HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 61

on appeal from: [2002] EWCA Civ 1373

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Campbell (Appellant)
v.
MGN Limited (Respondents)

Appeal Committee

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell

Counsel

Appellants:
James Price QC
Martin Farber
(Instructed by Schillings)

Respondents:
Richard Spearman QC
Jeremy Morgan QC
Andrew Sharland
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ON
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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann, Lord Hope of Craighead and Lord Carswell. For the reasons they give, with which I agree, I would dismiss this petition.

LORD HOFFMANN

My Lords,

2. Naomi Campbell sued the publishers of the Daily Mirror ("MGN") for breach of confidence. She alleged that they had published information in respect of which she was entitled to privacy. After a trial lasting five days in February 2002, Morland J found the case proved and awarded her £3,500 damages and costs. This modest award reflected the fact that Ms Campbell conceded that her own conduct prevented her from objecting to the newspaper's most serious allegation, namely, that she had been addicted to drugs. Her complaint concerned the publication of additional details and photographs concerning the treatment she was receiving. In October 2002 the Court of Appeal unanimously reversed the decision of Morland J and dismissed the action, ordering Ms Campbell to pay the costs of the trial and 80% of the costs of the appeal: [2003] QB 633. In May 2004 this House, by a majority of 3 to 2, reversed the decision of the Court of Appeal, restored the order of Morland J. and ordered the respondents to pay Ms Campbell's costs in the Court of Appeal and in this House: [2004] 2 AC 457.

3. Pursuant to the order of this House, Ms Campbell's solicitors served three bills of costs: £377,070.07 for the trial, £114,755.40 for the appeal to the Court of Appeal and £594,470.00 for the appeal to the House of Lords. MGN were mortified to find that although the award of damages had been only £3,500 (and five of the nine judges who considered the matter had thought that they should not be liable at all), they were being asked to pay legal costs (in addition to their own) in the sum of £1,086,295.47. This may be compared with the £1.5m damages which the European Court of Human Rights in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 thought so disproportionate even for a foul and persistent libel upon a respected public figure that it infringed the right to freedom of expression guaranteed by article 10 of the Convention.

4. MGN likewise complain that their right to freedom of expression has been infringed. They say that the threat of liability to pay a large sum by way of costs is just as likely to inhibit freedom of expression as the threat of liability to pay a large sum by way of damages. But the complaint is not, at any rate for the moment, concerned with the global figure for the costs of the whole proceedings. One reason is that the three bills have not yet been assessed. Costs awarded by the High Court and Court of Appeal are assessed in accordance with principles stated in Part 44 of the Civil Procedure Rules. Only costs which have been proportionately and reasonably incurred and which are proportionate and reasonable in amount will be recoverable against the paying party: see rules 44.4 and 5 of the CPR. Costs in the House of Lords are taxed on similar principles by the Taxing Officers of the House: see *Practice Directions Applicable to Judicial Taxations*, para 15.1. So the amount which turns out to be actually payable by MGN may be a good deal lower than the sum demanded.

5. In the meanwhile, in advance of assessment, MGN raise a point of principle about their liability to the costs of the proceedings in the House of Lords. A special feature of this stage of the proceedings was that Ms Campbell retained solicitors and counsel pursuant to a conditional fee agreement ("CFA"). At the trial and in the Court of Appeal they had acted under an ordinary retainer. But the appeal to the House of Lords was conducted pursuant to a CFA which provided that if the appeal succeeded, solicitors and counsel should be entitled to success fees of 95% and 100% respectively. Thus the basic profit costs claimed by the solicitors and fees claimed by counsel came to £288,468. Disbursements were £26,020.65. This basic total was more than twice the costs incurred by MGN but these figures remain, as I have said,

subject to taxation. It was the £279,981.35 success fees which brought the figure up to £594,470.

6. By a petition presented to the House on 21 February 2005, MGN seek a ruling of the Appeal Committee that they should not be liable to pay any part of the success fee on the ground that, in the circumstances of this case, such a liability is so disproportionate as to infringe their right to freedom of expression under article 10 of the Convention. In view of the importance of this question, it has been argued before an enlarged Appeal Committee consisting of those members of the House who heard the substantive appeal.

