such a person.

That note provided that wills of members of the Royal Family who are more remotely related might be the subject of a specific application after the Attorney General, acting in the public interest, has considered them on their merits and after the Sovereign, on the advice of the Attorney General, has made Her views known.

24. Mr Brown was refused permission to appeal against the decision of Charles J by Lord Justice Simon ([2016] EWCA Civ 1193).

The Executor's application

25. Mr Julian Smith, who is the private solicitor to Her Majesty the Queen, and who is also a partner at Farrer and Co LLP, acts for the Executor of the estate of HRH The Duke of Edinburgh, who died on 9 April 2021. The Executor is a company, Farrer and Co Trust Corporation. Mr Smith's evidence is in the form of a detailed affidavit.

26. Mr Smith relies upon the following factors:

    a) The long standing practice for the personal representatives of senior members of the Royal Family applying to the court to seal up the will of the testator or testatrix. The practice has been in place for over a century and there is no record of any applications having been refused.

    b) A consistent approach to the will of every senior member of the Royal Family avoids difficulties that might arise if some Royal Family wills were sealed while others were not, where, in such circumstances, the public might infer a desire for concealment in those sealed which would be contrary to the public interest;

    c) In 2013, during a wide-ranging consultation on a proposed revision of the NCPR, a draft rule specifically relating to wills of senior members of the Royal Family provided that 'the President of the Family Division shall make an order that the will shall not be open to inspection' (emphasis added). The rules were not updated and the draft was never brought into force.

27. Mr Smith urges the court to take account of the following matters:

    a) The right to privacy on the part of Her Majesty in relation to personal matters;

    b) The interests of the testator or testatrix in maintaining confidentiality in the final expression of his or her most personal wishes;

    c) The interests of those named as legatees in being protected from harassment or intrusion into their privacy;

    d) The interests of those who might be expected to be named as legatees, but are not;

    e) The wider public interest (which may itself embrace conflicting interests for and against inspection);

    f) The general rule in favour of inspection enshrined in SCA 1981, s 124.

28. The current rule providing a general right of public inspection of a will apparently dates back to legislation enacted in 1857. There is no authoritative explanation for the introduction of the rule but Mr Smith suggests that it may be supported by the following five factors:

    a) Publicity should ensure that effect is given to the wishes of the testator;

    b) The task of notifying and tracing legatees may be facilitated if the will is made public;

    c) Publication of a will might serve a general interest in notifying the deceased's creditors of the death;

    d) In circumstances where a testator's true, final will has been lost or supressed, others may come forward to prove a document in respect of which probate should be granted, those individuals having been alerted by the publication of a purported true will;

    e) Publication may give notice to those who might have a claim under the Inheritance (Provision for Family and Dependants) Act 1975.

29. Mr Smith argues that none of these five points really has any force in the context of a senior member of the Royal Family, whose estates are administered by professionals who are chosen to provide a high standard of service and, secondly, where the death of the individual is likely to be a matter of very significant national and international publicity.

Public or private hearing: Submissions

30. At the hearing of the application, Mr Jonathan Crow QC, for the Executor, firstly submitted that the hearing should be conducted in private and, as a preliminary issue, that the hearing to determine whether the substantive hearing should be in private should, itself, be in private. He submitted that Civil Procedure Rules 1998, r 39.2(3), which provides for hearings in private, was of relevance. Rule 39.2(3) states:

> "(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –
>
> (a) publicity would defeat the object of the hearing;
>
> (b) it involves matters relating to national security;
>
> (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
>
> (d) a private hearing is necessary to protect the interests of any child or protected party;

> (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;
>
> (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or
>
> (g) the court for any other reason considers this to be necessary to secure the proper administration of justice."

Mr Crow submitted that sub paragraphs (a), (c), (f), and (g) were particularly in point.

31. Mr Crow submitted that the degree of media curiosity, and if a public hearing took place, media coverage, would be very extensive indeed. Such coverage, itself, would be an intrusion into the privacy of the Sovereign. Any such publicity, coming soon after the death of HRH The Duke of Edinburgh could only be intrusive to Her Majesty The Queen and the immediate members of the Royal Family.

