

[2018] EWHC 2115 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION



No. HC-2016-002849

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings, Fetter Lane
London EC4A 1NL

Thursday, 26 July 2018

Before:

MR JUSTICE MANN

B E T W E E N :

SIR CLIFF RICHARD OBE

Claimant

- and -

(1) THE BRITISH BROADCASTING CORPORATION
(2) CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE

Defendants

MR J. RUSHBROOKE QC and MR G. BUSUTTIL (instructed by Simkins LLP) appeared on behalf of the Claimant.

MR G. MILLAR QC and MR A. EARDLEY (instructed by BBC Litigation Department) appeared on behalf of the First Defendant.

MR J. BEER QC (instructed by DWF LLP) appeared on behalf of the Second Defendant

JUDGMENT ON PERMISSION TO APPEAL

MR JUSTICE MANN:

1 The BBC, through Mr Gavin Millar QC, seeks permission to appeal from my judgment in this matter. The grounds on which permission is sought are particularised and they are as follows, as they appear in his skeleton argument.

" 28. The BBC seeks permission to appeal. The proposed appeal has a real prospect of success and, in any event, the issues raised mean that there is a compelling reason for the appeal to be heard. These arguments can be developed orally on Thursday if required. The proposed grounds are these:

Grounds relating to the engagement of ECHR Art.8/Reasonable Expectation of Privacy

(1) Failing properly to distinguish between the position of the public authority (SYP) and the news media (BBC) when considering whether the C's ECHR Art.8 rights were engaged;

(2) Finding that the C's status as a public figure did not reduce his reasonable expectation of privacy, but rather increased it;

Grounds relating to the balancing exercise

(3) Failing to give any weight to the respect for the presumption of innocence in the BBC's reporting;

(4) Failing to give any weight to the BBC's editorial decision to name the C;

(5) Failure to take into account the fact that media reporting police investigations, including the name/s of suspects, may result in witnesses coming forward;

(6) Finding that the C's status as a public figure and his prior conduct did not reduce his privacy rights and, further, by failing to consider the increased public interest in reporting on criminal investigations into public figures;

(7) In relation to the balancing exercise, whether by reason of the errors identified above or in any event, the judge reached a conclusion that was outside the ambit of the conclusions that a judge could reasonably reach;

Grounds relating to damages

(8) The finding that damages for injury to reputation may be awarded in a claim for misuse of private information was wrong in law;

(9) In any event, the award of general damages was so high as to be wrong in law;

Grounds relating to the contribution claim

(10) The finding that an order for the BBC to pay a contribution to SYP under the 1978 Act would not be an interference with the BBC's rights under ECHR Art.10(1) was wrong in law;

(11) The finding that, if the order for a contribution was an interference under ECHR Art.10, it pursued the legitimate aim of the protection of the rights of others under ECHR Art.10(2) was wrong in law."

2 The basis on which permission to appeal should be granted is set out in CPR 52.6(1) which provides:

"52.6

(1) Except where rule 52.7 applies, permission to appeal may be given only where -
(a) the court considers that the appeal would have a real prospect of success;
or
(b) there is some other compelling reason for the appeal to be heard."

In working within those provisions I do not have to consider whether or not I was wrong. I merely have to consider whether it is sufficiently arguable that I was wrong. The test is whether it is realistic as opposed to fanciful to suggest I was wrong. It is an exercise which High Court judges are attuned to carrying out. Against that legislative background I take the preferred grounds in turn.

- 3 Ground 1 raises a point dealt with in my judgment at paras.257 to 261. It is important to understand the starting point of the BBC's case in relation to privacy. At the trial Mr Millar actually accepted that, as against the police, the subject has a reasonable expectation of privacy (which according to my judgment is the presumptual starting point but the presumption can be displaced by a variety of circumstances). His case is that somehow when the information gets into the hands of the media that right of privacy is lost. I found that that argument is wrong. I consider it to be unsustainable and to have no real prospect of success. The position of the media is different because of their Art.10 rights but that comes in at a different stage of the reasoning.
- 4 Ground 2 is based on a misrepresentation of my judgment. In para.256 I did not say that Sir Cliff had an increased right of privacy. I pointed out that his public standing emphasised the need for privacy in a case such as this. There is no real prospect of success for a ground of appeal which misstates that which it seeks to appeal from.
- 5 Ground 3 is, in my view, no basis for an appeal. While I accept that there is no reference to this as a specific point when considering the balance exercising, I do not consider it arguable that that is a significant error of principle, which Mr Millar said it was.
- 6 Ground 4 as it stands does not present a readily intelligible ground of appeal. Mr Millar sought to explain it on the footing that there was a line of jurisprudence which allowed Art.10 to protect editors in respect of the form of reporting and in their seeking to name a suspect, and I think protecting possible errors of judgment. But whatever the underlying point is it is not sufficiently articulated to enable me to identify an error of principle sufficiently clearly to justify saying it has a real prospect of success.
- 7 Ground 5 is wrong and/or irrelevant. My judgment both acknowledges that encouraging witnesses to come forward might be a justification for disclosure in some cases, and clearly records, which was the case, that it was no part of the BBC's case that that was a reason for disclosure in relation to Sir Cliff. (See paras.221, 252 to 80, and 311) Since the BBC expressly disclaimed this as an operative factor this cannot, in my view, form a ground of appeal with any real prospect of success.
- 8 Ground 6 has two elements. The first complains of a failure to make a finding that Sir Cliff's public status and his prior conduct reduced his privacy rights. Thus stated it complains about something that would not give the BBC success. Unless the point is that a public figure has no privacy rights, which is not the BBC's case, it is meaningless to refer to reduced privacy rights as such. One has to find that the privacy rights are reduced in a way which is relevant to the case in question. That is not the way this ground is expressed. If it were then this is a fact sensitive judgment in relation to which, in my opinion, the Court of Appeal would not intervene so there is no real prospect of success in relation to it.
- 9 The second element of Ground 6 complains of a failure to consider the increased public interest in reporting on criminal investigations into public figures. This is not a point which comes in at the balancing exercise appearing in my judgment. As such it is inaccurate to say that my judgment does not "consider" it. I considered it in para.281 and actually

