Neutral Citation Number: [2022] EWHC 2925 (KB)

Case No: QB-2022-000174

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2022

Before:

MR JUSTICE CHAMBERLAIN

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Between:

HIS MAJESTY'S ATTORNEY GENERAL for ENGLAND and WALES	**Claimant**
– and –	
BRITISH BROADCASTING CORPORATION	**Defendant**

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Oliver Sanders KC, Jennifer Thelen and Emmanuel Sheppard (instructed by **the Treasury Solicitor**) made written submissions for the **Claimant**

Adam Wolanski KC and Hope Williams (instructed by **the BBC Legal Division**) made written submissions for the **Defendant**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 Earlier this year, the Attorney General issued a claim against the BBC seeking an injunction to restrain the BBC from publishing certain information about an individual, X. The allegation at the centre of the BBC's proposed story was that X was a covert human intelligence source (or CHIS) for the Security Service (MI5), who had physically and psychologically abused two female partners, in one case using his alleged CHIS status to terrorise and control her.

2 There were three substantive hearings. On 16 February 2022, I made a declaration under s. 6 of the Justice and Security Act 2013 and heard argument on the question whether, as the Attorney General submitted, the OPEN part of the hearing of her application for interim relief should proceed entirely in private. I rejected the Attorney General's submission on this point and gave my reasons in an OPEN judgment made public on 24 February 2022: [2022] EWHC 380 ("the open justice judgment").

3 On 1 and 2 March 2022, I heard the Attorney General's application for interim injunctive relief. I decided that injunctive relief to restrain publication of X's identity would be granted, but that the relief would not prevent the BBC from making the allegations central to its story. I gave my reasons in OPEN and CLOSED judgments handed down on 7 April 2022: [2022] EWHC 826 (QB) ("the interim injunction judgment").

4 The third hearing was held to resolve disputes between the parties about what information could safely be published without revealing X's identity. It took place on 27 April 2022, partly in OPEN and partly in CLOSED. The OPEN hearing was partly in public and partly in private. I gave my judgment on 18 May 2022, partly in public and partly in private: [2022] EWHC 1189 (QB) ("the identification judgment"). Some of the disputes were resolved in the Attorney General's favour and some in the BBC's. I granted an interim injunction in terms which reflect this.

5 Very shortly after the identification judgment was handed down, between 19 and 22 May 2022, the BBC broadcast programmes and published stories on its website about X, without naming or identifying him.

6 Negotiations then followed with a view to settling the claim. I approved a consent order disposing of the proceedings by way of a final injunction and providing for written submissions, and a written determination, on costs. This judgment explains my decision on costs.

The Attorney General's submissions

7 The Attorney General accepts that there should be no order in respect of the CLOSED part of the proceedings and accepts the Crown's liability to pay the costs of the Special Advocates, but invites me to order the BBC to pay her costs of the OPEN part.

8 The general rule is that a successful party should have its costs: CPR 44.2(2)(a). Identifying the successful party is a matter of common sense, to be determined by reference to the litigation as a whole: *HLB Kidsons v Lloyds Underwriters* [2007]

EWHC 2699 (Comm), [2008] 3 Costs LR 427, [10]. The court can depart from the general rule (CPR 44.2(2)(b)), but should not do so too readily: *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, [2011] CP Rep 41, [62]. It should be borne in mind that, in complex litigation, the successful party is likely to fail on one or more issues. That cannot itself justify an issue-based costs order: *Murphy & Sons v Johnson Precast Ltd (No. 2)* [2008] EWHC 3104 (TCC), [2009] 5 Costs LR 745, [10]. In any event, what constitutes "an issue" must be something for which a party could be granted relief: White Book 2022, para. 44.2.10.

9 The Attorney General advances four points in support of her application.

10 First, she was the successful party. The issue presented was binary: could the BBC identify X or not? The answer was "No".

