



Neutral Citation Number: [2023] EWHC 343 (KB)

Case No: KB-2023-002567

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2024

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

Between :

WFZ

Claimant

- and -

The British Broadcasting Corporation

Defendant

Mr Jacob Dean (instructed by **Farrer & Co**) for the **Claimant**
Mr Adam Wolanski KC & Ms Hope Williams (instructed by **BBC Legal Department**) for
the **Defendant**

Hearing date: 30th January 2024

Approved Judgment

This judgment was handed down remotely at 11am on 19TH February 2023 by circulation to
the parties or their representatives by e-mail and by release to the National Archives

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THE HONOURABLE MRS JUSTICE COLLINS RICE

Mrs Justice Collins Rice:**Introduction**

1. The background to this case is set out in (public and private versions of) my judgment in *WFZ v The British Broadcasting Corporation [2023] EWHC 1618 (KB)*, handed down in June 2023. That judgment explains an Order I made at the time restraining publication of a proposed BBC report in any form which identified the Claimant, or was likely to identify him, as the subject of active criminal proceedings. That *interim* injunction Order remains in force pending trial of the Claimant's claim. By his claim, he seeks *permanent* injunctive relief on the grounds that publication of such a report would constitute misuse of private information, contempt of court and/or a breach of his Article 6 ECHR rights to a fair criminal trial.
2. The Claimant now applies for permission to use a witness statement, provided by the BBC for the purposes of resisting the Claimant's application for an interim injunction last June, for a purpose connected to the active criminal proceedings to which he remains subject.

Derogations from open justice

3. For reasons I gave in open court, I heard some of this application in private. I was satisfied circumstances remained exceptional, as they were last June. The Claimant has a high public profile and is under active criminal investigation in relation to multiple allegations of serious sexual offences. His present application occasioned evidence and submissions considering some of the detail of the allegations, and some of the material considered in the June proceedings for which the witness statement was prepared, as well as the witness statement itself. These materials are subject to interim protection from public access, to preserve the integrity of the Claimant's claim until it can be tried.
4. I considered it impossible to hear the application fully in public, even subject to anonymisation, without fuelling speculation about the Claimant's identity and substantially risking the destruction of his anonymity and the emergence into the public domain of the very information which it is the purpose of the interim injunction to protect from publication. Counsel for the parties, Mr Dean and Mr Wolanski KC, did, however, set out in public session the nature of the application and the legal arguments they were making, before the hearing continued in private session.
5. This judgment sets out, and explains, my decision on the present application, in terms, including anonymisation, which are consistent with the derogations from open justice which are already in place, and with its being a public document itself. It can be read alongside either version of my June 2023 judgment as appropriate.

Legal framework

6. The use of witness statements for purposes other than those for which they were made is governed by Civil Procedure Rule 32.12, upon which the Claimant relies in making this application. It provides as follows:

Use of witness statements for other purposes

32.12—(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.

(2) Paragraph (1) does not apply if and to the extent that—

(a) the witness gives consent in writing to some other use of it;

(b) the court gives permission for some other use; or

(c) the witness statement has been put in evidence at a hearing held in public.

(3) This rule applies to affidavits in the same way as it applies to witness statements.

7. Here, the BBC witness who made the relevant statement (the journalist who investigated the story and prepared the report originally intended for publication) does not consent to the Claimant’s proposed use. The statement was put in evidence at the hearing of the Claimant’s application for interim relief, but that hearing was not held in public. The statement itself is protected by restrictions on access to it on the court file. In all these circumstances, the Claimant applies under CPR 32.12(2)(b) for ‘*permission for some other use*’.
8. The Court’s power to give permission is discretionary. The basis on which that discretion should be exercised was a matter of legal dispute between the parties, as was its application to the facts of this case.

Factual background

9. Police arrested the Claimant in 2022 on suspicion of a serious sexual offence, further to allegations made by a complainant. While still in police custody, he was further arrested on suspicion of two serious sexual offences against a different complainant. He was then bailed. The police later confirmed they were taking no further action in relation to one of the allegations. The Claimant was subsequently interviewed under caution on suspicion of committing a sexual offence against a third complainant.
10. A BBC investigation team had meanwhile been conducting a news investigation, with a view to publishing a report. The focus of the report was to be a critique of the sector in which the Claimant worked, for failing to act appropriately on allegations of sexual and relationship abuse made against employees. As part of that investigation, a journalist had spoken to all three complainants whose allegations were the subject of the live criminal proceedings against the Claimant. On 5th June 2023, the journalist wrote a ‘right of reply’ letter to the Claimant which outlined the BBC investigation, the complainants’ allegations and some material provided by others. The letter put the Claimant on notice of the proposed publication of the BBC report, and that it would name him.