32. Mr Crow explained that for the court to announce that an application had been made, that a hearing was subsequently going to be held to determine whether the substantive hearing should be in public or in private, for the court then to hold that hearing and, potentially, adjourn the substantive hearing to yet a further occasion followed, after a pause, by the handing down of judgment would create four or more occasions, spread out over a number of weeks, when the topic of the sealing of the will would be run and rerun extensively in the national and international media. News of the application and of the hearing(s) might generate wholly unfounded conjecture of a type that might be deeply intrusive to Her Majesty The Queen and Her Family. In contrast, a hearing conducted in private, but with a full public judgment, would allow the court to control the process and limit the publicity to one single event, namely the publication of the judgment.

33. Further, Mr Crow submitted that the public interest included the importance of maintaining the dignity of the Head of State and, separately, respecting Her Majesty's right to privacy in matters which are truly private, with the content of Her late consort's will falling firmly within this latter category.

34. In this regard, Mr Crow placed substantial weight on the fact that the Attorney General, representing the public interest, firmly favoured the application being determined at a private hearing. Mr Crow submitted, and I accepted, that that factor warranted significant weight.

35. Mr Crow rejected the court's suggestion that allowing lawyers acting on behalf of the media to attend and make submissions might provide a proportionate process and allow additional arguments in favour of publicity to be made. He submitted that, as a matter of constitutional law, where the Attorney General represents the public interest (*Gouriet v The Union of Post Office Workers*) it is not possible for another party or constituency also to stand for the public interest with a contrary view.

36. On the issue of whether the hearing should be in private or in public, the Attorney General, in the course of his oral submissions, strongly supported the application for the whole process to be conducted in private. The media interest in matters to do with the Royal Family was, seemingly, insatiable and highly intrusive. To have any part of

the process in public would, in the Attorney General's submission, simply fuel media curiosity. The benefits ordinarily gained by a public hearing would be wholly disproportionate to the degree of media curiosity and the extent of the consequent intrusion into matters which are essentially private. The Attorney General submitted that a brief open judgment at the end of the process would meet the requirements identified by the Court of Appeal in the *Brown* case.

37. The very purpose of the application is to protect the dignity of the person of the Sovereign, by protecting the privacy of those family members closest to Her. It would, therefore, defeat the object of the process for the hearing itself to generate enhanced, or indeed any, publicity by being held in public. The media interest was driven by prurient curiosity and the resulting publicity would be wholly disproportionate to any benefit that was within the genuine public interest.

38. For reasons which I will explain when I come to set out my conclusions, I directed that the hearing should proceed in private.

The substantive application: Submissions

39. In the course of his substantive submissions in favour of the application Mr Crow drew attention to an article by Professor Joseph Jaconelli (Law School, University of Manchester) "*Wills as public documents – privacy and property rights*" [Cambridge Law Journal 71(1) March 2012 147] which questions what justification there is for the current law which requires every will to be open to public inspection. Professor Jaconelli draws attention to the 'report of the committee on privacy' under the chairmanship of Sir Kenneth Younger in 1972 which reported the findings of a survey into the views of the public. Under the heading 'publication of will', 77% of those canvassed were of the opinion that this was an invasion of privacy, while 71% believed that it should be prohibited. In circumstances where there is no clear account of the legislature's reasons over 160 years ago for requiring the publication of wills and where, now, the right to privacy is, generally, taken very seriously, it is legitimate to question what weight should be given to the need for openness with respect to a will in any particular case.

40. Mr Crow submitted that whilst from birth the Sovereign has an extensive public persona, She or He is also a private individual. The will of the Sovereign's consort, children or other close family members, will be a genuinely private document, which is not at all to do with the Royal or public role of either the Sovereign or the deceased.

41. Mr Crow submitted that there is a <u>public</u> interest in protecting the <u>private</u> rights of the Sovereign. He laid particular weight on that submission and, in my view, he was entirely right to do so.