acknowledged the public interest in the reporting of a criminal investigation into a celebrity in general terms. If this element seeks to suggest that there is a public interest in reporting on a criminal investigation into every celebrity who might be investigated, then that is, in my view, manifestly unsustainable. If it avers the public interest in a criminal investigation into this celebrity, i.e. Sir Cliff, then that is a fact sensitive judgment in relation to which, in my view, there is no real prospect of success.

- 10 Ground 7 is in part a follow on from the preceding ground. Unless at least one of the preceding grounds is arguably sustainable, Ground 7 cannot succeed. So far as it seeks to go beyond those preceding grounds (by use of the words "or in any event") it is unsustainable as being unparticularised, although I return to an allied point below.
- 11 Ground 8 is admittedly a question of law and thus a better candidate for an appeal than matters of fact and assessment. However, in the light of the authorities that I have cited and in the light of my analysis, I consider the point to be so clear that it would be bound to fail and there are no real prospects of success.
- 12 Ground 9 relates to an assessment of general damages. A pleading that is it "wrong in law" without more is not a sufficient pleading. General damages of this kind are typically left to the trial judge and, in my view, there is no real prospect of success in an appeal. Mr Millar sought to amplify this ground by saying that judgments of this level will have a chilling effect, which makes the judgment wrong in law. That is a fact sensitive matter of assessment with which, in my view, the Court of Appeal is unlikely to interfere and I consider it has no real prospect of success.
- 13 Ground 10 raises a point of law but in my view it has no real prospect of success. The same is true of Ground 11. There is no common sense at all in a situation in which the BBC would be able to claim, in effect, an indemnity in this sort of situation in every case and nothing in the legislation which would drive one to such a striking result for the reasons I gave in my judgment.
- 14 In the light of all that, no proposed ground of appeal has a real prospect of success and I refuse permission.
- 15 I do, however, also deal with another aspect of this case in light of the considerable public interest it has attracted. In para.28 of his skeleton argument, as I have already pointed out, Mr Millar suggested that there was a "compelling reason for the appeal" without actually identifying one. I asked for clarification as to whether he was in any way adopting or relying on the widely expressed fears of the media that my judgment had somehow imposed a new bar on press reporting, or prevented the naming of any suspects in police investigations. He did not quite adopt that as a separate ground but my having raised it he did raise the chilling effect of my judgment as a basis for the appeal and something which, he said, amounted to a compelling reason for it.
- 16 In the light of that I should say something about it. I do not accept that properly read my judgment should have the striking effect contended for by some. It has been suggested that my judgment is remarkable in imposing a new blanket restraint on the reporting of the subject of a criminal investigations, although it is fair to Mr Millar to say that he himself did not go quite that far in his expression, though his case was related to it. That is an erroneous reading of my judgment.

- 17 My judgment acknowledges that the reasonable expectation of privacy in the fact of an investigation is a presumption or starting point that can give way to countervailing factors; the safety of the public is one example. The desirability of flushing out potential witnesses or more potential complainants is another, as the judgment itself acknowledges. (See para.252 and probably para.221) The door is not closed to other potential reasons for displacing the presumption. Even if the right survives at that stage of the argument, the press can still involve its Art.10 rights including any public interest factors which it considers to operate, and the balancing exercise then takes place. So it is simply wrong to suggest that there is now some blanket restriction on reporting investigations.
- 18 Of course judgments have to be made and they may not always be easy. But it would be wrong to present my judgment as having any effect other than that just described. Accordingly I do not accept that there is some sort of wide effect of my judgment which provides some other compelling reason for an appeal and, insofar as relevant, I reject any application for permission to appeal on that basis too.
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