11. The right of reply letter prompted the Claimant's application for interim injunctive relief. That application was listed to be heard on 14th June 2023. The journalist who wrote the right of reply letter provided a witness statement for those proceedings, dated 9th June 2023 ('the June WS'). It took the form of a few brief covering paragraphs, and a confidential schedule. Derogations from open justice were sought and granted at the June hearing, and the June WS is subject to access protection on the court file, and to reporting restrictions.
12. The June WS contains information about how the journalist became aware of the allegations made against the Claimant, through discussions with a number of women including the three complainants in the criminal proceedings. It gives some information about how their allegations were investigated by the BBC team, and what conclusions the team came to.
13. At the time of the injunction application hearing in mid-June 2023, no charging decision had been taken, and the Claimant remained at liberty on bail conditions.
14. On 2nd August 2023, the Claimant's solicitors wrote to the BBC indicating that they '*may wish to rely*' on the content of the June WS '*in forthcoming representations to the Police and the Crown Prosecution Service, as well as in the criminal proceedings more generally should the need arise for the purposes of our client's defence or alerting the Police to potential lines of enquiry that they should be pursuing*'. The BBC responded with a request for further explanation and more details.
15. On 17th August 2023, the Claimant's solicitors clarified there was an intention to refer to the June WS '*in forthcoming representations to the Police and/or the CPS in order to draw attention to*': (a) the dates the journalist made contact with the complainants, (b) the extent of the contact between the journalist and the complainants and (c) what the journalist reported the complainants saying about the allegations. This information was said to be '*directly relevant to the investigation*'. The BBC's response was to confirm that no consent would be given, and that the purpose proposed did not indicate a reason to depart from the default rule that a witness statement may be used only for the purpose of the proceedings in which it is served.
16. Correspondence continued. On 13th September 2023, the Claimant's solicitors confirmed his criminal defence team were '*in the process of preparing representations to the CPS*' which had to be submitted by the end of the month. The present application was issued on 22nd September 2023. It was accompanied by a witness statement from the Claimant's solicitor in the criminal proceedings which included the following:

The purpose of the present application is to enable [the Claimant] to rely upon the contents of [the June WS] in forthcoming representations [the Claimant's solicitors] intend to make to the CPS. Such representations will be in connection with the CPS's review of the Police file and to ensure that the CPS have all the relevant information when applying the Full Code Test as set out in the Code for Crown Prosecutors (the Code) [referenced] and whether there are further lines of enquiry that the CPS consider the police should pursue before a final charging decision is made.

The statement explained that the Claimant was entitled, under the Code, to make written representations to the CPS *‘upon and in relation to their consideration of an investigation file’*. The Code itself states that:

Although prosecutors primarily consider the evidence and information supplied by the police and other investigators, the suspect or those acting on his behalf may also submit evidence or information to the prosecutor, before or after charge, to help inform the prosecutor’s decision.

The statement records the solicitor’s view that it would be *‘necessary’* to refer to the content of the June WS, in the respects foreshadowed in the 17th August letter, in order to highlight what were said to be *‘significant discrepancies’* between what the complainants told the police and what they separately told the BBC journalist. Examples are suggested. The statement expresses an opinion that the information contained in the June WS is of *‘direct relevance’* to the Claimant’s defence, the police investigation and the CPS’s charging decision. It might alert them *‘to further lines of enquiry that they should be pursuing before being in a position to reach a charging decision’*. The statement concludes with the submission of a *‘professional assessment’* that the Claimant’s *‘defence to the criminal allegations made against him will be materially prejudiced if he is not permitted to bring the contents of [the June WS] to the attention of the Police and CPS’*.