7. Although CFAs first made an appearance in the Courts and Legal Services Act 1990, the legislation giving rise to this dispute is largely to be found in the Access to Justice Act 1999 and subsequent subordinate legislation. (A full account of the earlier history will be found in the judgments of the Court of Appeal in *Callery v Gray* [2001] 1 WLR 2112 and *Hollins* v *Russell* [2003] 1 WLR 2487). Section 58 of the 1990 Act, which was substituted by section 27 of the 1999 Act, provides that a CFA which satisfies all the specified statutory conditions shall not be unenforceable by reason only of its being a CFA. This reverses the common law rule that it is unlawful for lawyers to charge fees which depend upon the outcome of the case. A CFA may provide that fees and expenses are to be payable "only in specified circumstances" and may provide for a "success fee" by which, in specified circumstances, fees are increased above the amount which would be payable if they were not payable only in specified circumstances.

8. The conditions laid down for an enforceable CFA are, inter alia, that it must relate to proceedings of a description specified by the Lord Chancellor, it must state the percentage by which the amount of fees which would be payable if it were not a CFA is to be increased and the percentage must not exceed the percentage specified by the Lord Chancellor. The Conditional Fee Agreements Order 2000 (SI 2000/823) allowed the use of CFAs in all litigation except criminal and certain family and environmental proceedings and fixed the maximum success fee at 100%.

9. Until the 1999 Act came into force, a successful litigant who used a CFA had to pay the success fee himself. It could not be included in the costs recoverable from the losing party. But this was changed when

subsections (6) and (7) of the new section 58A were inserted into the 1990 Act:

> "(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.
>
> (7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee)."

10. Under the Civil Procedure Rules and its accompanying Practice Directions, success fees are now (subject to assessment) normally recoverable from the losing party. Section 9.1 of the Practice Direction accompanying Part 44 of the CPR says that under an order for payment of 'costs' the costs payable will include an "additional liability" incurred under a "funding arrangement". A funding arrangement means a CFA or a policy taken out to insure against liability to pay the other side's costs ("after the event" or "ATE" insurance) and an "additional liability" is the success fee or the ATE premium. Part 11.8 of the Practice Directions deals with the assessment of the success fee:

> "(1) In deciding whether a percentage increase is reasonable relevant factors to be taken into account may include:
>
> (a) the risk that the circumstances in which the costs, fees and expenses would be payable might or might not occur;
>
> (b) the legal representative's liability for any disbursements;
>
> (c) what other methods of financing the costs were available to the receiving party.
>
> (2) The court has the power, when considering whether a percentage increase is reasonable, to allow different percentages for different items of costs or for different periods during which the costs were incurred."

11. It is important to notice the impact of the recoverability of success fees upon the principle that recoverable costs should have been proportionately and reasonably incurred. The overriding objective set out in CPR 1.1 includes—

"Dealing with the case in ways which are proportionate

(i) to the amount of money involved;

(ii) to the importance of the case

(iii) to the complexity of the issues; and

(iv) to the financial position of each party.".

12. As Lord Woolf CJ said in *Lownds v Home Office* (*Practice Note*) [2002] 1 WLR 2450, 2451, the policy is that "litigation should be conducted in a proportionate manner and, where possible, at a proportionate cost." But the test of proportionality and reasonableness is applied only to the basic costs. It is not applied to the total sum for which the losing party may be liable after the addition of the success fee. This is explicitly recognised in the Practice Direction. Section 11.5 says:

> "In deciding whether the costs are reasonable and (on a standard basis assessment) proportionate, the court will consider the amount of any additional liability separately from the base costs."

13. The consequence is spelled out in section 11.9:

> "A percentage increase will not be reduced simply on the ground that, when added to the base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate."

14. These principles have been accepted as equally applicable to a taxation of costs in the House of Lords: see *Designer Guild Ltd v Russell Williams (Textiles) Ltd (No 2)* [2003] 2 Costs LR 204 at para 20 and para 26 of the House's *Practice Directions Applicable to Judicial Taxations*.

15. Keith Ashby and Professor Cyril Glasser, in a recent article in the Civil Justice Quarterly (*The Legality of Conditional Fee Uplifts* (2005) 24 CJQ 130, 134) say that the success fee—

> "is added as a percentage bonus to the cost of work actually done, based not on any conduct or attribute of paying parties, but as a penalty for having lost in litigation

against opponents who have entered into a particular type of contract with their own lawyers."

16. I am not sure that "penalty" is quite the right word, but there is no doubt that a deliberate policy of the 1999 Act was to impose the cost of all CFA litigation, successful or unsuccessful, upon unsuccessful defendants as a class. Losing defendants were to be required to contribute to the funds which would enable lawyers to take on other cases which might not be successful but would provide access to justice for people who could not otherwise have afforded to sue. In some kinds of litigation, such as personal injury actions, the funds provided by losing defendants were intended to be in substitution for funds previously provided by the state in the form of legal aid.

