



FRIDAY 09 JUNE 2023



**IN THE COURT OF APPEAL**

ON APPEAL FROM KING'S BENCH DIVISION  
MEDIA AND COMMUNICATIONS LIST  
KB-2019-002507

CA-2022-001390

**BEFORE** DAME VICTORIA SHARP, PRESIDENT OF THE KING'S BENCH  
DIVISION  
LORD JUSTICE SINGH  
LORD JUSTICE WARBY

ON PAPER

**B E T W E E N**

Application No.

ARRON BANKS

CLAIMANT /  
APPELLANT

CA-2022-001390

- and -

CAROLE CADWALLADR

DEFENDANT /  
RESPONDENT

**UPON** the Respondent's application for (1) permission to present a petition of appeal to the Supreme Court of the United Kingdom against paragraphs 2.1 and 2.2 of the court's order dated 17 May 2023 ("the Costs Order"); and (2) a stay of those paragraphs of the Costs Order pending the determination by the Supreme Court of the appeal or (if permission to appeal is refused by this court) a further application for permission to appeal.

**AND UPON** reading the written submissions filed and served by the parties

**IT IS ORDERED THAT**

1. Permission to appeal against the Costs Order be refused;
2. A stay be refused.

**REASONS**

*Permission to appeal*

1. Permission to appeal to the Supreme Court is only granted in a case which raises an arguable point of law of general public importance which ought to

be considered by the Supreme Court. It is extremely rare for a decision on costs to raise a point of that kind, and in our judgment, this decision does not do so.

2. The respondent (Ms Cadwalladr) does not challenge the court's decision that she should pay one third of the appellant's (Mr Banks's) costs of the appeal, assessed in the sum of £52,000. Her proposed appeal is solely against the order that she should pay 60% of his costs of the first instance proceedings.
3. This was a discretionary decision, applying well-established principles. The general rule is that costs follow the event: the unsuccessful party pays (all) the costs of the successful party: CPR 44.2(2)(a). The court can make a different order, departing from this general rule; and one of the things it can do is to make an issue-based costs order. But it is not obliged to do this, and the cases caution against doing so (see, for instance, *Fox v Foundation Piling Limited* [2011] EWCA Civ 790, [2011] CP Rep 41 [62] (Jackson LJ)).
4. Ms Cadwalladr does not challenge the court's decision that Mr Banks was the successful party overall. She points out that she succeeded in defending part of the claim but on established principles that factor would not entitle her to a different order. It was taken into account by the court, which decided to reflect her partial success by reducing the proportion of Mr Banks's costs which she has to pay to 60%.
5. Ms Cadwalladr rightly concedes that this decision is unimpeachable as a matter of 'domestic' law, that is to say, leaving aside the Human Rights Act 1998 (HRA). Her argument is, in effect, that the HRA obliged the court to make a different order, ensuring that she did not have to meet any of the costs of that part of the case. She maintains that any other order represents a "penalty" for lawful speech that is incompatible with her rights under Article 10 of the Convention.
6. We considered this argument when making our order and concluded that the order gave sufficient weight to any Article 10 considerations. We do not consider it arguable that we were wrong. In our judgment the Strasbourg authority cited does not support Ms Cadwalladr's argument. Nor do we regard that argument as materially different from the one considered and

rejected by the Supreme Court in *Flood v Times Newspapers Ltd* (No 2) [2017] UKSC 33, [2017] 1 WLR 1415 [65]-[74]. In that case the Court reviewed the Strasbourg case law and concluded that it would only be in “exceptional” circumstances that Article 10 might justify a different costs order from the one that would otherwise be made.

7. In our view, there is no arguable case that the facts here are exceptional in any relevant respect, nor (if there is any broader principle) that the facts make our order disproportionate to the legitimate aims which it pursues. No evidence has been served to support the argument that the conditions under which Ms Cadwalladr contested this case impaired her right of access to justice.
8. On the facts as they currently appear, Ms Cadwalladr is insured for the first £275,000 of the liability imposed by our order and has the benefit of crowdfunding in excess of £1.1m. She calculates that if, as is usual, Mr Banks’s costs are assessed by reference to his approved budget the sum which our order requires her to pay is some £560,000.. Ms Cadwalladr’s own lawyers have acted on Discounted Fee Agreements so that although she claimed and was paid some £791,000 on account of her liability to them at the end of the trial, the outcome of the appeal has reduced that liability to some £513,000. Mr Banks, the overall winner, has to meet 40% of his costs at first instance (at least £373,000) and 2/3 of his costs of the appeal (some £100,000).

*Stay*

9. The application is now limited to paragraph 2.1 of our order (to pay 60% of Mr Banks’ costs at first instance). Paragraph 2.2 of our order (repayment of the sum paid on account of Ms Cadwalladr’s costs) has been complied with.
10. The general rule is that an appeal does not operate as a stay. The party applying for a stay must show by cogent evidence that there is a risk of injustice if a stay is refused: *Hammond Suddard Solicitors v Agrichem International Holdings Limited* [2001] EWCA Civ 2065 [19], [22] (Clarke LJ). No such evidence has been submitted, nor are we persuaded that there is such a risk.

11. Ms Cadwalladr does not suggest that Mr Banks would not be good for the money if an appeal succeeds, nor that payment pending an appeal would be oppressive. Although it was part of Ms Cadwalladr's argument on costs before we made our order that we should not make her destitute, we were neither provided with nor referred to any evidence that this would or might be so. Nor has any such evidence been filed at the present stage. The facts and figures set out above tend to suggest otherwise.
  
12. The application is now put on the basis that we should exercise discretion to order a stay because it would cause no injustice to Mr Banks and would avoid the risk that costs will be wasted on an assessment process that turns out to be unnecessary. The first point reverses the onus of proof and the risk identified is speculative and in our view improbable given the likely timescale.

**BY THE COURT**