17. The clerk to Nicklin J wrote the parties on 3rd October 2023, recording the Judge’s request for more details in order to inform a decision about listing the hearing of the Claimant’s application. In particular, the Judge wanted to know whether the CPS had been notified of the application and the Claimant’s wish to provide them with the June WS, and: *‘If so, has the CPS given any indication as to whether it will wait to receive this evidence before making a charging decision? If not, why not?’*
18. The Claimant’s solicitors responded by return, confirming that initial defence representations, which referred to the application, had now been sent to the police, to be provided to the CPS. It was not clear if the representations (or the police file) had yet been forwarded to the CPS. But they were given to expect the CPS would in any event require a substantial amount of time to review the file, and there would therefore be an opportunity for further representations.
19. On 4th October 2023, a police detective working on the criminal investigation into the allegations against the Claimant wrote to the Court on behalf of both the police and the CPS. He confirmed they had been made aware of the application (but not until 2nd October). He had already contacted the BBC on 29th September *‘with a request for disclosure of any material gathered during the BBC investigation and contact with individual complainants. I also asked whether the BBC journalist was prepared to speak with police and provide a statement concerning the BBC investigation’*. He confirmed that the BBC had refused, relying on its editorial guidelines to decline to release *‘untransmitted journalistic material’* without a court order which, in this case, would be one pursuant to section 9 and Schedule 1 of the Police and Criminal Evidence Act 1984 (‘PACE’). The police detective continued as follows:

Given this response, I shall need to consider whether it may be necessary to apply to vary the Court Order referred to in the

BBC's letter [that is, the injunction Order obtained by the Claimant in June], and/or whether to file a Production Order application pursuant to Schedule 1 PACE 1984.

However it is the view of both the police and the CPS that any statement from a BBC journalist, which relates to contact with individual complainants, will need to be reviewed as part of the process of advice on a disposal (charging) decision. In particular, it will be necessary to check whether the statement from the BBC journalist is consistent with the evidence currently in the possession of the police and CPS. Ideally, the police and CPS would wish to review the material from the BBC in advance of any disclosure to the Claimant. At this time, the CPS are not in possession of the full advice file.

Second, whilst the police and CPS are not parties to the High Court proceedings, it is respectfully submitted that the Claimant's application is not urgent in circumstances where (i) a disposal decision is still being considered, and (ii) the police and CPS will want to review the BBC material as part of the process of advice on a disposal decision.

20. The police detective confirmed on 3rd November 2023 that no charging decision would be taken before the new year. On 29th November 2023, he stated in further correspondence that *'I can confirm the police view regarding the potential relevance of any statement and/or material held by the BBC remains as set out in my email dated 4 October 2023. As to any Production Order application, it remains our intention to submit an application but I cannot provide you with any comment regarding timing.'*
21. The position as at the date of the hearing of the Claimant's present application, at the end of January 2024, was therefore as follows.
 - i) No decision about whether or not the Claimant will be charged with any offence has yet been made. No basis has been provided for understanding when any such decision may be made.
 - ii) The police/CPS are aware of the Claimant's present application for permission to use a BBC witness statement which had been prepared for use in the injunction proceedings. They have made no applications or representations, and have provided no evidence, in connection with this application, apart from suggesting that listing it was not, in all the circumstances, 'urgent'.
 - iii) The police/CPS know the statement in question was made by a BBC journalist, and that it relates to contact the journalist had had with individual complainants.
 - iv) They wish to review that statement as part of the process of making a charging decision. Without knowing the content of the statement, the issues they have said they are interested in are (a) potential differences between what the complainants said to the police and what they said to the journalist, and (b) the nature of the interactions between the journalist and the complainants. In connection with the latter point, the police had already given an indication, when

they were made aware at least one of the complainants had been in discussion with the BBC, that contact between journalists and complainants was '*not ideal*', and had sought further details '*so that we can negate future impacts*'.

- v) The police/CPS have confirmed an intention to pursue the obtaining of the June WS by applying for an order under the PACE regime to compel the BBC to hand it over. They have not yet made that application.
- vi) The BBC has confirmed it is content for the Claimant to share the 'right to reply' letter with the police/CPS; it is not clear whether this has happened.