17. The consequences of this policy in relation to personal injury claims arising out of motor vehicle accidents were discussed by the Court of Appeal and this House in *Callery v Gray* [2001] 1 WLR 2112 (CA) [2002] 1 WLR 2000 (HL). The legality of the policy of shifting the burden of funding that type of litigation from the state to unsuccessful defendants was not in dispute. I myself described it as a rational social and economic policy. The effect was to internalise the cost of road accident litigation within the class of road users, because the liability insurers called upon to pay these costs passed it on to road users through increased premiums. The problem in *Callery v Gray* arose out of the removal of any market forces restraining the levels of success fees and ATE insurance premiums when they became payable only by the losing party. As the client who agreed the success fee and the ATE premium has no financial interest in the matter, the only line of defence against excessive charges is the costs judges, who are handicapped by the lack of market-driven comparators on which to base their assessments.

18. This is not however a problem which arises in the present case. There has, as I have said, been no assessment in which the level of the success fees might be contested. The challenge is to the allowance of any success fee at all.

19. That challenge is based upon the special position of the media as defendants to actions for defamation and wrongful publication of personal information such as that brought by Ms Campbell against the Daily Mirror. There is no human right to drive a vehicle upon the road free of the cost of litigation arising from road accidents. But there is a

human right to freedom of expression with which the imposition of an excessive cost burden may interfere. It is true that costs are awarded only against defendants who have been found to have wrongfully published matter which is defamatory or in breach of a claimant's right to the confidentiality of personal information. So it may be said, and Ms Campbell's counsel does say, that there is no harm in inhibiting such publications. But that, it seems to me, is not the point. It is the effect which the threat of heavy liability may have upon the conduct of a newspaper in deciding whether to publish information which ought to be published but which carries a risk of legal proceedings against it. When the European Court of Human Rights in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 said that damages of £1.5m in that case were an excessive and disproportionate restriction on freedom of expression, I am sure that they did not mean that people should be free to publish gross and deliberate libels at an affordable price, like the ancient Roman in the story of Aulus Gellius (*Noctes Atticae* 20.1.13) who was followed by a slave carrying a bag of coins to pay the depreciated statutory penalty to the people whom his master insulted. The court was concerned with the indirect effect of a high level of damages awards upon the ordinary bona fide work of the media.

20. MGN nevertheless accept that freedom of expression under article 10 (1) may be restricted, as article 10(2) says, on grounds prescribed by law and necessary in a democratic society to protect the rights of others. The speeches in the substantive proceedings in this case discuss the relationship between the rights of the Daily Mirror under article 10 and Ms Campbell's right to preserve the confidentiality of personal information. This right is one of the means by which our law protects the right to respect for private life guaranteed by article 8 of the Convention. The availability of legal services under a CFA is necessary to provide the access to a court required by article 6 and thereby give litigants an effective means of enforcing their rights.

21. Until the 1999 Act, legal aid was not available in defamation actions (see the Legal Aid Act 1988, Schedule 2, Part II, para 1), which were therefore the almost exclusive preserve of the rich. The Strasbourg court was fairly undemanding about this state of affairs, usually holding that it was not inconsistent with article 6 to expect both claimants and defendants in defamation proceedings to act in person: see *McVicar v United Kingdom* (2002) 35 EHRR 22 and a number of earlier Commission rulings cited in para 34 of that judgment. But the court had said in an early decision (*Airey v Ireland* (1979-80) 2 EHRR 305) that in complex cases article 6 might require some provision for legal assistance, the precise form being a matter for the member state. And

most recently in *Steel and Morris v United Kingdom* (2005) Application No 68416/01, 15 February 2005 it held that such assistance should have been provided to defendants in a lengthy and complex defamation action which had been brought against them by a multi-national company.

22. It is however not necessary to decide that article 6 positively requires legal assistance in actions for defamation and the like in order to come to the conclusion that the provision of such assistance is a legitimate objective which, unless it amounts to a disproportionate burden, a member state is entitled to consider necessary in a democratic society. In principle, MGN accept this argument. But they say that in the circumstances of this case, an award of costs increased by a success fee is for two reasons disproportionate. First, they say that it is necessarily disproportionate because it is more than (and up to twice as much as) the amount which, under the ordinary assessment rules, a costs judge would consider reasonable and proportionate. Secondly, they say that it was not necessary to give Ms Campbell access to a court because she could have afforded to fund her own costs, as she did at the trial and in the Court of Appeal.

