IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2012/0076**
ON APPEAL FROM THE COURT OF APPEAL (Civil Division)
ON APPEAL FROM THE HIGH COURT OF JUSTICE (QBD)

BETWEEN:

(1) Katherine Lawrence
(2) Raymond Shields

Appellants/Claimants

- and -

(1) David Mitchell Coventry (t/a RDC Promotions)
(2) Moto-Land UK Limited
(3) Terence Raymond Waters
(4) James Edward Waters

Respondents/Defendants

WRITTEN SUBMISSIONS OF THE MEDIA LAWYERS ASSOCIATION

Introduction

1. These written submissions are made on behalf of the Media Lawyers Association (the "MLA") as intended Interveners in this appeal. They are being filed simultaneously with the MLA's application to intervene in accordance with the directions of the court.

2. The MLA is the association of in-house media lawyers for UK newspaper, magazine and book publishers, as well as broadcasters and news agencies. More information is provided about the MLA below.

3. The MLA wishes to intervene in this appeal because the CFA scheme introduced by the Access to Justice Act 1999 (1999 Act) is still in operation in publication cases, such as claims in respect of defamation and misuse of private information, in which the rights of its members under Article 10 of the Convention ("ECHR") are engaged.

4. Whilst the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") in April 2013 removed the right to recover success fees and ATE premiums from the opponent in other types of litigation, publication cases have been excluded from these necessary changes to the 1999 Act scheme.

5. This is so even though four years, almost to the day, have passed since the European Court of Human Rights ("the ECtHR") held that this scheme was in violation of the ECHR Article 10 rights of such publishers, exceeding *even the broad margin of appreciation to be accorded to the State in respect of general measures pursuing social and economic interests.* See ***MGN Limited v United Kingdom*** [2011] 53 EHRR 5 at [217][1].

6. The circumstances in which MGN made its application to Strasbourg are well known. In ***Campbell v MGN Limited (Costs)*** [2005] 1 WLR 3394 the Judicial Committee of the House of Lords had dismissed a Petition by MGN contending that any order requiring it to pay a success fee in Ms Campbell's successful substantive appeal to the House of Lords would be in violation of its ECHR Article 10 rights. Lord Hoffmann, with whom the other members of the Committee agreed, considered that the statutory:

> *[28]...success fee as such cannot be disallowed simply on the ground that MGN's liability would be inconsistent with its rights under article 10. The scheme under which such liability is imposed was a choice open to the legislature...the existing scheme is compatible.*

7. The MLA appreciates that in the present appeal the court is considering whether an order that the respondents should pay costs to the appellants, including slices of success fee and an ATE insurance premium, infringes the ECHR Article 6 and/or A1P1 rights of the respondents. Though it is a case where the 1999 Act CFA scheme applies, it is not a publication case.

8. It wishes to intervene, however, for the following reasons.

9. First, if the court were to conclude that the 1999 Act CFA scheme, and in particular a claimant's right to recover a success fee and ATE premium from a defendant, does infringe the rights of defendants under ECHR Article 6 and/or possibly A1P1 it would follow that such rights of the publishers are being infringed in the publication cases – in addition to the violations of ECHR Article 10 identified by the ***MGN v UK*** decision. This point is discussed below.

10. Secondly, ECHR Article 1 requires contracting parties, as a matter of international law, *to secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention.* These include the rights of publishers under ECHR Article 10. ECHR Article 13 requires an *effective remedy* for Convention violations before domestic courts. The failure of the UK government to amend our domestic law so as to remove the possibility of violations of ECHR Article 10 of the sort identified in the ***MGN v UK*** case leaves the UK in continuing breach of its obligation under ECHR Article 1 and it has also failed to abide by the Strasbourg judgment as required by ECHR Article 46. Although the Human Rights Act 1998 was supposed to ensure that

[1] Judgment of 18 January 2001.

the courts could grant a remedy in this sort of situation this has not happened on this occasion, because of the decision of the Judicial Committee in ***Campbell v MGN Limited (Costs)***[2]. That decision has not been reconsidered since ***MGN v UK***. It is respectfully submitted that the court should reconsider it in resolving the issues that arise in this appeal. It should acknowledge the correctness of the ruling of the ECtHR in ***MGN v UK***.

The Media Lawyers Association

11. The MLA exists to promote and protect, through co-operation, monitoring and lobbying, freedom of expression and the right of everyone to receive and impart information, opinions and ideas. The MLA intervenes in cases affecting its members both here and abroad. For example it intervened in the ECtHR in ***Mosley v United Kingdom*** [2011] 53 EHRR 30. It also provides evidence and responses to government and other consultations and inquiries affecting the media. For example it provided evidence to the House of Commons Culture Media and Sport Committee during the course of its inquiry into *Press standards, privacy and libel* in 2010[3]. It was consulted during Jackson LJ's review of civil litigation costs[4].

12. The MLA has a broad membership. It includes in-house lawyers from both national and regional/local publishers and broadcasters. The current members are as follows:

    - **National news organisations**: Associated Newspapers Limited; Express Newspapers; Guardian News & Media Limited; Independent Print Ltd; News Group Newspapers Ltd; The Press Association; Telegraph Media Group; Times Newspapers Ltd; Trinity Mirror PLC (including MGN Ltd); The Economist Newspaper Ltd; The Financial Times Ltd; Thomson Reuters PLC.

    - **National broadcasters**: BBC; BskyB Ltd; Channel 4 Television Corporation; ITN; ITV Plc; CNBC (UK) Ltd.

    - **Book and magazine publishers:** Anova Books Group Ltd; Consumers' Association (Which?); Hearst Magazines UK.

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[2] See for example the unsuccessful attempts of defendants to rely on the ***MGN v UK*** case in ***Sousa v LB of Waltham Forest*** [2011] 1 WLR 2197 and ***Collett v Smith and others*** [2011] EWHC 90208 (Costs).

[3] Culture, Media and Sport Committee - Second Report of the Session 2009-10, 'Press standards, privacy and libel' (HC 362-I, incorporating HC 275-i–xv), published 24 February 2010.

[4] Review of Civil Litigation Costs: Final Report, December 2009 (TSO).

- **Publishing industry representative bodies:** The News Media Association[5], (the trade body formed from a merger of the Newspaper Publishers Association and the Newspaper Society, representing national, regional and local news media companies) and the Professional Publishers Association (the trade body for the UK magazine and the business media industry, with 250 members).

The backdrop to *MGN v UK*

13. Concerns about liability for success fees and ATE premiums have been advanced by defendants in publication cases for years now. They were expressed both at the time the 1999 Act scheme was introduced and throughout the following decade. They were detailed and repeatedly articulated. The government and the courts were well aware of them. The following is a very brief reminder of the position prior to the Strasbourg decision in ***MGN v UK***.

14. In 2003 the Department for Constitutional Affairs ("DCA") issued a Consultation Paper entitled *Simplifying CFAs*. The availability of CFAs in defamation proceedings emerged as a controversial issue in the consultation. Several national and regional media organisations raised concerns, complaining that CFAs inhibited the right to freedom of expression and encouraged unmeritorious claims.