The parties' positions

(a) The Claimant's primary submissions

22. The Claimant's application relies on CPR 32.12(2)(b). Mr Dean accepts, for the purpose of guiding my approach to my discretion, that the Claimant has the burden of establishing that permission should be given, and that he has to show 'a good reason' to depart from the default rule that a witness statement may be used only for the purpose of the proceedings in which it is served. He submits that in coming to its decision on such an application, a court must take into account the balance of justice between the parties and the public interest in the administration of justice.
23. Mr Dean accepts there is little *direct* guidance available from the authorities on the exercise of this discretion, and such as there is encourages analogy with the approach adopted to applications for permission to use disclosed documents under CPR 31.22(1)(b) (see for example *Rawlinson and Hunter Trustees SA v Serious Fraud Office [2015] EWHC (Comm)* at [42]). The authorities on the collateral use of disclosed material require an applicant to demonstrate '*cogent and persuasive reasons*', and indicate that a court will not give permission save in '*special circumstances*' and only where '*no injustice*' will be occasioned to the provider (*Crest Homes plc v Marks [1987] AC 829* at 860; *ACL Netherlands BV v Lynch [2019] EWHC 249 (Ch)* at [29]). However, Mr Dean says this analogy should be treated circumspectly, and not applied without careful consideration of whether the underlying public policy explaining it is of genuine relevance in all the circumstances of a given case.
24. In this case, Mr Dean says, it is not. A key consideration in the protection of disclosed material is that the provider has been under *compulsion of law* to disclose the material in the first place, in order for the litigation to be fair. A key consideration in the protection of witness statements in general is that a party has been required to give advance notice of the evidence it seeks to rely on at trial, and that compels the party to give a preview of its position before it can be fully contextualised – and the protection is therefore effectively an *interim* one. But here, he says, neither consideration is relevant. The BBC was under no compulsion to provide this witness statement or to include its contents – to that extent it was a voluntary act. And the purpose of the June WS in this litigation is fully discharged – it was served for the purpose of resisting the interlocutory injunction application and not as advance notice of trial evidence, and needs no further interim protection on that basis.
25. In these circumstances, Mr Dean says, the only reason the Claimant needs permission to make collateral use of the June WS is that the hearing was held in private. But this,

he says, was ‘*adventitious*’; its purpose was to protect the Claimant’s own interests and enable a fair hearing of the injunction application. So he is not seeking collateral use of any compelled material or any material with a live purpose in the litigation; he is seeking permission to use material properly in his own hands for a purpose which is entirely consistent with the injunction he obtained and other privacy rulings by which it is protected.

26. Mr Dean accepts the ‘*interests*’ of the BBC are relevant, to be weighed in an overall balance of fairness. But he says the Claimant’s interests are the stronger. He urges on me the Claimant’s Art.10 ECHR rights to impart information, and his Art.6 rights to fair criminal proceedings. He draws my attention to his solicitor’s evidence that it is *necessary* to show the June WS to the Police/CPS in order fully to exercise his right to make pre- (and post-) charge representations. And so he asks me to give permission accordingly.

(b) *The BBC’s position*

27. Mr Wolanski KC takes a different starting point. He says this is a very unusual application, one in which a suspect is in effect trying to deploy CPR 32.12(2)(b) to put into the hands of the Police/CPS journalistic material to which they have no right otherwise than on the terms set out in the PACE regime. He says the June WS contains ‘*material acquired or created for the purposes of journalism*’ (PACE section 13). In the hands of the BBC it is therefore journalistic material, and ‘*special procedure material*’ (PACE section 14); and in the hands of the Claimant it is journalistic material held in confidence and therefore ‘*excluded material*’ (PACE section 11). The police can apply to a circuit judge for a production order for journalistic material from the BBC (PACE section 9 and Schedule 1). And that is what they have said they will do in this case.
28. The way the PACE production order regime works is not controversial in this case (Mr Dean says it is simply irrelevant to the Claimant’s application). A circuit judge on a police application may make a production order requiring journalistic material to be given to the police only if certain conditions are satisfied. Those most relevant to the present case are set out in paragraph 2 of Schedule 1, namely if –

(a) there are reasonable grounds for believing—

(i) that an indictable offence has been committed;

(ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application ...;

(iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and

(iv) that the material is likely to be relevant evidence;

- (b) other methods of obtaining the material—
 - (i) have been tried without success; or
 - (ii) have not been tried because it appeared that they were bound to fail; and
- (c) it is in the public interest, having regard—
 - (i) to the benefit likely to accrue to the investigation if the material is obtained; and
 - (ii) to the circumstances under which the person in possession of the material holds it,

that the material should be produced or that access to it should be given.

29. Mr Wolanski KC says this is the test I should apply on this application, including because ‘*any lesser test would enable very well-funded individuals like the Claimant to circumvent the strict requirements of PACE, and use civil proceedings to gain an advantage not available to other suspects*’. He emphasises the height of the bar imposed by this test, and took me to some of the leading authorities on its application in practice, in particular *R (British Sky Broadcasting) v Chelmsford Crown Court [2012] EWHC 1295 (Admin)* and *R (BBC) v Newcastle Crown Court [2019] EWHC 2756 (Admin)* at [52]. These authorities firmly emphasise the public policy and ECHR Art.10 reasons underlying the protection of journalistic material in general and the relationship between journalists and their sources in particular.
30. Mr Wolanski KC asks me to note this observation from the judgment of the Divisional Court in the *Newcastle* case (at [54]):

A central reason for protecting journalistic material of the kind at issue in this case from disclosure is the risk that ordering its disclosure to the police would discourage people from speaking freely to the media. In particular, we accept the BBC’s submission that it is critical that the media are able to speak to sources, including alleged victims of sexual abuse, without those individuals fearing that a record made of their account by a journalist can be obtained by the police and made available to defence counsel to attack their credibility at a trial.