11 Second, the BBC did not achieve anything in the litigation. The Attorney General never objected to a story which did not name X. Until the April judgment, the BBC's position was that it would not publish the story if it could not name X.

12 Third, the fact that the BBC successfully argued that the OPEN portion of the hearing on 1 and 2 March 2022 should be conducted in public does not change the position on costs. The issue would not have arisen at all if the BBC had acted lawfully and not attempted to publish information which, as the court found, it had no right to publish. In any event, the costs attributable to the open justice argument were minimal. The hearing of 27 April 2022 resulted in "wins and losses for both sides". It would not have been necessary had the BBC accepted the Attorney General's initial position (that there was no objection to a story which did not name or identify X). Furthermore, certain aspects of the story went beyond what was permitted by the injunction.

13 Fourth, since CPR Part 82 contains no specific provisions on costs, the starting point should remain that costs follow the event, even though a closed material procedure was involved: *R (XH) v Secretary of State for the Home Department* [2017] EWCA Civ 41, [2018] QB 355, [160]. There is nothing to warrant any other order. The Attorney General says this:

> "The BBC was aware from the outset that the AG's case, including the CLOSED material, was a substantial one. There is no history of the AG making exaggerated claims to the media in connection with matters of national security, either in correspondence or in litigation. In these circumstances, the litigation risk would have been obvious to the BBC. It was, of course, for the BBC to decide to take that risk. However, having done so, there is no principled basis to now depart from the ordinary rule that costs consequences follow that decision."

The BBC's submissions

14 The BBC submits that there should be no order as to costs because neither party was successful within the meaning of CPR 44.2(2)(a). Alternatively, insofar as costs were reserved, they should be awarded on an issue-by-issue or proportional basis; and insofar as they were "costs in the case", each party should bear its own.

15 The court can determine that there was no clear successful party and thus that the general rule does not apply: *Cantor Gaming Ltd v Game Account Global Ltd* [2007] EWHC 2381 (Ch), [26]-[27]; *Square Mile Partnership v Fitzmaurice McCall Ltd* [2006] EWHC 236 (Ch), [34]. There is no rule that issue-based orders can only be made in an exceptional case: *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No. 3)* [2012] EWCA Civ 843, [47] and [49].

16 Although there is no separate costs regime applicable to CLOSED proceedings, the courts have been willing to take into account the particular features of such proceedings when deciding questions of costs. The general principle is that the residual discretion to award costs should be exercised "most cautiously and sparingly": see *CF v Secretary of State for the Home Department* (Wilkie J, unreported, 1 May 2013, as summarised in *Begg v HM Treasury* [2015] EWHC 1851 (Admin), [15]. See also the Court of Appeal's judgment in that case: [2016] EWCA Civ 568, [2016] 1 WLR 4113, at [21] and [25]-[27].

17 The BBC submits that it was the winner at the first stage (dealing with open justice aspects). The court rejected the Attorney General's submission that the OPEN part of the interim injunction hearing should take place in private, relying in part on the fact that it appeared that a Government source had briefed the press: see the open justice judgment, at [33]. Moreover, at this stage, the BBC objected to the very broad injunction initially sought by the Attorney General, which would have prevented them from publishing any of the information contained in a letter they sent to the Home Office without the Attorney General's express prior agreement: see the interim injunction judgment, at [84]. In the run up to the 1 and 2 March hearing, the Attorney General's case was confused and constantly evolving.

18 At the second stage (dealing in principle with the question whether to grant an interim injunction), some details of the story had entered the public domain through the open justice judgment. Despite this, the Attorney General still pursued very broad injunctive relief in the form originally sought. It was only by the end of the OPEN part of the interim injunction hearing that counsel for the Attorney General accepted that any injunctive relief would have to identify precisely the information that could not be disclosed. This meant the court did not have to determine whether the relief originally sought would have been appropriate, but the court expressed doubts about that: see the interim injunction judgment, at [87].