42. To illustrate this point Mr Crow referred to a Decision Notice dated 6 December 2010 issued by the Information Commissioners Office ('ICO') under the Freedom of Information Act 2000 ('FOIA 2000') with respect to Mr Brown's complaint about being refused access to the Attorney General's confidential note regarding the sealing of Royal wills. Two paragraphs in particular within the ICO decision illustrate the wider point that Mr Crow sought to establish:

> "33. The withheld information in this case represents the personal views of the Queen. Therefore the Commissioner considers that the public interest factor which is inherent in maintaining the exemption, and which is relevant in this case, is that of protecting the privacy and dignity of the Royal Family. There is a clear public interest in protecting the dignity of the Royal Family so as to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation. Furthermore, the Commissioner is also conscious that the Queen, whilst Head of State is also a private individual in her own right and the Commissioner believes that there will always be a strong and inherent public interest in protecting an individual's privacy.
>
> 34. The Commissioner is mindful of the fact that the information relates to what is essentially a private matter since it deals with how the wills of members of the Queen's family should be treated. Although there is often a significant overlap between the Queen's public role as Sovereign and her private life, the Commissioner considers that the withheld information in this case is clearly about a private matter. Therefore the Commissioner is of the view that there would need to be very strong factors in favour of disclosure in order to overturn the important public interest in maintaining the exemption."

43. Mr Crow also referred to another publication by the ICO, '*Communications with Her Majesty and the awarding of honours*'. The document gives guidance upon FOIA, 2000, s 37 which provides that information is exempt from disclosure if it relates to communication with the Sovereign and other members of the Royal Family. At paragraph 64 onwards, the guidance focuses upon 'public versus private life':

> "64. It is important to keep in mind that members of the Royal Family and Household are private individuals in their own right. This is significant because there is an inherent public interest in protecting the privacy of individuals.
>
> 65. There is also an inherent public interest in protecting the Royal Family's dignity in order to preserve their position and fulfil their constitutional role as a unifying symbol for the nation.
>
> 66. However, the Royal Family's unique role means that their public and private lives will often overlap. Where they do, the public interest in preserving the Royal Family's privacy and dignity is more likely to be a factor if:
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> - the information clearly relates to a private matter; and
>
> - it concerns a situation where the individual in question would have had a reasonable expectation of privacy."

44. In support of the application the Attorney General helpfully structured his submissions on the public interest in the form of a balance sheet. In summary, he submitted that the points in favour of public inspection of the will included:

    a) The prevention of fraud.

    b) To enable a potential applicant under the Inheritance Act 1975 to know who has inherited the estate and therefore assess the merits of their claim.

    c) To enable creditors to protect their rights.

    d) Transparency in respect of the finances of senior members of the Royal Family given their constitutional roles and taxpayer-funded support.

    e) Historic and journalistic interest.

45. The public interest factors against public inspection included, on the Attorney General's submission:

    a) Protecting the privacy and dignity of the Sovereign and Her close family and the institution of the monarchy, so as to preserve their position and ability to fulfil their paramount constitutional role as a unifying symbol of the nation and the Head of State.

    b) Protecting the Sovereign and other members of the Royal Family from undue intrusion into private matters.

    c) Consistency of practice for over 75 years.

    d) The important demarcation between the public role of the Sovereign and senior members of the Royal Family, and their personal privacy. The former is subject to the scrutiny of Parliament and the statutory scheme of the Sovereign Grant Act 2011, and the latter is private.

    e) There being no real possibility in any case involving close family members of the Sovereign of fraud or unsatisfied creditors.

    f) Crucially, it being open to any person able to demonstrate a private interest in examining the will to make such an application to the court for its disclosure.

46. Taking all of these matters into account the Attorney General considered that the public interest strongly favoured not permitting inspection of the will. He therefore supported and endorsed the Executor's application that it be sealed up. The same public interest also favoured withholding the value of the estate from the grant of probate.

47. In the course of his oral submissions, the Attorney General cited the assertion made by Walter Bagehot, in '*The English Constitution*' (1867), that a constitution needed two parts, 'one to excite and preserve the reverence of the population' and the other to 'employ that homage in the work of government'. The first Bagehot called 'dignified' and the second 'efficient'. The monarch was the prime example of dignity in this sense. The Attorney General submitted that there is a real constitutional importance in maintaining the dignity of the monarchy and that undue intrusion by the media into the

private arrangements of senior members of the Royal Family is therefore contrary to the public interest.