That, says Mr Wolanski, is squarely on point to the circumstances of the present case. It is for all these reasons that the BBC adheres firmly to its published editorial practice of not consenting to journalistic material being passed to criminal law enforcement agencies without a PACE production order. That, he says, is the balance Parliament has already struck between the competing public interests at stake here. And in those circumstances I should not accede to this application on any other basis.

Analysis

31. I begin by considering the two central elements of this application: the nature of the witness statement in question, and the collateral purpose for which the Claimant says he wants to use it.
- (a) *The June WS and the BBC's interests*
32. The June WS is a document created and used for the purposes of litigation – specifically, for defending an interlocutory application in civil proceedings. While he accepts the interests of the BBC are properly relevant to the Claimant's application, Mr Dean takes a preliminary point that in these circumstances the June WS should not be regarded as 'journalistic material' (whether for the purposes of PACE or otherwise) since it was not acquired or created for the purposes of journalism at all. To that preliminary point, however, there are a number of possible answers.
33. The first is that the June WS was created for the purposes of the BBC resisting an application to restrain publication of its report in any form identifying the Claimant as the subject of criminal proceedings. The BBC's original purpose of publication had been made plain in the right of reply letter. The purpose of publishing its exposé report was undoubtedly a journalistic purpose. To the extent that the BBC's opposition to the injunction application in June was itself in furtherance of that journalistic purpose, and the June WS was created to support its opposition, then to that extent it could reasonably be characterised as a document created for the purposes of journalism, even if it was *also* created specifically for litigation to advance those purposes.
34. The second, more pertinently perhaps, is that even if the June WS were regarded as a *document* created for the purposes of litigation rather than journalism as such, that does not prevent the *content* from *including* material both (previously) acquired and created for the purposes of journalism. Its subject matter includes, for example, some account or explanation of (a) the journalist's investigative methods, (b) the journalist's relationship with, cultivation of, and conclusions about, the complainants and others – that is, the journalist's sources and (c) the journalist's preliminary editorial evaluation of the public interest in the publication of the report. As *evidence*, it is of course an account from the journalist's perspective, addressed to a court. That account is, however, an account of the practice of journalism – a window into the journalist's professional world. So to that extent it is evidence *of*, and includes, specific journalistic content relating to newsgathering and investigative methods, relationship with sources, and editorial analysis.
35. And the third is that the criminal law enforcement agencies themselves appear to have accepted that at least on the face of it the June WS is, or contains, journalistic material as defined in PACE. That is why they have said – faced with the BBC's reliance on its editorial code to refuse to disclose it voluntarily or for the journalist to make a statement to them – they plan to apply for a PACE production order to obtain it from the BBC.
36. The police/CPS have nowhere that I have seen suggested that they are entitled to be given the June WS *by the Claimant* or indeed that they could obtain a PACE production order to obtain it from *him*. They appear to be proceeding on the basis that, in his hands, it would be subject to the default rule set out in CPR 32.12(1) and 'excluded material' for the purposes of PACE. In other words, the Claimant is *prima facie* not at liberty to pass this material to the police/CPS, since he has it at all only within the envelope of civil proceedings in which it has not entered the public domain, *and* they *prima facie*

have no power to receive it from him, because it contains journalistic material held by him subject to those obligations of confidentiality.