23. In my opinion these arguments are flawed. The first confuses two different concepts of proportionality. The CPR on costs are concerned with whether expenditure on litigation was proportionate to the amount at stake, the interests of the parties, complexity of the issues and so forth. But article 10 is concerned with whether a rule which requires unsuccessful defendants not only to pay the reasonable and proportionate costs of their adversary in the litigation, but also to contribute to the funding of other litigation, is a proportionate measure to provide those other litigants with access to justice, having regard to its effect on the article 10 right to freedom of expression. MGN do not really deny that in principle it is open to the legislature to choose to fund access to justice in this way.

24. The argument therefore depends upon its second limb, namely that funding litigation in this way becomes disproportionate when a litigant does not need a CFA to be able to sue or, in this case, appeal. Regulation 4(2)(d) of the Conditional Fee Agreements Regulations 2000 (SI 2000/692) requires a legal representative, before entering into a CFA, to inform the client "whether other methods of financing those costs are available…". But, as MGN concede, this rule is for the protection of the client, who may have some form of insurance which covers litigation costs and makes it unnecessary for him to enter into a CFA. It is not for the protection of the defendant. Similarly, one of the

matters to be taken into account in assessing the percentage to be allowed by way of success fee is "what other methods of financing the costs were available to the receiving party": see section 11.8(c) of the Practice Direction. But that, in my opinion, is also concerned with whether the claimant had the right to have the litigation funded by someone else. It does not contemplate an investigation into his means to decide whether he could have taken the risk of paying the costs himself.

25. There is in my opinion nothing in the relevant legislation or practice directions which suggests that a solicitor, before entering into a CFA, must inquire into his client's means and satisfy himself that he could not fund the litigation himself. By what criteria should such an inquiry be conducted? An application for legal aid requires a disclosure of means and sets out elaborate criteria for eligibility. But there is no such machinery for a CFA. And if the solicitor is not expected to make such inquiries in advance, it would be most unfair for the success fee to be afterwards disallowed on the ground that his client had sufficient means.

26. Ms Campbell denies that she is so wealthy as to be able to view with equanimity the risk of having to pay both her own and MGN's costs of an appeal to the House of Lords. She says, probably with justification, that there can be few such individuals. But I think that it would not matter even if she demonstrably had ample means to pay. It is true that when one has to balance rights such as freedom of expression against other rights such as privacy or access to a court, there has to be, as Lord Steyn said in *In re S (FC)(A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 603, para 17, "an intense focus on the comparative importance of the specific rights being claimed in the individual case". So MGN says that in this case, Ms Campbell did not need a CFA and the balance therefore comes down in favour of freedom of expression. But concentration on the individual case does not exclude recognising the desirability, in appropriate cases, of having a general rule in order to enable the scheme to work in a practical and effective way. It was for this reason that the European Court of Human Rights decided in *James v United Kingdom* (1986) 8 EHRR 123 that Parliament was entitled to pursue a social policy of allowing long leaseholders of low-rated houses to acquire their freeholds at concessionary rates, notwithstanding that the scheme also applied to some rich tenants who needed no such assistance.

27. Thus, notwithstanding the need to examine the balance on the facts of the individual case, I think that the impracticality of requiring a

means test and the small number of individuals who could be said to have sufficient resources to provide them with access to legal services entitled Parliament to lay down a general rule that CFAs are open to everyone.

28. It follows that in my opinion the 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. Mr Spearman QC, who appeared for MGN, suggested various ways in which words might be read into article 3 of the Conditional Fees Order 2000 (which lists the proceedings for which CFAs are available) or CPR 44.3B (which provides for the recovery of success fees) to make them compatible with article 10 by excluding cases such as this from the scope of CFAs or by disallowing the success fees. But in my opinion there is no need for such measures because the existing scheme is compatible.

29. I cannot however part with this case without some comment upon other problems which defamation litigation under CFAs is currently causing and which have given rise to concern that freedom of expression may be seriously inhibited. They are vividly illustrated by the recent judgment of Eady J in *Turcu v News Group Newspapers Ltd* [2005] EWHC 799 (QB), delivered on 4 May 2005:

> "1. The claimant in these proceedings is seeking damages against News Group Newspapers Ltd, as publishers of *The News of the World*, in respect of articles appearing in the editions of that newspaper dated 3 November 2002… He issued his claim form under an assumed name (Alin Turcu), almost at the end of the one year limitation period, on 31 October 2003. He only revealed his true identity in early February of this year, about two months before trial, as Bogdan Stefan Maris. He was born in Romania on 26 July 1980 and is thus now aged 24. He appears to have borrowed the name Turcu from someone he knew in prison in Romania.
>
> 2. The claimant's false identity is not the only respect in which this case is unusual. The claimant has not taken part in the trial and has not even served a witness statement. Mr David Price, a solicitor advocate, has represented him on the basis of the instructions he received from his client, but without the advantage of his

evidence to back up those instructions. Mr Maris is apparently residing somewhere in Romania. Indeed, Mr Price told me before the trial began that he had last had contact with his client shortly after the true identity was revealed and, at the commencement of the trial, he remained out of touch and thus was only able to proceed on the basis of past instructions. He did, however, indicate that telephone contact was resumed at some time during the first week of the trial – but still no witness statement was forthcoming.

3. The evidence adduced by the defendant, which has not been challenged, is that the claimant is a petty criminal with a list of criminal charges or convictions at least in Romania, Germany, Italy and England. According to the evidence of a senior police officer from Neamt in Romania, "he is known as a very intelligent criminal". He came to England in August 1999 using his assumed name of Turcu and made an application for political asylum on the basis of a statement, which has been produced in evidence, and which contains a largely concocted account of his life and circumstances. His application was rejected, but he was allowed exceptional leave to remain in this jurisdiction until 2004, purely because he had lied, apart from anything else, about his age. He was thought to be 16 years old, whereas in fact by that time he was 19. He had already been sentenced in Romania on three occasions to terms of imprisonment. Had his true identity and age been revealed, he would not have been allowed to remain in this country.

4. When he was arrested in 2002 he was found to be in possession of forged Greek and Italian identity documents bearing his photograph but false names. I can readily infer that the claimant had those documents to facilitate the commission of crimes and to mislead the law enforcement authorities. He had been arrested in Italy only eight days before his arrival in England and that may possibly explain why he was seeking pastures new.

5. He eventually obtained employment in London on the basis that he was here legally, and thus he deceived his employers also…

6. The claimant now seeks a large award of damages, including aggravated and exemplary damages, against the proprietors of *The News of the World*, who were denied the opportunity not only of cross-examining him but also of even seeing evidence from him denying their published

> allegations, or to support the serious charges of dishonesty made on his behalf in the course of the trial. He is able to pursue his claim purely because Mr Price has been prepared to act on his behalf on the basis of a conditional fee agreement. 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 Mr Price 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*… This is a situation which could not have arisen in the past and is very much a modern development."

30. After a trial which lasted from 5 to 18 April 2005 the action was dismissed. The defendant's costs were no doubt substantial and irrecoverable.

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 of the litigation on the ground that the defendant's own costs were equally high. That was particularly evident in the case of *King v Telegraph Group Ltd [Practice Note]* [2005] 1 WLR 2282, to which Eady J referred. In that case also,

the claimant was without means and had no ATE insurance. Nevertheless, as Brooke LJ observed:

> "58 … There were no pre-action costs other than those associated with preparing the original letter before action, yet the claimant's solicitors revealed that by the time the original statements of case had been exchanged they had already incurred costs in excess of £32,000 (a sum equivalent to a potential liability of £64,000 for the other side on the basis of a 100% success fee). Over 54 hours of partner's time had already been charged out at just over £20,000 and over 48 hours of trainee solicitor's time at over £7,000…
>
> 64 … the claimant's solicitors served a substantial request for further information concerning the defence, to which the defendant responded in detail…
>
> 65 [In reply, the claimant's solicitors] dispatched a ten-page letter … which was settled by junior counsel in as aggressive a style as their letter before action … the preparation of this letter, to which the defendant's solicitors were put to the expense of preparing a courteous and concise three-page [reply] … would be charged out at £750 per hour (assuming a 100% mark-up) not including counsel's fees.
>
> 73 … the claimant's witness statement contained 114 pages…
>
> 74 … [Counsel] observed that large parts of this witness statement were unnecessary…
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> 75 His main complaint, however, is that this was another area in which, in the context of litigation conducted by a claimant on a CFA without ATE cover, conduct of this kind was wholly out of place. His clients would be put to irrecoverable expense in instructing their lawyers to consider this enormously lengthy statement, and in the event of any settlement into which they might be forced, not by the merits of the case but by purely commercial considerations, the claimant's solicitors would probably be seeking twice their already high hourly costs for the work they did in connection with this statement.
>
> 76 He said that extravagant conduct of this kind could not be effectively policed by robust orders made by a trial judge (if the action ever went to trial) or by drastic surgery by a costs judge because by then the defendant had already incurred the irrecoverable costs of having to respond to it…"

32. Brooke LJ was sympathetic to these complaints. He said (at para 99):

> "What is in issue in this case…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…"

33. The solution, ("the only way to square the circle"), offered by the Court of Appeal in *Musa King* was for the court at an early stage to make a "cost-capping" order, pre-empting the assessment of the cost judge by fixing a maximum amount (including any success fee) which, if the claimant was successful, the recoverable costs could not exceed. Brooke LJ went on to say at para 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…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."