19 Furthermore, the result at the interim injunction stage was substantially based on CLOSED material: see the interim injunction judgment, [62]-[64], [66] and [75]. The BBC was never privy to this material and could never assess its strength. It was not even aware of the security measures referred to at [66] and [75]. Applying the principles enunciated by the Court of Appeal in *Begg*, this feature should militate against any award of costs.

20 Finally, at the third stage (determining the information likely to be identifying), the Attorney General produced a very long list of information said to be identifying (20 items, each with up to 18 sub-categories). The BBC was the "substantial victor" in that the court criticised the Attorney General's approach as "absolutist" (see the identification judgment at [29]), accepted that the BBC was experienced in making judgments about what information would be identifying (see the identification judgment at [11]), found in respect of a large number of items that the BBC should be

left to evaluate whether to publish them in the context of the general prohibition (see the identification judgment at [38], [51], [53]-[54], [56], [60], [63], [66], [70], [71], [72], [75], [76], [81] and [84]) and found against the Attorney General in respect of others (see the identification judgment at [62], [36], [46], [51], [56]-58, [78], [73]-[76] and [70]).

Discussion

21 I begin by considering whether the Attorney General was the "successful" party and the BBC "unsuccessful" for the purposes of CPR 44.2(2)(a). At a superficial level, the Attorney General sought an injunction to prevent the BBC from publishing X's identity; the BBC resisted it; and I granted it. But that analysis ignores the relief the Attorney General was originally seeking: an injunction restraining the BBC from publishing any of the information contained in a letter it had written to the Home Office without the Attorney General's express prior approval. I described the story the Attorney General was initially prepared to permit the BBC to publish at [3] of the open justice judgment:

> "…there would be no objection to a broadcast making allegations about MI5's use and management of agents without naming or otherwise identifying X or any particular individual. Nor would there be any problem with a broadcast making allegations about the conduct and dangerousness of X without identifying him as an alleged MI5 agent."

22 Whether the Attorney General was truly "successful" can only be determined by comparing that original position to the final outcome. The BBC was ultimately permitted to broadcast a story that went far beyond general allegations about MI5's use and management of agents. The terms of the injunction I granted enabled the BBC to make very specific allegations about one particular individual (albeit without naming or otherwise identifying him), including the allegations that he was a dangerous right-wing extremist who had physically and psychologically abused two female partners and that he was an MI5 CHIS who had used that status to terrorise and control one of them. An interview with Beth was shown, with Beth's identity obscured, together with footage of X's attack on her.

23 Applying common sense, and considering the litigation as a whole, the outcome was mid-way between what the Attorney General had initially said she would accept and what the BBC wanted to publish. Neither party was, therefore, wholly successful or unsuccessful.

24 One possible solution would be an issue-based costs order. In this context, I reject the submission that an "issue" must be something for which a party could be granted relief and that, accordingly, the open justice issue does not count. The court's discretion as to costs in CPR 44.2 is framed in deliberately broad terms. What counts as an issue will vary from case to case. There is no reason why the open justice issue should not count. It had special importance in this case, where, as I noted at [18] of my open justice judgment, "the Government is deploying public resources, in what it says is the public interest, to restrain a publicly funded broadcaster from broadcasting information whose publication it claims to be in the public interest."

25 The BBC was entirely successful on this issue, in part because the Attorney General had been unable to negative the inference that a Government source had briefed The Daily Telegraph about the case, while at the same time inviting the court to order an entirely private hearing: see [32]-[34] of the open justice judgment.

26 On the identification issue, the result can best be described as a score draw.

27 The Attorney General fared better on the question whether an interim injunction was appropriate in principle, but this was only after she had substantially modified the relief she was seeking in the course of oral argument at the hearing on 1-2 March 2022. This refinement meant that I did not have to decide whether the original relief sought (which would have given the Attorney General "copy approval" over the BBC's story) was appropriate. I expressed serious doubts about this in [87] of my interim injunction judgment.

