



Neutral Citation Number: [2019] EWHC 192 (QB)

Case No: QB 2019 000131

**IN THE HIGH COURT OF JUSTICE**  
**QUEENS BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL  
Date: 05/02/2019

**Before :**

**MR JUSTICE EDIS**

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**Between :**

**THE BRITISH BROADCASTING  
CORPORATION  
THE PRESS ASSOCIATION**

**Claimants**

**- and -**

**(1) THE SECRETARY OF STATE FOR  
TRANSPORT  
(2) THE BRITISH AIRLINE PILOTS  
ASSOCIATION**

**Defendants**

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**Jane Philipps** (instructed by **RPC**) for the **BBC** and the **PA**

**Martin Chamberlain QC** (instructed by **Reynolds Dawson**) for **BALPA**

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**Judgment on Costs**

Approved Judgment

**Mr. Justice Edis :**

1. This is a claim by the British Airline Pilots Association (BALPA) for a limited order for costs consequent upon their successful opposition to a disclosure order under Regulation 25 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018, SI 2018 No. 321 (“the 2018 Regulations”). My decision on the application is at [2019] EWHC 135 (QB).
2. I have received written submissions on costs from both parties and now give my decision in this written judgment on that issue.
3. These were proceedings in the High Court brought under CPR Part 8. On behalf of BALPA, which was joined at its request on 16<sup>th</sup> January 2019, Mr. Chamberlain QC puts the matter very simply and clearly:-

BALPA respectfully submits that, as to the costs of the hearing, the general rule in CPR r. 44.2(2)(a) should prevail: the unsuccessful party should pay the costs of the successful party. At least so far as BALPA’s costs of the hearing are concerned, there is no proper basis for departing from this general rule.

4. In *Channel 4 Television Corporation v The Commissioner of Police for the Metropolis*, which has found its way on to BAILII at reference BAILII Citation Number: [2019] EW Misc B2 (CCrimC) I had to consider the appropriateness of a “costs follow the event” costs regime in proceedings which were closely connected with a trial on indictment in which the Article 10 rights of broadcasters were engaged. A production order had been sought by the police against Channel 4 under paragraph 5 of Schedule 5 to the Terrorism Act 2000. It was dismissed when the prosecution itself was discontinued by the CPS. I was invited to make a costs order against the police and to construe the statutory regime as permitting this course in order to vindicate the Article 10 right of Channel 4. I declined to do so. Among other things I said:

“66. I also find it difficult to accept that costs should necessarily follow the event, as if this were private litigation. The nature of the jurisdiction is to enable a judge to permit intrusion into legitimate journalistic activity in furtherance of the public interest in the effective investigation of terrorism. Notionally, these applications involve the police on the one hand trying to investigate terrorism in the interests of public safety, and journalists carrying out their important work in the public interest ensuring that power is held to account in a free society. It is the role of the court to balance these opposed public interests and it is quite conceivable that an order may be made or refused without the losing side having done anything wrong at all. They may, on the contrary, have contributed valuably to the court’s consideration of the issues even though the interest they were seeking to protect did not prevail. Both parties to these applications will be seeking to perform duties

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on many occasions: the duty to investigate as against the duty to keep sources confidential. The journalist may well be duty bound and also entitled to decline to hand over material without a court order, and may also desire to ensure that an order is made only if it lawfully should be.”

5. In the production order case I had held that the “no costs regime” which the statute appeared to create was not a violation of the Article 10 rights of a broadcaster against whom a production order application was made which did not result in an order being granted. This therefore describes a different regime altogether from CPR 44 on which Mr. Chamberlain relies. The general rule set out above applies if the court decides to make an order about costs. It allows the court, in that event, a discretion to make a different order. The court is required to have regard to all the circumstances in exercising that discretion, including the matters specified in CPR 44.4. The reasoning set out above was not designed to justify an exercise of discretion, but to explain why a “no costs regime” might rationally exist in such circumstances, and why it might be compatible with Article 10. It nevertheless seems to me that the considerations I expressed there are factors to which weight can properly be given in the present discretionary decision.
6. It would be contrary to the public interest, in my judgment, to deter responsible broadcasters and other news organisations from seeking to uphold the interests of open justice by assisting the criminal courts on that subject where they consider it right to do so. The experience of the courts shows that the parties to criminal proceedings are rarely either equipped or motivated to become involved in these disputes. Very frequently the prosecution will take the robust line that, whatever is published, any prejudice can be corrected by a suitable direction to the jury. To do otherwise offers a hostage to fortune. The prosecution may also often be keen to hold parts of trials in private to protect various interests. Equally frequently, the defence will only be interested in these questions if they appear to offer a route to staying the proceedings. It is often only the media which is willing to help the court by holding it to its duty to conduct its proceedings in public unless there is some extremely powerful reason to do otherwise. Holding proceedings in public means, in reality, permitting proper reporting of them. Experience has shown that where trial courts have been too quick to grant applications for trials to take place in camera, or to prevent reporting too readily, further proceedings have been necessary to correct the balance. That is avoided if the media is properly represented before the trial court.
7. This Part 8 claim was factually very closely connected with a current trial on indictment. It was issued and determined during the trial. It concerned evidence which was played to the jury and derived its force from that fact. Other applications for orders under Regulation 25 of the 2018 Regulations may be remote in time or in subject matter from a trial in the Crown Court, and entirely different considerations may apply. In reality, this Part 8 claim was designed to regulate what the Crown Court normally regulates as part of its trial jurisdiction: the openness of its proceedings. The 2018 Regulations create a particular regime for dealing with evidence which has been within an AAIB enquiry, even if it has been played to a jury in court. That means that the exercise of discretion under CPR 44 should, in my judgment, be affected by the different approach to costs which is taken in the Crown Court and by the reasons for that difference. This is not private litigation. A situation

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arose where a decision was required about where the public interest lay, after balancing two different and opposing interests. It is in the public interest that those who wish to assist the court by representing particular groups with a legitimate concern about such an issue should be encouraged to do so. A costs order made simply on the ground that the court set the balance as one party contended, and contrary to the contentions of the other, would not be conducive to that objective.

8. For these reasons, I exercise my discretion in favour of the Press Association and the BBC and make no order for costs in relation to the Part 8 claim. This means that BALPA is unable to recover the costs of its participation in the proceedings, even though that participation was successful in achieving its aim. I make it clear that this is in no way critical of BALPA or of its participation in these proceedings. I have had regard to the conduct of all parties and to the public interest in the efficient conduct of serious criminal proceedings in public and made an order which reflects that public interest, and the fact that both parties conducted themselves appropriately in these proceedings.