15. In 2004 a further DCA Consultation Paper was issued entitled *Making simple CFAs a reality*[6]. In the consultation media organisations reiterated that CFAs needed to be controlled in defamation proceedings. They stressed that funding these cases by CFAs interfered with the media's right to freedom of expression because the success fee could effectively double a claimant lawyer's cost. This resulted in a "ransom" or "chilling effect" that forced the media to settle claims they might otherwise fight due to excessive costs. The media also expressed concerns there was no true ATE insurance market (because the very small number of cases did not ensure a competitive market), and about the failure of costs judges to effectively control CFA costs in defamation proceedings.

16. In ***Musa King v Telegraph Group Limited*** [2005] 1 WLR 2282 the Court of Appeal was considering how a media defendant might be protected in respect of costs when facing a defamation claim brought by an impecunious website designer on a CFA (with an assumed 100% uplift) but with no ATE

[5] News Media Association regional members publish around 1100 regional and local newspaper titles with 1700 associated websites.

[6] Department for Constitutional Affairs, 'Making Simple CFAs a Reality' (CP 22/04), published June 2004.

insurance. Brooke LJ[7] said:

> *99. What is in issue in this case, however, is the appropriateness of arrangements whereby a defendant publisher will be required to pay up to twice the reasonable and proportionate costs of the claimant if he loses or concedes liability, and will almost certainly have to bear his own costs (estimated in this case to be about £400,000) if he wins. The obvious unfairness of such a system is bound to have the chilling effect on a newspaper exercising its right to freedom of expression … and to lead to the danger of self-imposed restraints on publication which* [the Defendant's solicitor] *so much feared …*
>
> *100. It is not for this court to thwart the wish of Parliament that litigants should be able to bring actions to vindicate their reputations under a CFA, and that they should not be obliged to obtain ATE cover before they do so. … On the other hand, we are obliged to read and give effect to relevant primary and secondary legislation so far as possible in a way that is compatible with a publisher's Article 10 Convention rights …*
>
> *101. In my judgment the only way to square the circle is to say that when making any costs capping order the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. It cannot be just to submit defendants in these cases, where their right to freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win.*
>
> *102. If this means … that it will not be open to a CFA-assisted claimant to receive the benefit of an advocate instructed at anything more than a modest fee or to receive the help of a litigation partner in a very expensive firm who is not willing to curtail his fees, then his/her fate will be no different from that of a conventional legally aided litigant in modern times. It is rare these days for such a litigant to be able to secure the services of leading counsel unless the size of the likely award of compensation justifies such an outlay, and defamation litigation does not open the door to awards on that scale today. Similarly, if the introduction of this novel cost-capping regime means that a claimant's lawyers may be reluctant to accept instructions on a CFA basis unless they assess the chances of success as significantly greater than evens (so that the size of the success fee will be to that extent reduced), this in my judgment will be a small price to pay in contrast to the price that is potentially to be paid if the present state of affairs is allowed to continue.*

17. In May 2005 Eady J made these observations in ***Turcu v News Group Newspapers Limited*** [2005] EWHC 799 (QB):

> *6. The claimant … seeks a large award of damages, including aggravated and exemplary damages, against the proprietors of The News of the World. … He is able to pursue his claim purely because [his legal representative] has*

[7] With whom Parker and Kay LJJ agreed.

been prepared to act on his behalf on the basis of a [CFA]. This means, of course, that significant costs can be run up for the defendant without any prospect of recovery if they are successful, since one of the matters on which [the claimant's legal representative] *does apparently have instructions is that his client is without funds. On the other hand, if the defendant is unsuccessful it may be ordered to pay, quite apart from any damages, the costs of the claimant's solicitors including a substantial mark-up in respect of a success fee. The defendant's position is thus wholly unenviable.*

7. Faced with these circumstances, there must be a significant temptation for media defendants to pay up something, to be rid of litigation for purely commercial reasons, and without regard to the true merits of any pleaded defence. This is the so-called 'chilling effect' or 'ransom factor' inherent in the conditional fee system, which was discussed by the Court of Appeal in ***King v Telegraph Group Ltd (Practice Note)*** *[2004] EWCA Civ 613; [2005] 1 W.L.R. 2282. This is a situation which could not have arisen in the past and is very much a modern development.*

18. ***Campbell v MGN Limited (Costs)*** (above) was decided in October 2005. Naomi Campbell's claim was a privacy rather than a defamation claim. She had pursued the claim up to the House of Lords without a CFA, winning at first instance and recovering damages of £3,500 and then losing – unanimously in the Court of Appeal. In her appeal to the House of Lords she retained solicitors and counsel on a CFA. Those agreements provided for the solicitors and counsel to be entitled to success fees of 95% and 100% respectively. The success fees claimed when she won her appeal amounted to £279,981.35. The base costs of her lawyers on the appeal were £288,468. So the costs MGN had a potential liability for were, in effect, doubled. There was, however, no ATE insurance.

19. Although MGN's Petition challenging the claim for the success fees was dismissed[8], the speeches of two members of the Judicial Committee recognised that there were valid concerns.

20. Lord Hoffmann referred to the ***Musa King*** and ***Turcu*** cases and said that:

[31] The blackmailing effect of such litigation appears to arise from two factors. First, the use of CFAs by impecunious claimants who do not take out ATE insurance. That, of course, is not a feature of the present case. If MGN are right about Ms Campbell's means, she would have been able to pay their costs if she had lost. The second factor is the conduct of the case by the claimant's solicitors in a way which not only runs up substantial costs but requires the defendants to do so as well. Faced with a free-spending claimant's solicitor and being at risk not only as to liability but also as to twice the claimant's costs, the defendant is faced with an arms race which makes it particularly unfair for the claimant afterwards to justify his conduct

[8] MGN was also held liable for the costs of the Petition, totalling approximately £255,535, including the 95% success fee of the solicitors (counsel did not act on a success fee on this application).

of the litigation on the ground that the defendant's own costs were equally high....

21. He noted:

> *[36] There are substantial differences between the costs in personal injury litigation which are the subject of the agreement and costs in defamation proceedings. In personal injury litigation one is for the most part dealing with very large numbers of small claims. The liability insurers are able to pass these costs on to their road user customers. Their own solvency is not threatened. Furthermore, the liability insurers had considerable negotiating strength because they were able to fight what Brooke LJ described as trench warfare, disputing assessments of costs in many cases and thereby holding up the cash flow of the claimants' solicitors. Both sides therefore had good reasons for seeking a compromise.*
>
> *[37] In defamation cases, on the other hand, the reasons are much weaker. One is dealing with a very small number of claims to payment of relatively large sums of costs, which some publishers may be strong enough to absorb or insure against but which can have serious effects upon their financial position. The publishers do not have the same negotiating strength as the liability insurers because there are few assessments to be contested and disputing them involves considerable additional costs... In the end, therefore, it may be that a legislative solution will be needed to comply with art 10.*

22. Lord Carswell noted that the 1999 Act changes to the CFA scheme had:

> *52. ...completely changed the balance between litigating parties: the losing party is now liable for not only his own costs, which he could generally not recover when he won against a legally aided party, but the success fee payable to the winner's lawyer, which could be up to 100% of the base costs, and even the premium paid by the winner for insurance to protect himself against the consequences of losing the case.*

23. Lord Carswell went on to comment on this imbalance:

> *[54] It has to be said that there are many who regard the imbalance in the system adopted in England and Wales as most unjust. The regimen of CFAs and the imposition of these charges upon the losing party is, however, legislative policy which the courts must accept, as Lord Hoffmann has stated in para 16 of his opinion, and the present case has to be judged against this background.*
>
> *[55] It is necessary to bear in mind that the House has been asked to rule only on the matter of principle whether success fees can be charged at all in defamation cases brought against the media or whether they are incompatible with art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). That such fees constitute a "chill factor" cannot be doubted, but the issue is whether they are a proportionate way of dealing with the issue of the funding of such litigation. As Lord Hoffmann has stated (para 23 of his opinion), it is not*

really in dispute whether the legislature can in principle adopt this method of funding access to justice...