37. I return below to the question of the relevance or otherwise of PACE procedure and tests to the application before me. However, *whether or not* the June WS qualifies as ‘journalistic material’ for the purposes of PACE, I am satisfied it contains material which it is at the very least right and proper for a civil court to consider as engaging the *interests* of journalism and at least potentially the legal protections for journalism. I do not understand that to be seriously disputed.
38. And that is the explicit basis on which the BBC, and the witness, now decline to provide it voluntarily to the criminal law enforcement agencies. Mr Dean seeks to make much of the journalistic interests the BBC now advances not having been raised at the June hearing as a reason for the privacy ruling. That is why he says the privacy ruling about that hearing, which is the reason the Claimant cannot now make free collateral use of the June WS, was in his own interests as a suspect alone, and ought to be regarded as essentially waivable by him in the same capacity. But the BBC raised no journalism point about the June WS at the time because it did not want or need to. Its purpose then was to publish its report. Had permitting that been my decision, then issues about the residual protection of the ‘confidential’ or journalistic substance of the June WS might well have arisen.
39. As it is, the BBC *now* relies on its published editorial policy for present purposes. I do not see that takes any inconsistent position, or that they are not entitled to raise that case. I have before me a witness statement from the BBC’s Director of Editorial Policy and Standards (which is not materially challenged, and which I accept) which sets out how and why they do so. The BBC says the June WS is, or contains, unpublished material which explains the processes and sources of, or is the product of, serious investigative journalism. They will not disclose it to the police/CPS otherwise than under legal compulsion.
40. I agree with that characterisation of the content of the June WS. So I cannot agree that the Claimant’s application is *only* a request for permission for the further use of material lawfully in his hands, and for a purpose which is consistent with the reasons for the derogations from open justice which protect his interests. It is *also* a request for the exercise of legal compulsion over unpublished journalism. That is a consideration *additional* to those of witness confidentiality and the fair conduct of civil proceedings which are inherent in any application made under CPR 32.12(2)(b), and *additional* to the further reasons of privacy and confidentiality for which derogations from open justice have been put in place in this particular case. The *reasons* for the BBC’s refusal of consent to the Claimant’s proposed collateral use are highly relevant.

(b) *The Claimant’s proposed purpose*

41. An application under CPR 32.12(2)(b) is necessarily addressed, specifically, to ‘*some other use*’, that is, use for some other ‘*purpose*’. That demands some clarity and precision about identifying that use and purpose. On any of the bases canvassed for the exercise of my discretion, understanding the interests and purposes of the Claimant in making representations to the police/CPS is fundamental to considering this application.

42. The purpose as articulated in the present application is to make written representations to the police/CPS ‘*in relation to the ongoing criminal investigation*’ into the complainants’ allegations against him, and specifically in relation to ‘*the CPS’s decision whether or not to bring charges against him*’.
43. Put bluntly, it must be the Claimant’s primary objective to seek to persuade the CPS not to charge him. A decision to charge will not be taken unless the CPS considers there to be a more than even prospect of conviction and it is in the public interest to proceed. The former is a matter of assessing *all* the potential evidence. In a case of the present sort, that is likely to depend crucially on an assessment of the credibility of the complainants and the weight-bearing potential of their testimony. So it is in the Claimant’s interests to be able to draw attention to any indications, or lines of inquiry, capable of undermining the weight the CPS could properly place on the complainants’ evidence in reaching its charging decision. Any representations the Claimant can make ahead of the charging decision, which are capable of being weighed in that assessment in his favour, may help him achieve his primary objective.
44. A number of points arise from this. First, I take this focus on the *charging* decision to be the essence of this application. Some of the evidence and submissions made on the Claimant’s behalf do refer more generally to his potential fully and fairly to defend himself against any charges which may ultimately be brought. To be clear, however, that is not territory into which I consider it necessary or proper to advance to any degree.
45. That is for the same sort of reasons as those I articulated in my judgment in June of last year. The injunction in place in this case governs the period between arrest and charging decision, and we are still in that period. If the Claimant is charged, then a detailed statutory and procedural regime comes into effect to ensure he can have a full and fair prospect of defending those charges. That regime makes specific provision for obtaining and testing the complainants’ evidence, including dealing with whether there are potentially relevant inconsistencies in their accounts over time, and/or whether their evidence is collusive or has been influenced by third parties. It also makes provision for potential reporting restrictions. It is entirely unnecessary and inappropriate to speculate on any possible deficiency of criminal procedure *post-charge* which fairness might require to be addressed in civil proceedings of the present sort; and none was specifically identified, proposed or evidenced in this application.
46. My focus therefore is on the present pre-charge period, and the Claimant’s interest in making representations going to the charging decision. I accept in principle the Claimant’s entitlement to participate as fully as possible in making pre-charge representations that might assist him, consistently with the opportunity given in the Code for Crown Prosecutors. After the hearing of this application, Mr Dean drew my attention to the decision of the Divisional Court in *R (Law Society of England & Wales) v The Lord Chancellor* [2024] EWHC 155 (Admin) confirming in principle the potential application of Art.6 ECHR in the pre-charge period. I accept Art.6 is at least in principle engaged at this stage, and the Claimant is in principle entitled to make best use of the opportunity provided to *make representations* addressed to the charging decision. That is his stated ‘*purpose*’, for which he wishes to ‘*use*’ the June WS.