28 More importantly, the basis for the general rule that a party who has been successful (overall or on a particular issue) should have their costs paid by the unsuccessful party is that parties are generally in a position to judge whether there is a reasonable basis for bringing or defending a claim (or contesting a particular issue). The prospect of having to pay the other side's costs operates as an incentive to get the judgment right. In a closed material procedure, however, a party may be in no position to judge whether there is or is not a reasonable basis for bringing the claim (or contesting a particular issue).

29 Lord Dyson MR (with whom Longmore and Lloyd Jones LJJ agreed) made clear at [21] of his judgment in the Court of Appeal in *Begg* that, because closed material procedures involve a serious derogation from the principle of natural justice, "the courts should be vigilant to ensure that the procedures do not operate in any way that is more unfair, or exacerbates the inequality between the parties to a greater extent than is necessary". At [26], he approved Cranston J's conclusion at first instance that, because of the CLOSED material relied upon in that case, "reputable and competent legal representatives cannot advise whether the prospects are, in fact, good". This finding was sufficient to enable the Court of Appeal to allow the appeal from the judge's refusal to make a protective costs order in the claimant's favour.

30 *XH* was very different. In that case, "[b]y far the greater part of the case was taken up with challenges brought by XH which were addressed in court in the open part of the proceedings", many of which involved points of law: see at [160].

31 I would reject the Attorney General's submission set out at [13] above that a party facing a Government opponent relying on an OPEN national security assessment should generally bear the risk of costs even if the challenge fails on the basis of CLOSED material. It may be that there is "no history of the AG making exaggerated claims to the media in connection with matters of national security, either in correspondence or in litigation". But it would be fundamentally unfair to require a litigant to assume (on pain of an adverse costs award) that a proposition which is not made good by OPEN material will be substantiated by CLOSED material he has not seen. As Lord Dyson said, the courts must be alive to ensure that closed material procedures do not give rise to any greater unfairness than is inherent in them.

32 In my judgment, the authorities show that, in a claim involving a closed material procedure, the question whether costs should follow the event will depend on the extent to which the success of the winning party was based on CLOSED material. If success was based substantially on CLOSED material, it may be difficult to conclude that the unsuccessful party was at fault in bringing or contesting the proceedings, unless the CLOSED material contains matters known to that party. If, on the other hand, the winning points were substantially OPEN ones, the fact that some CLOSED material was deployed will not stand in the way of an award of costs.

33 In this case, the Attorney General's success in the interim injunction judgment was based in large part on CLOSED material. As I made clear at [60], the BBC characterised the Attorney General's national security case as "entirely generic", because it did not know how much detail was contained in the CLOSED evidence. It was that evidence which convinced me that disclosure of X's identity would expose him to a real and immediate risk of death or serious injury: see at [62]-[65]. The security measures referred to at [66] and [75] were also important because they undermined the argument that disclosure of X's identity would serve to protect women. In these critical respects, the Attorney General's success depended on CLOSED material, which the BBC did not see and whose contents it could not have predicted. That being so, it cannot be said that it acted unreasonably in contesting the principle of an interim injunction.

34 Whilst it might in principle be possible to divide up the issues and make different orders in respect of each, it is necessary to stand back and take a broad view of what justice requires, bearing in mind the desirability of avoiding complex assessment proceedings. In my judgment, the simplest and fairest outcome is that each party bears its own costs of the entire proceedings.

Conclusion

35 When this judgment was circulated in draft, the BBC invited me to order that they should have the costs of preparing the costs submissions, on the basis that they have beaten their "without prejudice save as to costs" offer in relation to costs, which was rejected by the Attorney General. I decline to make such an order. I have specifically rejected the principle of an issue-based costs order. The outcome on costs does not alter the overall view set out in [34] above. Moreover, as a general matter, I do not think parties should be encouraged to make costs submissions so elaborate that they generate their own satellite costs issues.

36 For these reasons, there will be no order as to costs.