34. In *Callery v Gray* [2002] 1 WLR 2000 all members of this House agreed that the responsibility for monitoring and controlling the new costs regime lay with the Court of Appeal and that this House should be slow to interfere. And I would certainly indorse the sentiments expressed by Brooke LJ in *King's* case and hope that judges

in lower courts will put his suggestions into practice. It is, however, only a palliative. It does not deal with the problem of a newspaper being faced with the prospect of incurring substantial and irrecoverable costs. In the *Turcu* case, News Group Newspapers Ltd was financially strong enough not to submit to pressure. But smaller publishers may not be able to afford to take such a stand. Furthermore, neither capping costs at an early stage nor assessing them later deals with the threat of having to pay the claimant's costs at a level which is, by definition, up to twice the amount which would be reasonable and proportionate.

35. The Department of Constitutional Affairs, in a consultation paper published in June 2004, after *King's* case, discussed the problem but did not propose any legislative intervention. It hoped that the representatives of the media and the lawyers who specialise in defamation and associated proceedings would negotiate an agreement in the way in which an agreement on costs had been agreed between personal injury lawyers and liability insurers. The Civil Justice Council offered mediation services, although the consultation paper correctly observed that mediations work only if both sides want to try to find a mediated solution (see para 49).

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. Of course, one object of extending CFAs to defamation and breach of confidence claims was to enable people of modest means to protect their reputations and privacy from powerful publishers who

previously did not have to fear litigation even if their publications were totally unjustified. Henceforward they would be able to vindicate their rights, which are also Convention rights, in the way that the rich and powerful have always been able to do. There may well be more of these cases in future. Finding ways of moderating the costs of defamation cases would then be in the best interests of all concerned. But the rich and powerful have also had to pay the price of failure. Finding ways of ensuring that the impecunious claimant can also do this may be more of a challenge. In the end, therefore, it may be that a legislative solution will be needed to comply with article 10.

38. I would dismiss the petition.

LORD HOPE OF CRAIGHEAD

My Lords,

39. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Carswell. I agree with them, and I would make the same order as Lord Hoffmann proposes.

40. It is perhaps worth noting that, while civil legal aid is still available in Scotland under Part III of the Legal Aid (Scotland) Act 1986 in actions for personal injury, para 1 of Part II of Schedule 2 to the Act provides that it shall not be available in proceedings which are wholly or partly concerned with defamation or verbal injury. But it is open to litigants who would not otherwise have access to justice to enter into what are known as speculative fee charging agreements to obtain legal assistance. These are provided for, in the case of counsel, by the Act of Sederunt (Fees of Advocates in Speculative Actions) 1992 (SI 1992/1897) and, in the case of solicitors, by the Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992 (SI 1992/1879). The primary legislation from which the Lords of Council and Session derived their power to make these enactments is to be found in section 36(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

41. Under these agreements the fee is payable only if the client is successful in the litigation. It is open to the advocate and the instructing

solicitor, and to the solicitor and the client as the case may be, to agree that the fee, taxed as between party and party (which is the standard basis) or agreed, shall be increased by a figure not exceeding 100 per cent. The amount of the permissible uplift was fixed by the Lord President of the Court of Session in 1992 following consultation with the Faculty of Advocates and the Law Society of Scotland. It was intended to reflect the degree of risk of non-payment of fees which would be involved in undertaking the litigation on the client's behalf. But, in contrast to the system which now operates in England, it is the client who must pay the uplift if he is successful in the litigation. It is not recoverable from the losing party.

42. The system of conditional fee agreements which was originally introduced in England under section 58 of the Courts and Legal Services Act 1990 did not, of course, provide for the recovery of the uplift, or "success fee" as it was called in section 58(2)(b), from the losing party. But section 58A of the 1990 Act, which was introduced by section 27(1) of the Access to Justice Act 1999, changed all that. Section 58A(6) provides that a costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring payment of any fees payable under a conditional fee agreement which provides for a success fee. Conditional fee arrangements cannot be the subject of an enforceable conditional fee agreement in criminal proceedings or family proceedings: see section 58A(1) and (2). Subject to those exceptions the system is available to litigants, as section 58A(6) says, in "any proceedings". It is not possible to read these provisions as excluding proceedings in cases of defamation or breach of confidence. So, in contrast to the position in Scotland, litigation may now be conducted in these cases in England on the basis that if the client is successful it will be the losing party that has to pay the success fee.