(c) *Consideration*

47. This application, and the Claimant's purpose of making pre-charge representations, however, necessarily proceed on the basis that the content of the June WS can also be, or has been, communicated to the police/CPS in the first place. That is not expressly stated in the application, but the Claimant's solicitor's evidence confirms he wants to bring the *contents* of the WS to the attention of the authorities. Plainly, the Claimant cannot make meaningful representations without referring to the contents of the June WS. And, crucially, those representations cannot meaningfully inform the charging decision unless the CPS can consider them in the context of what the June WS actually contains.
48. The Claimant's present purpose, or intended use, is therefore necessarily twofold. First, he wishes to be able to place the June WS into the hands of the law enforcement agencies for the purposes of making representations to them. And second, he wishes to be able to use it to make those representations.
49. It is necessary to take this one step at a time. The situation before me is not one in which the police have already obtained the June WS in exercise of their PACE powers, and the Claimant is now approaching the High Court to release him from any civil law constraints on making representations about it. Nor, of course, is it a situation in which an application has been made under PACE for a production order and been refused – in that situation, an application under CPR 32.12 would at least raise some obvious questions about why it could or should achieve a different result. Instead, this application seeks to pre-empt both situations, and in my judgment falls into forum and process error in doing so. That is because, on the facts of this case, it seeks to deploy CPR 32.12 *alternatively and prematurely* to achieve a result the criminal law enforcement agencies have already given the clearest indication of preparing to pursue themselves: the obtaining by them of the June WS *for their own purposes*.
50. The purposes of the police/CPS themselves are the central components of the machinery the Claimant seeks to engage by making representations to them. This application would be futile if conceived of as being limited to the *Claimant's* purposes in making his representations, unless the criminal law authorities can *also* use the June WS for their *own* purposes subsequently in pursuing lines of enquiry, making charging decisions and so on. The potential purposes of the police/CPS, however, are plainly considerably wider than, and cannot in practice be limited to, those of the *Claimant*. The Claimant wishes to draw attention to matters in the June WS he considers to favour a decision not to charge him. The police/CPS, however, may and perhaps must need to use it more broadly in the exercise of their powers and functions (including, indeed, for purposes adverse to the Claimant and/or favouring a decision to charge him).
51. The situation *from the point of view of the criminal law enforcement agencies*, to the limited extent I have been given to understand it, is as follows. The police/CPS already know the complainants have been in touch with journalists. They are aware of the existence of the June WS and know who made it. The Claimant has already made pre-charge representations to them, to the full extent he is able to do so without revealing not just the existence but the content of the June WS. The police/CPS have access to the right of reply letter which gives a significant gist to the interaction between journalists and complainants, and sets some context for the WS itself. They are alive to the *potential* relevance of the June WS to the charging decision before them. They are actively interested in its *potential* to suggest, whether inherently in its content or by way of indicating future lines of enquiry, something about the quality, robustness and

weight-bearing strength of the testimony the complainants may be able to give in criminal proceedings – one way or the other. They have acknowledged its *potential* relevance accordingly. They have statutory powers to apply to obtain it for any and all of these purposes, subject to the satisfaction of criteria imposed by Parliament. They have indicated an intention to use those powers and make that application. They are not seeking my assistance in doing so, otherwise, perhaps, than by asking me to take into account the thought that determining this application in the meantime may be at least unnecessary.

52. I repeat, I have no representations and no evidence from or about the criminal law enforcement agencies other than the view they have vouchsafed that the present application need not be determined while matters stand as they do. And that is why Mr Wolanski KC's suggestion that the way through all of this is for me to apply the PACE test to this particular application does not work (and to that extent I agree with Mr Dean that this is not the right test on a CPR 32.12 application). The PACE test can sensibly be applied only to a PACE application – one which addresses the test in all the circumstances of the *criminal* investigation and any preparation of *criminal* charges. I, of course and entirely properly, know next to nothing about the substance of the police/CPS case as such. I have no proper basis at all for judging the potential bearing of the June WS on whatever else may be on the police file or within the contemplation of the CPS – nor, therefore, whether the June WS is '*likely to be of substantial value to the investigation*' or '*relevant evidence*' in criminal proceedings (PACE Sch.1). To attempt to do so from a position of ignorance about these matters would be to deal in speculative generalities only. The police/CPS have their own case to make on the application of PACE, and they will make it to a criminal court in due course. Much less can I simply accept the opinion evidence of the Claimant's solicitor that a civil order for disclosure of the June WS *to the criminal agencies* is *necessary to their* purposes; the Claimant *may* know more about the investigation into the allegations against him than I do, but if so he has not told me about that.
53. The whole purpose of the injunction which is currently in place is to permit the criminal investigation to proceed, without the prejudice of premature publicity, up to and including the charging decision. The police/CPS have given me to understand they have no present intention to proceed to a charging decision without applying for a production order for the June WS. It is not strictly a matter for me on this application, but there would appear on the face of it to be at least some risk of unfairness, to the Claimant or the criminal proceedings, if the police/CPS were now to proceed to charge the Claimant without doing what they said they were going to do and without warning him of that, knowing as they do that there is more the Claimant wants to say. But the police/CPS have their own obligations of fairness to the Claimant, with which they give every appearance of complying and intending to continue to comply. In any event, I have no basis for working on any other understanding than that the police intend to apply for a production order, and no basis for speculating further.
54. If the police/CPS proceed to obtain the June WS, then I can see that the Claimant might well have a *prima facie* case for applying under CPR 32.12 for permission to make his *own* use of it for the purposes he outlines if the BBC continues to object. On the other hand, if the police make an application which is refused, then the Claimant's position on a CPR 32.12 application may well depend on the reasons given for the refusal. In