[57] My conclusion accordingly has to be clear, though I do not reach it without regret. While I am far from convinced about the wisdom or justice of the CFA system as it is presently constituted, it has to be accepted as legislative policy...

24. In August 2007 a Ministry of Justice Consultation Paper was issued, *Conditional fee agreements in defamation proceedings: Success Fees and After the Event Insurance.* It sought views on proposed changes to the costs regime in publication proceedings including a proposal for the introduction of a range of fixed staged recoverable success fees and on the recoverability of ATE premiums. A slightly revised scheme was published with responses to the consultation in July 2008. The media did not support the scheme and strongly opposed its implementation, instead calling for additional measures to address disproportionate and unreasonable costs in CFA cases. The scheme was not implemented.

25. In February 2009 there was a Ministry of Justice Consultation Paper entitled *Controlling costs in defamation proceedings*[9]. This noted that high levels of legal costs in defamation and other publication proceedings had been the subject of criticism and debate in the courts and Parliament where there was concern that excessive costs may force defendants to settle unmeritorious claims and threatened a more risk-averse approach to reporting, undermining freedom of expression. The consultation sought views on proposals to better control costs through: limiting recoverable hourly rates; costs-capping; and requiring the proportionality of total costs to be considered on costs assessments conducted by the court. Following the responses received to the consultation the Civil Procedure Rules Committee considered a number of measures to control costs in publication proceedings, and proposed draft rules concerning, *inter alia*, the giving of additional information about the CFA and control of ATE insurance. These came into force as the Civil Procedure (Amendment) Rules 2009 on 1 October 2009. The government left the other matters in abeyance pending the Jackson Review.

26. Sir Rupert Jackson's Review of Civil Litigation Costs in 2010 strongly criticised the 1999 Act CFA regime, highlighting the four key flaws of the system summarised by Lord Neuberger at [37] in his judgment on 23 July 2104 in this appeal. Though important, these are well known, and will not be repeated here[10]. The Review was even more critical of the operation of the regime in publication proceedings, going so far as to describe it as *the most bizarre and expensive system that it is possible to devise* for the following three

[9] Ministry of Justice, Consultation Paper, 'Controlling costs in defamation proceedings' (CP4/09), published 24 February 2009.

[10] They were set out in the judgment in ***MGN v UK*** at [113].

reasons[11]:

> *(i) Defendants pay a heavy price in order to ensure (a) that claimants within the CFA regime are protected against adverse costs liability and (b) that defendants can still recover costs if they win.*
> *(ii) Despite paying out large ATE insurance premiums in cases which they lose, the defendants' costs recovery in cases which they win may be only partial. This is because the defendants' costs recovery will be subject to the policy limits agreed by claimants in those cases.*
> *(iii) The present regime of recoverable ATE insurance premiums is indiscriminating. A wealthy celebrity suing a hard pressed regional newspaper publisher is fully entitled to take out ATE insurance, effectively at the expense of the defendant. The present regime provides protection against adverse costs, but it is in no way targeted upon those claimants who need such protection.*

27. Sir Rupert therefore recommended far-reaching reform. For all civil litigation, including publication cases, there should be a return to CFAs whose success fees and ATE premiums were not recoverable from the losing party (the pre-1999 Act position). He considered that those arrangements had not suffered from the above flaws but had opened up access to justice for many individuals who formerly had no such access. At the same time he recognised that this measure could adversely affect the ECHR Article 6 rights of some claimants in publication cases, making it more difficult to obtain representation. To address this he recommended a number of measures, including increasing the general level of damages in defamation and breach of privacy proceedings by 10% and introducing a regime of qualified one way costs shifting ("QOCS"), under which the amount of costs that an unsuccessful claimant may be ordered to pay had to be a reasonable amount, taking account of the means of the parties and their conduct in the proceedings.

28. Much the same concerns and recommendations were echoed in the subsequent report by the House of Commons Culture, Media and Sport Committee in 2010[12], to which the MLA had given evidence. This noted in its *Introduction* that:

> *Throughout our inquiry we have been mindful of the over-arching concerns about the costs of mounting and defending libel actions, and the 'chilling effect' this may have on press freedom. The evidence we have heard leaves us in no doubt that there are problems which urgently need to be addressed in order to enable defamation litigation costs to be controlled more effectively. We find the suggestion that the problem confronting defendants, including media defendants, who wish to control their costs can be solved by settling cases more promptly to be an extraordinary one. If a defendant is in*

[11] See ibid at [114].
[12] Report into 'Press standards, privacy and libel' (HC 362-i, incorporating HC 275-i–xv), Session 2008–09, published 24 February 2010.

the right, he should not be forced into a settlement which entails him sacrificing justice on the grounds of cost.

All the evidence which we have received points to the fact that the vast majority of cases brought under a Conditional Fee Agreement (CFA) are won. We therefore see no justification for lawyers to continue to demand 100 per cent success fees which are chargeable to the losing party. We recommend that the recovery of success fees from the losing party should be limited to no more than 10%, leaving the balance to be agreed between solicitor and client. We further recommend that the Government should make After the Event Insurance premiums irrecoverable.

29. Later in its report the Committee noted:

307. All the evidence we have heard leads us to conclude that costs in CFA cases are too high. We also believe that CFA cases are rarely lost, thereby undermining the reasons for the introduction of the present scheme. However it is vital to the maintenance of press standards that access to justice for those who have been defamed is preserved. We do not agree with the Ministry of Justice that the maximum level of success fees should be capped at 10 per cent, nor do we believe that success fees should become wholly irrecoverable from the losing party. However we would support the recoverability of such fees from the losing party being limited to 10per cent of costs leaving the balance to be agreed between solicitor and client. This would address the key issue and seems to us to provide a reasonable balance, protecting access to justice, adequately compensating solicitors for the risks taken, giving claimants and their lawyers, in particular, a strong incentive to control costs and ensuring that costs to a losing party are proportionate. …

309. … Just as the press must be accountable for what it writes, lawyers must be accountable for the way in which cases are run, and that includes costs. The current costs system, especially the operation of CFAs, offers little incentive for either lawyers or their clients to control costs, rather the contrary. It also leads to claims being settled where they lack merit. We hope that the combined effect of our recommendations, the Ministry of Justice consultations and the conclusions of Lord Justice Jackson, will provide the impetus for a fairer and more balanced approach to costs in publication proceedings.