43. Under the Scottish system, as was the case in the system which was originally introduced in England, the amount of the uplift is fixed by the agreement which the client has entered into with the solicitor. This then becomes a matter of contract. So it is not open to the client to have the amount of the uplift reduced when the solicitor's account is being taxed, although the figure to which it is to be applied is subject to taxation. The importance of the reference to the rules of court in section 58A(6) of the 1990 Act under the English system is to be seen against this background. It is to the rules of court that one must look to see what protection, if any, is afforded to the losing party under the new arrangement – bearing in mind that he was not a party to the agreement by which the amount of the success fee was fixed.

44. CPR rule 44.3A provides for the assessment of costs where a funding arrangement that provides for a success fee has been entered into. The basis of the assessment is set out in rule 44.4, para (2) of which provides that, where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue and that it will resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party. The expression "costs" for this purpose includes any additional liability by way of a percentage increase incurred under a conditional fee agreement: see the definitions of "costs", "funding arrangement" and "additional liability" in rule 43.2(1). These definitions are reflected in section 9.1 of the Practice Direction, which provides that under an order for payment of costs the costs payable will include an additional liability incurred under a funding arrangement.

45. In my opinion it is plain that rule 44.2 is intended to provide the paying party, who was not of course party to the funding arrangement entered into between the receiving party and his solicitor, with an opportunity to seek a modification of the amount of the success fee on the ground that is either unreasonable or is not proportionate. The way the rule is intended to operate is described in section 11 of the Practice Direction. Section 11.5 provides that, in deciding whether the costs claimed are reasonable and (on a standard basis) proportionate, the court will consider the amount of any additional liability separately from the base costs. Section 11.9 declares that a percentage increase will not be reduced simply on the ground that, when added to the base costs, the total appears disproportionate. The effect of these directions is that the exercise of applying the tests of reasonableness and proportionality to the percentage increase is, when compared with the task of applying these tests to the base costs, a separate exercise.

46. Direction 11.8 states that in deciding whether a percentage increase is reasonable relevant factors to be taken into account may include, among other things, "what other methods of financing the costs were available to the receiving party." This provision should be read in the light of regulation 4(2) of the Conditional Fee Agreements Regulations 2000 (SI 2000/692) about the information to be given to the client before a conditional fee agreement is made. It uses the same expression, adding the words "and, if so, how they apply to the client and the proceedings in question." It refers to other external sources of finance, whether as a result of insurance, membership of a trade union or otherwise, that may be available. This is not a means testing exercise. The means of the client are irrelevant to the question whether or not it

was reasonable for her to enter into a conditional fee agreement. The most important question for the court in assessing reasonableness is the risk that the client might or might not be successful: see direction 11.8(1)(a). In evenly balanced cases a success fee of 100 per cent might well be thought not to be unreasonable.

47. There remains the question of proportionality. The direction does not attempt to identify any factors that may be relevant, other than directing that the question whether the success fee is proportionate is a separate question from that relating to the proportionality of the base costs. On the other hand it would be wrong to conclude that this is an empty exercise. It is, in the end, the ultimate controlling factor which the court must apply if it is to ensure, in a case such as this which is for breach of confidence, that the right of access to the court of the receiving party to vindicate her right to privacy under article 8 of the Convention is properly balanced against the losing party's article 10 right of free speech. Account must, of course, be taken of the fact that it is to be the losing party that is being called upon to pay the success fee. But any reduction in the amount of the percentage increase that is to be paid by the losing party will have to borne by the client under her agreement with the solicitor. So the rights and interests of both sides must be considered and weighed up against each other in deciding whether, having regard to the interests at stake, the amount was proportionate.

BARONESS HALE OF RICHMOND

48. For the reasons given by my noble and learned friend, Lord Hoffmann, I agree that this petition should be dismissed. It is a separate question whether a legislative solution may be needed to comply with article 10. As my noble and learned friend has shown, this is a complex issue involving a delicate balance between competing rights upon which I would prefer to express no opinion.

LORD CARSWELL

My Lords,

49. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Hoffmann and Lord Hope of

Craighead. I agree with their reasons and conclusions and wish to add only a few observations of my own.