48. The Attorney General drew attention to the observation made by Sir Mark Potter P in the course of the *Brown* case, to which the Court of Appeal (paragraph 47) did not dissent, when the President described the "seemingly insatiable curiosity about the private lives, friendships and affections of members of the Royal Family and their circle". The Court of Appeal went on to observe that this factor "may justify special treatment for Royal wills". It is the Attorney General's considered conclusion that that is indeed the case.

49. Further, the Attorney General submitted that there is a strong argument in favour of this court maintaining the consistency of approach that has been established in respect of Royal wills over the past century. Unless there is a reason to change the established practice, and he submitted that there was not, the court should determine this application in accordance with the established practice.

50. Finally, and on a separate matter, the Attorney General submitted that it would be sensible for the court, in every application of this sort, both now and in the future, to establish the practice of handing down a 'closed' judgment in every case so that, if an occasion arose where specific and particular private matters were raised with respect to the content of an individual will, the court could evaluate those matters in the course of a closed judgment which would remain private. In most, if not all, cases the closed judgment might simply say 'no private matters were raised in the course of this application'. Issuing a closed judgment in each case, however, would not draw attention to those particular cases, in the future, in which a particularly private or sensitive matter might arise which would, on that occasion call for a more substantial closed determination.

Discussion and conclusion

51. The court has jurisdiction under NCPR, r 58 to disapply the default position in favour of openness in SCA 1981, s 124 and direct that a will or document shall not be open to inspection when probate is granted. The test in r 58 is satisfied when the court concludes that 'such inspection would be undesirable or inappropriate'. Whilst the provision creates an exception to the norm, the wording of the rule does not require there to be 'exceptional' circumstances. The words 'undesirable' and 'inappropriate' are not qualified by the addition of an adverb such as 'wholly' or 'significantly'. The conjunction separating them is 'or' rather than 'and', so that only one of the two conditions is required to be satisfied rather than both. The terms 'undesirable' and 'inappropriate' should be given their ordinary meaning. On that basis, the hurdle established by r 58, whilst requiring an applicant to make out a clear case for departing from the normal rule, is not an especially high one.

52. In the context of the present application relating to the will of a deceased senior member of the Royal Family, I accept the submission of both parties before the court that, in determining whether having the will and other probate documents open to inspection would be undesirable or inappropriate, what is in the public interest is likely to be determinative.

53. The Attorney General's role in these proceedings is important. He appears before the court not only as a party in order to make submissions. As a matter of public law, the Attorney General is uniquely entitled to represent the public interest. The Attorney General's statement that the public interest strongly favours not permitting publication of the will and details of the estate should, therefore, be regarded as evidence of great weight on the question. In the context of a test to be measured on a scale of inappropriateness or undesirability, a finding, on the basis of the Attorney General's statement, that a particular course is strongly in the public interest should be regarded as compelling and I find that it is indeed so in this case. On that basis alone, it is effectively inevitable that the application must succeed.

54. In addition to taking due regard of, and affording substantial weight to, the Attorney General's evaluation of the public interest, I separately conducted my own assessment of the relevant factors for and against the application before I concluded that it was both undesirable and inappropriate for the will and accompanying documents to be open to public inspection. I have rehearsed the arguments that were made to the court and it is therefore possible to set out the reasons for that conclusion in short terms.

55. Someone who is given basic knowledge of the fact of this application might reasonably ask 'why should there be an exception to the ordinary rule for senior members of the Royal Family?'. The answer, in my view, is rooted in the unique status of the Sovereign and Head of State. For the reasons which are so clearly and correctly set out by the Office of the Information Commissioner, in both the *Brown* decision and, separately, the *Guidance* (referred to at paragraphs 42 and 43 above), there is an inherent public interest in protecting the Sovereign's dignity, and that of the close members of Her family, 'in order to preserve their position and fulfil their constitutional role' [paragraph 65 of the *Guidance*]. As the Attorney General submitted, there is real constitutional importance in maintaining the dignity of the monarchy.