30. Yet more consultation was afoot. In January 2010 the Ministry of Justice published a Consultation Paper entitled *Controlling Costs in Defamation Proceedings—Reducing Conditional Fee Agreement Success Fees*[13]. The executive summary stated:

The Government has for some time been concerned about the impact of high legal costs in defamation proceedings, particularly the impact of 100 per cent success fees, which can double the costs to unsuccessful defendants in

[13] Ministry of Justice, Consultation Paper, 'Controlling costs in defamation proceedings: reducing conditional fee agreement success fees' (CP1/2010), published 19 January 2010.

cases funded under conditional fee agreements (CFAs).

CFAs have increased access to justice for claimants in making it more possible to bring cases. However, the experience over the past decade suggests that - in defamation proceedings in particular - the balance has swung too far in favour of the interests of claimants, and against the interests of defendants. The current arrangements appear to permit lawyers acting under a CFA to charge a success fee that is out of proportion to the risks involved. Aside from the cost burden this places on the opposing side, this could encourage weaker and more speculative claims to be pursued.

The Government does not believe that the present maximum success fee in defamation proceedings is justifiable in the public interest. This is particularly the case because the evidence shows that many more defamation claims win than would substantiate such a generous success fee. This view is supported by Sir Rupert Jackson's report ...

This consultation paper seeks views on a proposal to reduce the maximum success fee which lawyers can currently charge from 100per cent to 10per cent of the base costs. This is an interim measure for dealing with disproportionate costs while the Government considers Sir Rupert's wider proposals which seek to radically change the existing arrangements for all cases where CFAs are used. The proposal in this consultation paper would help reduce the costs for media defendants further and limit the potential harmful effect very high legal costs appear to have on the publication decisions of the media and others.

This proposed change is intended to complement changes already introduced on 1 October 2009 in respect of defamation proceedings which were designed to control the costs of individual cases.

31. On 3 March 2010 the Ministry of Justice published its Response to this Consultation paper[14]. This concluded at p.17:

2. The Government has had particular concerns about the high costs in defamation cases... Sir Rupert's report is substantial with recommendations that are far reaching with potentially widespread impact on many areas. However, it sets out a clear case for CFA reform. Even those respondents who did not support our proposal of reducing defamation success fees to 10% agree that the status quo cannot be permitted to continue. The main flaw identified by Sir Rupert of the current regime is the costs burden placed upon the opposing side. He also points out that the CFA regime was working satisfactorily before recoverability of success fees and ATE was introduced – an assertion that is made by a large number of respondents to the consultation.

4. Previous attempts to control the success fees have proved unfruitful....

6. The Government is actively assessing the implications of Sir Rupert's

[14] Ministry of Justice, Response to Consultation, 'Controlling costs in defamation proceedings: reducing conditional fee agreement success fees' (CP(R) 1/2010), published 3 March 2010.

proposals and will also consider the Committee's report and recommendations including those on costs. However, in the meantime we are minded to implement the proposal to reduce the maximum success fee in defamation cases to 10per cent immediately as an interim measure.

A Conditional Fee Agreements (Amendment) Order[15] was laid before Parliament but did not pass through Parliament in the run up to the general election.

The decision in *MGN v UK*

32. MGN's complaint under ECHR Article 10 was about the recoverability of success fees under the 1999 Act CFA scheme in publication cases against media organisations.

33. As indicated above the success fees it had been required to pay in the two appeals in the House of Lords *amounted to double the amount of the base costs of those appeals in a situation where domestic courts were expressly precluded by the Costs Practice Directions (paragraph 11.9) from controlling and reducing the total costs payable*[16].

34. The ECtHR found that the requirement to pay costs of the two appeals including the success fees was an interference with MGN's ECHR Article 10 rights, within the meaning of Article 10(1)[17].

35. It was accepted that the interference was *prescribed by law* as required by Article 10(2). The law which prescribed the measure was the relevant statutory law set out in the Courts and Legal Services Act 1990 and the 1999 Act, the Conditional Fees Arrangement Orders 1995 and 2000 as well as the CPR and the relevant Costs Practice Directions.

36. MGN had argued that the requirement to pay the costs including the success fees did not pursue a *legitimate aim* within the meaning of Article 10(2)[18]. The court held, however, that the availability of CFAs with recoverable success fees *sought to achieve the legitimate aim of the widest public access to legal services for civil litigation funded by the private sector and thus the protection of the rights of others within the meaning of Article 10 § 2 of the Convention.* The rights concerned were the rights of claimants under ECHR

[15] Draft Conditional Fee Agreements (Amendment) Order which was passed by the House of Lords (HL *Hansard*, 25 March 2010, cols 1152–78), but was rejected by the House of Commons (House of Commons, First Delegated Legislation Committee, 30 March 2010, col 21).
[16] See at [161].
[17] See at [192]. MGN had argued that it amounted to an interference with freedom of expression in the form of a *penalty* within the meaning of Article 10(2), a *punitive award* of costs. See at [163].
[18] See at [162].

Article 6 to have effective access to a court[19].

37. The question posed by Article 10(2), as to whether the UK government could justify the interference, therefore turned on the third Article 10(2) requirement namely that the interference should be *necessary in a democratic society* in pursuit of that legitimate aim. This third requirement implies the existence of a *pressing social need* and that the interference is limited so that it is proportionate to the legitimate aim being pursued. Contracting states must provide the court with relevant and sufficient reasons as to why these requirements are met.

38. Contracting states have a certain margin of appreciation in assessing whether such a need exists and the means adopted to meet it. Where there is a wide margin of appreciation the ECtHR will operate a more restrained review of the balance struck by the contracting state, though it is empowered to give the final ruling on whether the interference is reconcilable with freedom of expression as protected under ECHR Article 10. See generally the passages from ***Lindon v France*** [2008] 46 EHRR 35 at [45], referred to in the judgment at [139].

The ECtHR's observations on the margin of appreciation in ***MGN v UK***

39. The court noted the presence of two factors that, according to its case-law, point towards a wide margin of appreciation.

40. First, the case required a balancing of individual Convention interests namely *on the one hand, freedom of expression protected by Article 10 and, on the other, an individual's right of access to court protected by Article 6 of the Convention*[20].

41. Secondly the case concerned legislation in an area of social policy, though it noted that it could still find such legislation incompatible if the means chosen to achieve the social policy objective produced an *individual and excessive burden*[21].

42. The presence of a critical countervailing factor, pointing to much stricter review in ECHR Article 10 cases, was also noted, however. This is whether the measures in issue are:

> *...capable of discouraging the participation of the press in debates over matters of legitimate public concern (**Jersild v. Denmark***, cited above, § 35; and ***Bladet Tromsø and Stensaas v. Norway*** *[GC], cited above, § 64. It is, moreover, not necessary to consider, in any particular case, whether a*

[19] See at [196] and [197].
[20] See at [199].
[21] See at [200] citing ***James v United Kingdom*** [1986] ECHR 2 at [50].