either eventuality, the High Court would have a fully informed basis on which to consider the merits of the application in their own right.

55. In the meantime, I am not satisfied I have been given a good reason, on *any* of the legal approaches suggested, for making an order placing the June WS into the hands of the criminal law enforcement agencies *now*. They are intending to apply for a production order to a timetable of their own choosing and which I have been given no basis for going behind, criticising or seeking to pre-empt. I of course entirely understand the Claimant's frustration with the length of time that has already elapsed without any charging decision having been made, not least in view of the number of times he has now received the impression that a charging decision was reasonably imminent. But I have not been put in any fair position to inquire into, much less to cut across, that process.
56. I have not necessarily agreed with Mr Dean's characterisation of the application as simply a matter of balancing the 'interests' of the BBC against the Claimant's interests in putting his side of the issues fully and fairly before a charging decision is taken. But I have been given no reason to doubt in any event that the Claimant will indeed have that opportunity at a suitable point in the criminal investigation, including, if necessary, by having a CPR 32.12 application considered on its merits in due course. It is not necessary for me *in the meantime* to reach any final view about the correct approach to determining the full merits of this application, or the precise test to be applied, because on any basis the Claimant has not discharged his burden of showing a good reason for me to make the Order he seeks *now*. He does not appear to be in any *present* jeopardy of prejudice or unfairness in the criminal proceedings, and there is no case for speculating on the future of those proceedings in the meantime.
57. On the other hand, as I have observed, the BBC makes active objection to the subjection of unpublished journalism to legal compulsion for purposes related to criminal proceedings. There is at least *enough* of a prima facie issue about the journalistic content of the June WS to persuade the criminal law authorities they need to apply for a production order to get it. That is the obvious next step in the criminal proceedings and I have been given no good reason to interfere with or intervene in it.

Conclusions

58. The problem with the Claimant's application in these circumstances is timing, or prematurity. I cannot proceed on the basis that the police/CPS might act unfairly. I have no evidential basis which could possibly support that premise. Nor can I proceed, for the same reason, on the basis that their current timetable for progressing this issue is otherwise than what it properly needs to be. The Claimant's opportunity to seek to make representations on the basis of the June WS (either with the consent of the BBC or by application under CPR 32.12) properly comes *after* the criminal procedure relating to the June WS has taken its course, and the interests of the criminal law enforcement agencies in having it for their *own* purposes have been determined.
59. The Claimant's application is not, on a proper analysis, simply about the removal of a barrier to making representations in the criminal proceedings, that barrier having been imposed in his own interests in the first place. It also necessarily touches on the obtaining by legal compulsion, and use, by the agencies of law enforcement, of the June WS, against the wishes of the journalist who made it, and in circumstances in which

journalistic objections, which have prima facie substance, have been raised. That is a set of circumstances for which Parliament has specifically provided in the PACE production order regime. That is a regime with which the agencies have said they now intend to engage (unless, it may be inferred, they decide for other reasons not to charge the Claimant). That is also a regime which builds in careful protections not only for journalism but also for suspects, complainants and potential witnesses, and in which the fair conduct of continuing and future criminal proceedings is of the essence. I have been given no good reason to determine the present application in the Claimant's favour *now*, while that process remains active. On the contrary, it is plainly in the interests of justice for the criminal processes to continue to take their course without interference. That, as I have already said, was the central pillar and purpose of the decision I took last June, and it should be no surprise that it remains front and centre of this decision.

60. For these reasons, I am not at present prepared to make the order the Claimant seeks.