56. In that regard, Mr Crow was right to assert that there is, therefore, a public interest in protecting the private rights of the Sovereign and close members of the Royal Family. The content of a person's will and the details of their estate are plainly entirely private matters. Whilst much of the life of a member of the Royal Family will be taken up with public activities, both they and the Sovereign Herself are also private individuals.

57. The answer to the question 'why should there be an exception for senior members of the Royal Family?' is, in my view, clear: it is necessary to enhance the protection afforded to the private lives of this unique group of individuals, in order to protect the dignity and standing of the public role of the Sovereign and other close members of Her family. In this regard, the ICO correctly encapsulated the point in paragraph 66 of the *Guidance*:

> "However, the Royal Family's unique role means that their public and private lives will often overlap. Where they do, the public interest in preserving the Royal Family's privacy and dignity is more likely to be a factor if:
>
> - the information clearly relates to a private matter; and
>
> - it concerns a situation where the individual in question would have had a reasonable expectation of privacy."

58. I accepted Mr Smith's evidence to the effect that none of the general factors that may support the principle that all wills should be open to inspection, for example the avoidance of fraud, or alerting others to the death of an individual so that they may make a claim, are likely to apply in the case of a senior member of the Royal Family.

59. I accepted the submission that, whilst there may be public curiosity as to the private arrangements that a member of the Royal Family may choose to make in their will, there is no true public interest in the public knowing this wholly private information. The media interest in this respect is commercial. The degree of publicity that publication would be likely to attract would be very extensive and wholly contrary to the aim of maintaining the dignity of the Sovereign.

60. Against a test measured in terms of that which is 'undesirable or inappropriate', the circumstances, when seen in the manner that I have now described, plainly justified the granting of these applications.

61. In addition to the general matters that I have thus far described, which would apply to the wills of any member of the small circle of senior members of the Royal Family, I consider that it is relevant to assume that, because of the convention that has now been in place for over a century, HRH The Prince Philip is likely to have executed his will on the understanding that it was not going to be open to public inspection. If that approach, contrary to my decision, were now to change, I consider that any change should in any event only apply for the future and not to HRH The Prince Philip's estate.

62. I would therefore answer the five questions identified by the Court of Appeal in *Brown* (see paragraph 19 above) as follows:

    i) It has not been possible to identify what principle lay behind the enactment of the ordinary rule that is now in SCA 1981, ss 124 and 125 that wills should ordinarily be exposed to public inspection. The various factors identified by Mr Smith (see paragraph 28 above) are important and are likely to be relevant. That said, as the article by Prof Jaconelli suggests, the question of whether such a rule is still justified or acceptable to the public in the 21st century may be an open one.

    ii) I have held that the hurdle in r 58 is not a high one and that the words 'undesirable' and 'inappropriate' should have their ordinary meaning. No attempt has been made to offer an exhaustive list of relevant considerations for all types of cases; the focus of this judgment is firmly confined to the wills of senior members of the Royal Family.

    iii) Question (iii) does not arise for consideration in this application and the issue has not been addressed.

    iv) I have held that, because of the constitutional position of the Sovereign, it is appropriate to have a special practice in relation to Royal wills. There is a need to enhance the protection afforded to truly private aspects of the lives of this limited group of individuals in order to maintain the dignity of the Sovereign and close members of Her family.

v) As much detail as possible, short of compromising the conventional privacy afforded to communications from the Sovereign, should be made public as to the process by the publication of this judgment.

Private hearing

63. For essentially the same reasons that justified granting the substantive applications, I concluded that both the hearing about whether the substantive hearing should be in private, and that hearing itself, should be in private. That conclusion was contrary to the initial view that I had formed before hearing the application. My preliminary view had been that the fact that the application had been made should be publicised and that the hearing(s) should be in public. I was, however, persuaded to the contrary view by the submissions of Mr Crow and the Attorney General that I have recorded at paragraphs 30 to 38. Whilst the Civil Procedure Rules 1998 do not strictly apply to an application under the NCPR (see CPR, r 2.1, NCPR, r3(1)), the provisions of CPR, r 39.2 are plainly relevant to this issue.