> *damages award has a chilling effect on the press as a matter of fact so that, for example, unpredictably large damages awards in defamation cases are considered capable of having such an effect* (***Independent News and Media and Independent Newspapers Ireland Limited v. Ireland***, *no. 55120/00, § 114, ECHR 2005-V (extracts)).*

The court's identification of the "fundamental flaws underlying the recoverable success fee scheme"

43. At [98] and [99] the ECtHR had noted the observations of the High Court and Court of Appeal in ***Turcu*** and ***King*** (see above). It had then considered in detail at [100]-[120] the various public consultation processes referred to above and the conclusions of the Jackson Review. It set out Sir Rupert Jackson LJ's *'four points of criticism'* at [113].

44. At [204]-[216] the ECtHR drew out of this material what it characterised at [203] as the *fundamental flaws in the recoverable success fee scheme, particularly in cases such as the present.*

The ECtHR's conclusion

45. In light of the *depth and nature of the flaws* identified, the court considered that even the broad margin of appreciation to be accorded to the state in respect of general measures (i.e. even if that were the margin the court should apply in this case) could not save the flawed CFA scheme, involving the success fees in issue, from a finding of incompatibility [217].

46. The citation at [217] of paragraph 50 in the case of ***Tolstoy Miloslavsky v United Kingdom*** (1995) 20 EHRR 442 is important and needs to be considered in a little detail.

47. This was the case in which the ECtHR considered a damages award by a jury of £1.5m, approximately three times higher than the largest amount previously awarded by a jury. The Court of Appeal had concluded that Tolstoy Miloslavsky's appeal on quantum, based on the judge's directions to the jury on quantum, was weak so that he should pay security for costs on the appeal. He was unable to do so and the appeal was dismissed. The ECtHR noted at [26]:

> *...As to what test the Court of Appeal should apply in exercising its powers to set aside a jury's verdict on damages, Lord Kilbrandon* in ***Broome v Cassell & Co Ltd*** *([1972] AC 1027, [1972] 1 All ER 801, at page 1135 of the former report) stated that it was not sufficient for the court to conclude that the award was excessive; it had to ask whether the award could have been made by sensible people, or whether it must have been arrived at capriciously, unconscionably or irrationally....*

48. The ECtHR found that the award violated the applicant's ECHR Article 10 right. The key passages in its reasoning are at [50] and [51]:

> *[50]...In a more recent case,* ***Rantzen v. Mirror Group Newspapers Ltd****, the Court of Appeal itself observed that to grant an almost limitless discretion to a jury failed to provide a satisfactory measurement for deciding what was "necessary in a democratic society" for the purposes of Article 10 (art. 10) of the Convention. It noted that the common law - if properly understood - required the courts to subject large awards of damages to a more searching scrutiny than had been customary. As to what guidance the judge could give to the jury, the Court of Appeal stated that it was to be hoped that in the course of time a series of decisions of the Court of Appeal, taken under section 8 of the Courts and Legal Services Act 1990, would establish some standards as to what would be "proper" awards. In the meantime the jury should be invited to consider the purchasing power of any award which they might make and to ensure that any award they made was proportionate to the damage which the plaintiff had suffered and was a sum which it was necessary to award him to provide adequate compensation and to re-establish his reputation (see paragraph 28 above). The Court cannot but endorse the above observations by the Court of Appeal to the effect that the scope of judicial control, at the trial and on appeal, at the time of the applicant's case did not offer adequate and effective safeguards against a disproportionately large award.*
>
> *51. Accordingly, having regard to the size of the award in the applicant's case in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the Court finds that there has been a violation of the applicant's rights under Article 10 of the Convention* [emphasis added].

49. At [217] in ***MGN v UK*** the ECtHR was making a similar point, albeit in the context of costs awards mandated by legislation rather than damages awards arrived at by juries. The lack of judicial control over the total costs awards under the CFA scheme, in publication cases, means that there are no *adequate and effective safeguards against a disproportionately large award* on the facts of a particular case.

50. In other words the 1999 Act CFA scheme was a legislative scheme to extend access to justice but one which would inevitably produce an *individual and excessive burden* in particular cases, as per ***James v United Kingdom*** [1986] ECHR 2. There were no judicial controls in the scheme capable of preventing this. Therefore it was incompatible with the ECHR Article 10 rights relied upon by MGN.

51. This wide-reaching conclusion was *borne out by the facts of the present case.* See at [218] – [220].

***MGN v UK* - discussion**

52. It is submitted that the facts of the ***MGN v UK*** case plainly did bear out the general conclusion reached by the ECtHR about the CFA scheme. The power of the ECtHR to give a final ruling on compatibility of domestic legislation with Convention rights enabled it to reach this general conclusion. The inability of the Judicial Committee in ***Campbell v MGN Limited (Costs)*** to disapply the statutory rules that led to MGN's liability for disproportionate costs, including success fees on the appeals was itself indicative of the lack of the required judicial controls.

53. Three further important points need to be made.

54. **First**, in ***MGN v UK*** the ECtHR found a disproportionate costs liability on the basis of 95% and 100% uplifts but without MGN also being liable for a claimant's ATE premium. As the court has noted already in this appeal liability for an ATE premium in addition can effectively triple, not merely double, the losing defendant's liability for a very high slice of base costs[22]. The scope for the 1999 Act CFA scheme to produce an *individual and excessive burden* on a media defendant in a publishing case is even greater than is indicated by the facts of that case.

55. **Secondly**, there is an inter-relationship between the ECHR Article 6 and Article 10 rights of a defendant in a publication case. Measures adopted by the state must not deny an effective right of access to the court under ECHR Article 6 for such a defendant.

56. In the well-known case of ***Steel and Morris v UK*** (2005) 41 EHRR 22, for example, the ECtHR held that exclusion of two such defendants from the coverage of the legal aid scheme meant that they were unable effectively to defend the libel case brought against them by McDonald's over the leaflet they had distributed. A violation of their ECHR Article 6 rights of effective access to the court was found[23]. The ECtHR went on to find a violation of their ECHR Article 10 rights as well:

> *95. If, however, a State decides to provide such a remedy to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for. The Court has already found that the lack of legal aid rendered the defamation proceedings unfair, in breach of Article 6 § 1. The inequality of arms and the difficulties under which the applicants laboured are also significant in assessing the proportionality of the interference under Article 10. As a result of the law as it stood in England and Wales, the applicants had the choice either to withdraw the leaflet and*

[22] See Lord Neuberger's speech in [2014] 3 WLR 555 at [32].
[23] See at [72].

> *apologise to McDonald's, or bear the burden of proving, without legal aid, the truth of the allegations contained in it. Given the enormity and complexity of that undertaking, the Court does not consider that the correct balance was struck between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's rights and reputation. The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others are also important factors to be considered in this context....*

57. The *chilling effect* or *ransom factor* which operates under the 1999 Act CFA regime, as identified by Eady J in ***Turcu*** (above), may have the same sorts of consequences for media publishers, especially smaller regional and local publishers, as the lack of legal aid did for Ms Steel and Mr Morris. A media publisher may have to forgo a worthwhile defence and settle the claim for fear of a huge costs bill, denying them effective access to the court (ECHR Article 6)[24]. Or they may be unable to risk the CFA costs liability involved in mounting a full but unsuccessful defence and so fail to present a full defence at trial. An adverse substantive conclusion to the proceedings may also involve a violation of their ECHR Article 10 rights in these circumstances, particularly if public interest issues are involved.