50. Prior to the passing of the Courts and Legal Services Act 1990 it was not possible for parties to litigation and their lawyers to enter into conditional fee agreements ("CFAs"), whereby the lawyers were entitled to charge an extra success fee in the event of success in the litigation, but the clients would not be liable to pay the lawyers' fees if they were unsuccessful. The reasons why such agreements were unenforceable at common law and contrary to professional ethics are well known and do not require repetition. They centre round twin concerns: first, the conflict of interest seen to exist in the temptation for a lawyer to advise settlement of a case below its value in order to secure payment of his costs and, secondly, the temptation for the client to press on with a hopeless and irresponsible claim in the hope that he might obtain some profit, while at no risk in respect of his own side's costs. As late as 1979, when the government accepted the view of the Royal Commission on Legal Services to that effect, this was conventional morality.

51. The government, allied with the Law Society, underwent a Pauline conversion in 1989, when it published a Green Paper favouring the introduction of CFAs and followed it up by making statutory provision for them in the 1990 Act. The reasons for the shift in opinion were described by Lord Woolf CJ in para 7 of his judgment in *Callery v Gray* [2001] 1 WLR 2112, 2116:

> "The introduction of the legislation which made conditional fees lawful was motivated primarily by two problems in relation to the provision of legal aid for civil litigation. The first was that progressively fewer members of the public were eligible for legal aid to bring civil proceedings. It was thought that the introduction of CFAs would have the effect of enabling those who could not afford to bring proceedings without the benefit of legal aid to do so. The second problem was that the cost of providing legal aid was growing year on year. Accordingly the Government decided to reduce the areas of litigation which were funded by legal aid. It was considered that this would not reduce access to justice since those affected could bring proceedings using CFAs. The reason for reducing the areas of litigation eligible for legal aid was not, it was said, to reduce expenditure overall but rather to use the funds saved thereby to meet

the need for publicly funded legal services to be provided in a different manner."

52. The subsequent history of CFAs has been fully set out in the opinion of Lord Scott of Foscote in the House of Lords in *Callery v Gray (No 1)* [2002] 1 WLR 2000, to which I would refer. For present purposes the two most significant developments were the extension of the scheme to defamation actions, which were originally not covered by it, and the provision in the Access to Justice Act 1999 and consequent rules of court which made the opposing party liable for payment of the successful party's success fee and after-the-event insurance premium. The former change opened the way for claimants to pursue causes of action which could thitherto be afforded only by litigants with very deep pockets, as the size of the costs bills in the present case amply demonstrates. The latter 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 per cent of the base costs, and even the premium paid by the winner for insurance to protect himself against the consequences of losing the case.

53. It is, however, worth mentioning that that system has not been universally accepted in all parts of the United Kingdom. As Lord Hope of Craighead has pointed out in paras 40 and 41 of his opinion, in Scotland the client who has succeeded in the litigation has to pay the success fee out of his damages and it cannot be recovered from the losing party. In Northern Ireland under the Access to Justice (Northern Ireland) Order 2003 (2003 No 435 (N.I. 10)) provision is made both for CFAs and an alternative, the setting up of litigation funding agreements. It is still under consideration which of these will receive the support of the government as a substitute for the existing system of legal aid still in operation, but the model of litigation funding agreements has attracted considerable support.

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 cases brought against the media involving issues such as breach of confidence or defamation or whether they are incompatible with article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. 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.

56. The petition before the House then turns upon the question whether it is nevertheless still proportionate to permit the operation of the CFA system to the detriment of a losing defendant in a breach of confidence case when the claimant could be regarded as well able to afford to pay the costs and so as not being in need of the support of a CFA. It seems to me undeniable that there is a degree of roughness about the justice of this, but there are inevitably incidents of any system for the funding of litigation which will bear more harshly upon some parties. The practical problems involved in determining at the time when parties enter into CFAs with their lawyers whether they can afford to finance the litigation themselves would be enormous. It was submitted on behalf of the appellant Ms Campbell, supported by the helpful written submission of the Law Society, that such an examination would be unworkable, and I have to agree with this conclusion, attractive as the idea might appear at first sight.

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. It has not been shown to be incompatible with the Convention and the objections in principle advanced by MGN cannot be sustained. The quantum of the costs sought by Ms Campbell is not in issue in this appeal and will be decided in due course by the costs judge. I would only add, by way of a tailpiece, that I see considerable force in the comments made by Lord Hoffmann in the concluding paragraphs of his opinion.