64. In short, I accepted that to have a series of announcements, hearings and then a judgment would be likely to generate very significant publicity and conjecture over an extended period, and that this would be entirely contrary to the need to preserve the dignity of the Sovereign and protect the privacy surrounding genuinely private matters. The publicity would, therefore, in part, defeat the core purpose of the application. I also accepted the argument that only the Attorney General can speak, as a matter of public law, to the public interest, and that there was, legally, therefore no role for those who might represent the media at a hearing (public or private) in putting forward any contrary view of the public interest.

Future applications

65. It is to be hoped that the publication of this judgment, with its analysis of the relevant factors, may provide the template for the court to follow in the event that any future applications for the sealing of the will of a senior member of the Royal Family may be made. It will, however, be for the President of the Family Division at the time to determine the course that should be followed in the event that such an application is made to them.

Closed judgment

66. I am grateful to the Attorney General for suggesting that in future the court should, as a matter of course, give a ‘closed judgment’ which, if there is a need to do so, would record the court’s evaluation of any specific matters relating to the content of a will or other documents that may arise in a particular case. I accept that, to avoid conjecture in the event that a closed judgment were given in some cases but not in others, a closed judgment should be given on every occasion.

67. I consider, however, that that practice should apply for the future but not to this application lest there be any suggestion that the above practice has been adopted because there is some specific private information relating to HRH The Prince Philip’s will or estate which, irrespective of the general approach, itself justifies avoiding publication. It is in the public interest that I should make clear in this judgment that I have neither seen, nor been told anything of the contents of, the will of HRH The Prince

Philip (other than the date of its execution and the identity of the appointed Executor). I have determined these applications solely on the basis of the matters that I have recorded in this judgment and on no other basis.

A time limit?

68. The need for privacy surrounding a Royal will, in order to maintain the dignity of the Sovereign, is likely to be at the height of its importance at the time that probate is granted. As each year passes, the importance of the factors justifying withholding publication will diminish. Any historical or biographical interest in such wills will, however, remain. At present Royal wills that have been the subject of orders made by my predecessors are sealed without any time limit. Where the default position for all other wills is that they are to be open, it must be questionable whether sealing for an indefinite period is either necessary or proportionate. I therefore invited the Attorney General and Mr Smith to consider whether a time limit should be introduced so that, after a very significant period, wills that have been sealed may be opened and deposited in a suitable archive. I am grateful to both parties for their further submissions.

69. The Attorney General submits that a period of 125 years would be the most appropriate before the question of unsealing a will should be considered, in the absence of any individual application for unsealing that may otherwise be made. The period of 125 years accords with the perpetuity period established by the Perpetuities and Accumulations Act 2009, s 5(1) applicable generally to trusts. The Attorney General argues that a shorter period, even though measured in terms of a century, would be likely to risk compromising the privacy of children and grandchildren of the deceased Royal person who may still be living.

70. Mr Smith supports the adoption of the period of 125 years but submits that after that time the unsealing of an individual will should not automatically follow. Mr Smith suggests that, after 125 years, a review might then be conducted to assess whether it would be appropriate for an individual will to be unsealed. If such a practice were to be adopted, Mr Smith suggests that the Sovereign, through the Sovereign's Private Solicitor, the Keeper of the Royal Archives and the Attorney General should be consulted and given the opportunity to inspect the will and make any representations as to publication, so as to ensure that a mechanism is in place to identify circumstances where a particular will may raise sensitivities which may continue to justify keeping its contents under seal. Both Mr Smith and the Attorney General (who agrees with this proposal), accept the court's suggestion that the Personal Representatives of the deceased (if still available) should also be consulted.

71. The questions of whether this court should now establish a period of time during which orders that have been made to seal wills of members of the Royal Family are to have effect and, if so, what length that period should be, fall to be assessed in terms of proportionality and necessity. It is an exercise to which there will not be an empirically precise, or otherwise 'right', answer. That this is so, is compounded by the fact that the court has no knowledge of the contents of any of the individual wills or, where this is relevant, whether there were any specific reasons for sealing any particular will over and above the general principles that have been considered in this judgment.