58. **Thirdly** the margin of appreciation issue discussed above did not, of course, fall to be considered by the Judicial Committee in ***Campbell v MGN Limited (Costs)***. The need to consider it in Strasbourg introduced the key ECHR Article 10 principle in ***Jersild v. Denmark*** and ***Bladet Tromsø and Stensaas v Norway*** into the reasoning process. It is worth reiterating it, as articulated in the Norwegian Grand Chamber case, [2000] 29 EHRR 125:

> *64. The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.*

59. Views may differ about whether the particular article or broadcast at issue in the publication case amounts to the *participation of the press in debates over matters of legitimate public concern.* But this does not matter for the purposes of this principle. If the measure complained of as an interference with the ECHR Article 10 right in the case – whether it is a fine, an injunction, a high award of damages or costs – is capable of "chilling" such expression on other occasions, this makes Strasbourg more willing to find a violation of the ECHR Article 10 right. Orders requiring publishers to pay triple the base costs of lawyers who have brought a successful claim in respect of a publication are quite capable of having this chilling effect on public interest journalism.

[24] Indeed ironically the more worthwhile the defence, the higher the percentage uplift is likely to be, and the greater the disincentive to run it. See [2014] 3 WLR 555 at [35] and [37].

Developments since *MGN v UK*

60. These are summarised for completeness.

61. The Leveson Report into the Culture, Practices and Ethics of the Press, published on 29 November 2012 [25] also considered Jackson LJ's recommendations on the costs of defamation and privacy proceedings, noting that his suggestion of the application of some form of QOCS had *not found favour with the Government.*[26] His recommendations for reform included the introduction of an arbitral system to settle defamation and privacy complaints with media defendants, where parties would face costs consequences should they fail to use it, but insisted on starting court proceedings instead. In the alternative he supported the introduction of QOCS into these types of proceedings.

62. Shortly after the Leveson Report, on 4 December 2012, the Joint Committee scrutinising the Defamation Bill published its Seventh Report.[27] This re-iterated the familiar concerns with the existing CFA model and the need for changes to be made:

> *Costs, funding and access to justice*
> .....
>
> *61. It has therefore been argued that defendants in actions for defamation could be perceived to be under a coercive financial risk, as they could be liable for success fees on top of base costs. Critics argue that this inhibits the freedom of expression of defendants in a real and material way. Irresponsible parties have no incentive to maintain sensible costs, as they are afforded protection by the structure and operation of the CFA model. In addition, ATE insurance raised similar concerns, as it was recoverable from the losing defendant.*
>
> *62. The European Court of Human Rights recently gave judgment in MGN v the UK (2011) ECHR 66 in which the Court agreed with such a view, finding that the existing CFA arrangements on recoverability contravened Article 10: the risk to the defendant of being liable for the high and disproportionate costs in a defamation action produced a chilling effect on free speech. CFAs that enabled recovery of success fees from the losing side were deemed disproportionate.*
>
> *63. The subsequent Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 has altered the way in which CFAs operate. Sections 44-46 of the LASPO Act 2012 govern the recoverability of success fees and ATE insurance. The net effect of these provisions is to limit the recoverability of success fees and ATE in a CFA-funded*

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[25] 'An inquiry into the culture, practices and ethics of the press', Executive Summary (HC 779) and the Report, Vols 1-4 (HC 780-I-IV 2012-13), published 29 November 2012.

[26] ibid, Vol 4 (HC 780-IV), Part J, 'Aspects of Regulation: The Law and the Press Complaints Commission', Chapter 3, at para 3.9.

[27] Joint Committee on Human Rights, 'Legislative Scrutiny: Defamation Bill, Seventh Report of Session 2012–13' (HL Paper 84 HC 810), Section 3, p20, 'Wider issues raised by defamation reform', published 4 December 2012.

case from a losing defendant. Members will recall that a major criticism of these reforms is that they render the CFA-model almost obsolete, as lawyers will be reluctant to take on defamation cases on a CFA-basis if they are no longer commercially viable.

64. We wrote to the Government expressing our concerns that this change to CFAs and ATE may inhibit access to justice for those claimants and defendants, who are middle-income, but not eligible for legal aid. The Government has responded to our concerns by reaffirming their commitment to the LASPO reforms, and the belief that these rules will restore balance to the system and result in a reduction in legal costs. The Government also relied on the decision of the European Court of Human Rights in MGN Ltd. V the UK, to justify the changes to costs in defamation proceedings: the new rules on non-recoverability of success fees and ATE from the losing party will address the European Court's criticism in that case.

65. The Government also outlined what the LASPO reforms would achieve:

> *"We are not removing the access to CFAs of either claimants or defendants; rather we aim to create a stronger balance between the interests of claimants and defendants. The reforms will still provide the claimants with a means to bring meritorious cases but will also ensure that the costs faced by defendants are proportionate, thereby correcting the present anomaly where claimants have little incentive to keep an eye on the costs they incur. Moreover, it is unfair on defendants that they may feel unable to fight cases, even when they know they are in the right, for fear of excessive costs if they lose."*

66. However, the Government has acknowledged the dilemma facing less wealthy claimants and defendants, as they may be put off from pursuing or defending reasonable actions because of the risk of having to pay the other side's legal costs if their case fails. The Government has therefore said that it will therefore consider the issue of costs protection.

67. Lord McNally made a commitment at Second Reading to ask the Civil Justice Council to consider the case for, and possible options for reform of, costs protection in defamation and privacy related claims. The Civil Justice Council is an advisory body, chaired by the Master of the Rolls, and has previously assisted the Ministry of Justice in developing a regime of costs protection in personal injury cases. The Government has indicated in its response to us that the Civil Justice Council will set up a working group to consider the issue of costs protection in defamation/privacy cases, and report with its recommendations by the end of March 2013. This timetable will allow the Government to consider what, if any changes, should be made to the Civil Procedure Rules when the Defamation Bill comes into effect.

63. The Working Group of media law practitioners was duly formed by the Civil Justice Council in December 2012 to identify a proposed way forward. It was asked to consider options for reforming the costs regime in publication cases, considering in particular whether, if some type of QOCS system were to operate, on what basis that could be done. Whilst the group did not know what type of arbitral system (if any) would be formed in the wake of the proposals contained in the Leveson Report, it proceeded on the basis that the provisions of LASPO would be introduced removing the right to recoverability

of success fees and ATE premiums. The group reported in March 2013,[28] with the recommendation that a variation on QOCS would be the most appropriate mechanism to apply, and that it should be in a form that both claimants and defendants could apply for, based on certain eligibility criteria (proposals in respect of which they set out). The report was submitted to the Ministry of Justice for consideration in conjunction with the then draft Defamation bill, the proposed changes following the Leveson Report and the wider changes to the costs regime for civil litigation that were soon to be introduced.

The current situation

64. Sections 44 and 46 LASPO 2012 came into force on 1 April 2013, removing the recoverability of success fees and ATE premiums in most types of civil litigation. However, because of concerns about ensuring access to justice for parties in defamation and privacy claims, the government had suspended the operation of those provisions in such claims in December 2012. This was to be *until a new regime of costs protection can be implemented through changes to the civil procedure rules.*[29] A ministerial statement issued at the time explaining the decision said that:

> *...this short delay in implementation will mean the protection which currently exists through recoverable insurance premiums will continue until a new regime of costs protection can be implemented through changes to the civil procedure rules (emphasis added).* [30]

65. The government accepted the recommendation in the Leveson Report that a variant of QOCS should be extended to privacy and defamation cases. Following the publication of the Working Group's report, in September 2013, the Ministry of Justice published a consultation paper on proposals to introduce QOCS for privacy and defamation cases.[31] Under the proposed rules, a judge would be able to impose a "one-way" costs order (in favour of a claimant or defendant) in a case where it was clear that one side would not otherwise be able to participate in proceedings because of the potential legal costs. The less well off party would only be liable for its own legal costs, while the better off party would be liable for both sides' costs if it lost the case.

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[28] Civil Justice Council (CJC) Defamation Costs Working Group 2013, Final Report, published 18 April 2013, (http://www.judiciary.gov.uk/wp-content/uploads/2012/12/Defamation-costs_final-report_18-4-13-d.pdf).

[29] Article 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013/77.

[30] House of Commons Hansard Ministerial Statements for 12 December 2012, 'Justice, Civil Litigation Funding and Costs', Col 39 WS.

[31] Ministry of Justice, Consultation Paper, 'Costs protection in defamation and privacy claims: the Government's proposals', consultation beginning on 13 September 2013 and ending on 8 November 2013.

66. The consultation paper provided that ss.44 and 46 of LASPO would be implemented for defamation and privacy cases at the same time as the new costs protection rules came into effect.

67. The proposals provided costs rules for three groups of claimants/defendants, based on their means: (i) those of modest means, who would be entitled to costs protection in full – this group would face "severe financial hardship" if they had to pay the other side's costs; (ii) those of some means who would be entitled to costs protection in part (capped liability); and (iii) those of substantial means, who would be entitled to no costs protection. Costs protection would be lost if there was fundamental dishonesty, or the case was struck out.

68. The consultation ran from 13 September 2013 to 8 November 2013. On its website at the time the proposals were published, the government said it *hoped to introduce the new costs protection regime through changes to the Civil Procedure Rules in April 2014, at the same time as fully implementing no-win-no-fee reforms.*

69. To date, however, the regime has still not yet been implemented. A response to the consultation has not been published. It appears highly unlikely that any action will be taken before the general election. What was predicted to be a *short delay* when publication cases were excluded from ss.44 and 46 LASPO has turned into a lengthy one. It is now over two years since the announcement of the exemption in respect of privacy and defamation claims and there has been no indication of when, if ever, a costs protection regime will be implemented. The reasons for the delay are not known to the MLA. There has been no public dialogue on the subject for over a year since the end of the last consultation period.

70. The Secretary of State has mentioned cost-capping orders as a possible means of controlling the extent of the costs liability defendants generally face under the 1999 Act scheme. See [112.2] in his submissions. But this has not in practice turned out to be the solution perhaps suggested by Brooke LJ's comments in ***Musa King*** (above). The order cannot cover any additional liability arising in the future because the claimant's lawyers are acting on a CFA[32]. The conditions for such an order[33] also make them very difficult to obtain. Eady J, declining to make one in the defamation case of ***Peacock v MGN*** [2009] 4 Costs LR 584 was also influenced by what he described as *a general stipulation contained in what is now para 23A.1 of the Costs Practice Direction to the effect that "the court will make a costs capping order only in exceptional circumstances".*[34]

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[32] See now at CPR 3.19(2).

[33] Now at CPR 3.19(5).

[34] See at [9] and now at CPR 3FPD para 1.1 as to the exceptionality requirement.

The extent of the injustice to defendants in publishing cases

71. The MLA is concerned that the court should have an idea of the costs claims made by claimant CFA lawyers in publication cases that are lost at trial. To this end a Schedule is attached to these submissions setting out the figures claimed in four recent defamation cases against MLA member organisations. Three cases are anonymised because the costs claims have been neither published nor settled. The cases can be identified if necessary.

72. In his judgment in this appeal at [2014] 3 WLR 555 at [42] Lord Neuberger raised the important question of whether, in practice, the word *may* contained in s.58A(6) of the Courts and Legal Services Act 1990 (added by s.27 of the 1999 Act) was in practice read as *must*.[35] The same question arises in relation to s.29 of the 1999 Act.[36] The MLA is not aware of any costs award in favour of a CFA claimant in a publication case where these words have not been read and applied in this way. As the Schedule suggests such claimants always seek these additional costs.

73. The figures in the Schedule indicate the extent of the inflation of costs liability through the recoverability of success fees and ATE premiums. The exposure to this inflated costs liability is particularly unjust to regional and local publishers who, to adapt the words of Lord Hoffmann in ***Campbell v MGN Limited (Costs)***, are not *strong enough to absorb or insure against* such liability. The *ransom* and *chilling effect* is most keenly felt here and investigative journalism has suffered particularly badly in this important part of the press. It is invariably regarded as simply too risky to undertake. The scale of the problem was made clear in various pieces of evidence provided to the Culture Media and Sport Committee's inquiry into *Press standards, privacy and libel*.[37]

74. Foot Anstey, a respected regional firm of solicitors whose Media & Publishing team represented approximately 40-50% of the regional paid for and free-of-charge newspapers in the UK at the time of giving evidence, made compelling arguments in their written submissions.[38] These can be summarised as follows:

    - There seemed to be a common misconception that publishers of regional newspapers had access to unlimited funds from national

[35] The wording of s58A(6) provided that an order for costs: *may, subject... to rules of court, include provision requiring the payment of any fees payable under a conditional fee arrangement which provides for a success fee.*

[36] This provided that the costs order: *may, subject in the case of court proceedings to rules of court, include costs in the respect of the premium of the policy.*

[37] See fn 3 above.

[38] Ibid, written submissions, Ev 3.

parent companies, when in fact invariably the opposite was true. In addition, many privately owned publishers are actually small businesses that have only their own assets to rely on to support litigation.