72. Whilst respecting the submissions that have been made, there is no direct relevance between the statutory perpetuity period of 125 years and the present issue. The rule

against perpetuities seeks to prevent a donor seeking to control the disposition of property indefinitely by their will (or otherwise), so that if a gift or the establishment of a trust has not taken place by a certain date then it is likely to be void. The rule, therefore, sets a time limit (known as the perpetuity period) within which future dealings with property (such as gifts to a particular child, or a group of people who fulfil a particular condition) must occur. Other than identifying a period of time which is intended to be safely beyond the length of a life in being at the time of the original disposition, there is no other direct connection between the rule against perpetuities and the reasons justifying the sealing of a Royal will.

73. In considering the question of how long the period should be, it is helpful first to determine whether unsealing should automatically follow the expiration of that period or, as Mr Smith submits, the passing of the key date should simply trigger a process in private of consideration of the will's content and then submissions to the court on the question of whether it should, at that stage, be made public. On this point my conclusion is clear. The process described by Mr Smith and supported by the Attorney General is plainly a wise and sensible one. I therefore propose to order that, where the initial period during which a Royal will has been sealed expires, there is then to be a process by which it is opened and considered in private by the individual office holders that I have referred to before the court is then invited to determine whether the will should either be made public at that time or re-sealed for a further set period. I also agree with the suggestion made by the Attorney General that the physical process of un-sealing should be conducted by a professional archivist from the Royal Archives (or such other professional as the Keeper of the Royal Archives appoints) to ensure that the document and its seals are properly preserved.

74. In the light of that decision as to process, the question is how long the period of time should be before the will is initially un-sealed and its future publication is considered. Given the protection that is provided to those representing the Sovereign's interest and the public interest by the process that will be in place, I consider that a period as long as 125 years is not justified. Equally, a period much less than 80 years would seem to be too short; 80 years looks back to 1941 and the early years of the Second World War.

75. The initial period before a sealed will is considered for possible publication is justified, for the reasons that I have rehearsed in the main part of this judgment, by the need to protect the dignity of the Sovereign and the senior members of the Royal Family during that period. Once a period of some 80 years or so is reached, the potential for the publication of a will to intrude adversely on the private life and dignity of those who may at that time be in the category of those who are to be protected by the court's order should have very substantially diminished. Nevertheless erring on the side of caution, I consider that an initial period of 90 years is proportionate and sufficient in all the circumstances.

76. It follows that I will direct that the orders that have previously been made for the sealing of Royal wills are to be taken to be varied by the order of this court so that on the expiration of the period of 90 years following the date upon which probate for any such will was granted, the will is to be opened in private, at the direction of the then President of the Family Division, so that its content may be inspected by the Sovereign's Private Solicitor, the Keeper of the Royal Archives, the Attorney General, and by the any of the deceased's personal representatives who may be available. The physical process of un-sealing is to be conducted by a professional archivist from the Royal Archives (or

such other professional as the Keeper of the Royal Archives appoints) to ensure that the document and its seals are properly preserved. I have invited the parties to make further short submissions on the detail of the process, which the court will determine before then undertaking the task of unsealing those wills to which it applies.

Publication of a list of Royal wills that are currently sealed

77. Following the issue being raised by the court, both parties have provided further submissions on the question of whether a list of the Royal wills that are sealed and currently held in the custody of the President of the Family Division should be published.

78. The Attorney General considers that publication of a list of sealed wills would not be in the public interest. He submits that to publish such a list would encourage applications, particularly from media organisations, to open sealed wills, which would result in fevered media speculation and, in turn, further intrusion into the private lives and dignity of the Sovereign and Her Family. Further, given Her Majesty's longevity, the Attorney General submits that the wills of many of Her closest family members will be included in the list.

79. Given that the primary purpose of the application to seal these wills is to protect the dignity and standing of the public role of the Sovereign and other close members of the Royal Family, to invite media intrusion would defeat that very purpose.

80. If multiple applications were to be made, this would involve the Queen's Private Solicitor and the Attorney General in substantial costs and additional work.