- The very high rates charged by the well known London-based claimant libel lawyers, which are then increased significantly by the entitlement to a success fee, gave rise to an intolerable (but incalculable) pressure on the regional press compelling them both to *refrain from publishing contentious material and to settle potential claims, irrespective of the merits of the claim.*

- ATE insurance contributed *significantly to the pressure that is applied to the right to freedom of expression on the part of the regional press* and the common practice of incurring that liability even before the letter of claim is sent to the publisher *is a particular problem for a regional publisher.* It represents a significant injustice particularly if the publisher agreed that the complaint was valid early on and admitted liability after receipt of the letter of claim[39]. Citing these costs as a financial commitment that *many regional publishers are simply not capable of giving,* they added: *They know that they have little option but to refrain from publishing or to settle (even if the claim is without merit).*

- The *fearless reporting* of the press was at risk of suppression because of the use of CFAs, *even where a meritorious defence may exist.* The firm finished by giving the following example of what type of claims their clients routinely faced:

> *...we have represented 17 clients since 2004 to whom Protocol letters were sent by the three or four prominent claimant solicitors. Two complaints were the subject of proceedings, and the remaining fifteen were settled without proceedings being issued. Of the 15 complaints which were settled, five were considered by us to be legitimate. The other 10 were thus considered to be unjustified and/or defendable from a purely legal perspective, but were nevertheless settled because of concerns by our publishing clients of the financial consequences of defending the claims. They knew that they would be significantly out of pocket, even if their defences were*

[39] Foot Anstey gave its evidence to the Committee in January 2009; this issue was somewhat mitigated subsequently by the introduction of CPR 44.12B which came into effect on 1 October 2009, as a response to the Ministry of Justice's consultation 'Controlling costs in defamation proceedings' (see fn 9 above). CPR 44.12B provided that an ATE premium could not be recovered in costs only proceedings against a party if *that party made the admission of liability and offer of settlement before, or within 42 days of, being provided by the other party with* [the relevant] *information.* Although CPR 44.12B has since been superseded by the new CPR costs provisions introduced on 1 April 2013, it remains in place by virtue of CPR 48PD.1 and 3.2 in cases covered by saving provisions in respect of LASPO.

successful, and that they could be severely damaged financially if the defences were unsuccessful.

75. The submission made by the Society of Editors (a not-for-profit organisation, working to protect the freedom of the media, and made up of more than 400 members from national, regional and local newspapers, broadcasting and digital media) included the following[40]:

> *4. CFAs and Freedom of Expression*
>
> *The media has explained to the MoJ that the CFA system requires urgent reform to address the freedom of expression problems which it has created for all sectors of the media. It has produced a chilling effect upon publication and "ransom" effect in litigation, forcing settlement rather than defence of legal actions, because of the potential litigation costs - high base costs, success fees uplifts and ATE insurance premiums. .....*
>
> *While we all recognise the importance of access to justice, there is no justice in a system in which media companies, however rich they may appear, face disproportionate costs. That applies to the largest national organisation as much as the smallest regional or local newspaper.*
>
> *In the case of the regional press, the reality is that not all media organisations are major national or multi national operations. In the regional media each centre tends to be treated as a stand alone operation. Privately owned publishers tend to be small to medium sized local enterprises.*
>
> *There is no justice and no public interest in damaging the ability of the media to report on behalf of the public or in a disincentive to investigate and publish information that the public has a right to know.*
>
> *There is no justice in a system that means editors will settle actions even when they have a complete defence simply because they cannot risk the level of costs that they may need to commit in advance and most of which will be irrecoverable. Costs of £10,000 to £20,000 represent substantial sums in regional newspaper budgets. Costs of £100,000 could cover salaries of a weekly paper reporting team for a year. The editors of medium to large regional daily newspapers and indeed national newspapers have to think carefully about embarking on stories that could threaten their budgets at that level even if they were able to provide a full and solid defence.*
>
> *CFAs are a dramatic and dangerous threat to freedom of expression. They seriously inhibit the kind of reporting that government ministers continually demand of the media. It is a reasonable request that because of well-intentioned legislation that has become inappropriate in practice, editors frequently have to refuse. That is unacceptable.*

[40] ibid, written submissions, Ev 418.

..... CFAs are bound to have a chilling effect on journalism that is in the public interest although it is clearly difficult to provide direct detailed evidence of this. Tony Jaffa is a solicitor who represents many regional newspapers. He says his experience is that the CFA system fails to discourage weak claims and the regime allows claimants and their lawyers to hold publishers to ransom because both claimants and publishers know that publishers incur risks of huge costs that are probably irrecoverable even if they defend an action successfully. It means that regional publishers may have to make financial commitments that they cannot afford.

76. Similar concerns were expressed in the evidence submitted on behalf of another group of news publishers which included the Newspaper Society[41] (now part of the News Media Association, representing regional news interests, and a member of the MLA):

> *27. CFAs are having a serious commercial impact on all publishers—who sometimes face bills running into millions of pounds to defend even fairly straightforward cases—and, even more importantly, a profound chilling effect on investigative journalism.*
> *.....*
>
> *28. Publishers defending actions are now in a hopeless situation. The problem of cost is most damaging for local and regional newspapers, in common with other small publishers and individuals who often cannot afford to fight legal actions which could put their business or livelihood in jeopardy. The regional and local press is particularly vulnerable to the chilling effects of the CFA regime under which newspapers can in effect be held to ransom. The threat of CFA inflated costs of litigation can deter publication or force settlement of actions, even though the claims might have little merit. Thus right across the media, cases are being settled where there is no editorial reason to do so.*
>
> *29. The ATE insurance system attendant on the CFA regime has also created particular problems for the regional and local press. In practice, no allowance is made even for where newspaper editors and publishers feel that a valid complaint has been made and have sought to resolve the matter as soon as reasonably practicable on receipt of the complaint. At the behest of their solicitor, the claimant will often have already incurred the liability to pay an ATE premium—but which the claimant will not actually pay—even before the letter of complaint has been sent to the newspaper. The newspaper therefore becomes liable to pay a substantial sum, which has been incurred by another who will not be actually liable to pay it, before the newspaper knows the precise substance of the legal complaint, regardless of the merits of the claim and irrespective of a swift resolution, which renders any such insurance and insurance premium completely unnecessary....*

Conclusion

[41] Ibid, Ev 108. The other parties on behalf of whom these submissions were made included the Press Standards Board of Finance Ltd, the Newspaper Publishers Association, the Periodical Publishers Association, the Scottish Daily Newspaper Society and the Scottish Newspaper Publishers Association.

77. Defendants in publication cases are therefore exposed to, and may end up in, exactly the situation of the respondents in this case where: *The amount of the base costs in this case is however dwarfed by the totally potentially recoverable costs, which are nearly three times as much*[42].

78. They remain in this position notwithstanding a judgment of the ECtHR making clear that the 1999 Act CFA scheme exposing them to this sort of liability is incompatible with their rights to freedom of expression. A costs order of the sort faced by the respondents in this appeal would be an unjustifiable penalty for exercising the right to freedom of expression (within the meaning of Article 10(2)) if imposed on a defendant in a publication case. This is not only an indefensible state of affairs as a matter of human rights law; the operation of the 1999 Act CFA scheme in these cases (as in the case under appeal) is plainly unjust.

79. As indicated in these submissions the ECHR Article 6 rights of the organisations represented by MLA members are engaged, and may well also be breached, when they face defamation and privacy proceedings conducted under a CFA. Their voice should therefore be heard in this appeal and the court is urged to consider not only these rights but also to reconsider ***Campbell v MGN Limited (Costs)***. Recognition by this court of the correctness of the decision of the ECtHR in ***MGN v UK*** is long overdue. If permitted to intervene the MLA is anxious to assist the court in any way it can, including by adding to or clarifying these written submissions, providing evidence or making oral submissions.

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Matrix

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5RB

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12 January 2015

[42] See at [2014] 3 WLR 555 at [37].