81. Further, the Attorney General submits that the publication of a list may not be necessary in that if anyone applies to the Principal Probate Registry for a copy of such a will, then they will be informed that it is sealed. Record of the grant of probate of members of the Royal Family who have died in more recent times can be found on the Government online 'Find a Will' service, which either records that the will is sealed or simply refers to the grant of probate and not the will.

82. In the alternative, if the court is minded to publish a list, the Attorney General submits that any adverse consequences would be significantly mitigated if the court's judgment were to make plain that:

    (a) There is a time period after which it was generally considered to be in the public interest for a will to be open for public inspection;

    (b) The sealed wills may not be opened for public inspection before that time limit expires (subject to any individual who has a genuine private interest in making a bespoke application to open a particular will before then);

    (c) Once the time limit has expired, an application to open the will would still be necessary; and

    (d) There may be circumstances where it would not be appropriate for a Royal will to be unsealed even after that period, whether in full or in part.

83. The Attorney General's submissions on this point are supported by Mr Smith who, in like manner, encouraged the court to make it plain that any generalised application to re-open a will before the expiry of the proposed time limit would be unlikely to succeed.

84. Having now determined that there is indeed to be an initial time period of 90 years during which the order for sealing will stand, but at the end of which consideration will be given to publishing a previously sealed will, it is possible to deal with the question of the publication of a list shortly.

85. As is plain from this judgment, I consider that it is a necessary and proportionate intrusion into the private affairs of Her Majesty and the Royal Family to make public the fact that an application to seal the will of HRH The Prince Philip, Duke of Edinburgh has been made and granted in private, and to explain the underlying reasons. It is now well known that for over a century it has been the custom of the court, when an application has been made, to direct that the will of a senior member of the Royal Family should be sealed. The court has been told about media coverage of the issue surrounding the wills of HM The Queen Mother and HRH The Princess Margaret. The process was described in detail in the *Brown* judgments. It is therefore hard to make a principled distinction between the information about this process which is already in the public domain, and the publication of a list of those with respect to whose wills a sealing order has previously been made. The Attorney General's submission that the information is already available, at least by implication, on application to the Probate Registry or by going to the 'Find a Will' website, suggests that drawing all the information together into an authoritative list would avoid the Press making fishing applications to the Registry and would simply confirm the position which is, in any event, ascertainable by other means.

86. However, I note and take seriously the argument of both parties that the publication of a list might generate a flurry of applications by media agencies to open one or all of the wills named in the list. Were that to happen, it would certainly give rise to significant work and costs. More importantly, it would be likely to cause significant media interest and speculation of a type that the court has been at pains to avoid by the process that it has adopted thus far and which would be bound to be inimical to the dignity and integrity of the Sovereign.

87. Drawing matters together, the principle that there should be a level of transparency as to the fact that a Royal will, in this case that of HRH The Prince Philip, has been sealed has now been established. The fact that a number of other wills have been similarly sealed over the past century is known and, in those circumstances, the same level of transparency should now apply to those wills so that the fact that they have been sealed and are currently in the custody of the President of the Family Division should be made public by naming them in a list.

88. The publication of the list is, however, in no manner an invitation for any person or agency to apply to open any or all of those wills. So far as is known, the sealing orders that have previously been made are open-ended in terms of time. By the order that will follow this judgment, that situation has now changed and, after the expiration of 90 years from the grant of probate, an initial and private process will be undertaken to consider whether at that stage the will may be unsealed and made public. It must be absolutely plain to one and all that any application to open a sealed will, prior to the expiration of the 90 year period, is likely to be dealt with by the President of the Family

Division on a summary basis and is highly likely to fail in the absence of a specific, individual or private justification relating to the administration of the deceased's estate (for example a potentially meritorious claim of entitlement to inheritance). In short, the publication of the list is intended to be an end in itself, in order to achieve transparency, and nothing more.

89. It may be that one or both of the parties will wish to seek permission to appeal against the orders that will follow from this judgment with respect to the time period and/or the publication of the list of sealed wills. The annex containing the list of wills will not therefore be published at this stage to allow for any potential appeal process to run its course.

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