CASE OF MGN LIMITED v. THE UNITED KINGDOM

(Application no. 39401/04)

THE RELEVANT HUMAN RIGHTS LAW

(This account relies heavily on *Lester, Pannick & Herberg: Human Rights Law and Practice*, to which the reader is referred for further details.)

Section 2 of the Human Rights Act 1998 requires (amongst other things) domestic courts to take account of decisions of the ECtHR. Although such decisions are not binding, the House of Lords has repeatedly held that domestic courts should (absent special circumstances) follow any "clear and constant reasoning" of the ECtHR[1].

That said, the doctrine of precedent remains binding upon the lower courts, which (with some exceptions) are bound by UK authority even where that authority is in conflict with ECtHR decisions[2]. The higher courts are not so bound, however, and in particular, where the Court of Appeal concludes that one of its previous decisions is inconsistent with a subsequent decision of the ECtHR, in an appropriate case it is able to depart from its previous decision[3].

Section 3(1) of the Human Rights Act 1998 provides that in so far as it is possible, both primary and secondary legislation must be interpreted in a way that is compatible with ECHR rights and freedoms. Lord Nicholls had this to say on the topic:[4]

> "[Section 3 is a powerful tool whose use is obligatory. It is not an optional canon of construction. Nor is its use dependent on the existence of ambiguity. Further the section applies retrospectively."

The ECtHR has explained that interpretation of ECHR should meet the needs to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individuals' fundamental rights[5].

There are several routes by which a legislative provision may be read in such a way as to be compatible with those rights. Respected commentators have noted that permissible techniques include 'reading down' words (i.e., giving words a narrow meaning), 'reading broadly', and 'reading in' words that Parliament did not use[6]. Lord Nicholls has explained that section 3(1) of the Human Rights Act 1998

---

[1] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23
[2] *Kay v Lambeth London Borough Council* [2006] UKHL 10
[3] *R (RJM (FC)) v Secretary of State for Work and Pensions* [2008] UKHL 63
[4] *Re S (Care Order: Implementation of Care Plan)* [2002] UKHL 10
[5] *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, ECtHR, at para 69.
[6] *Lester, Pannick & Herberg: Human Rights Law and Practice*, 3rd ed, LexisNexis

may require a court to depart from the *un*ambiguous meaning the legislation in question would otherwise bear[7].

There are, however, limits to the extent to which the court may depart from the words used. In particular, section 3 of the Human Rights Act 1998 is concerned with interpretation of legislation, not amendment. Lord Nichols had this to say on the topic[8]:

> "Not all provisions in primary legislation can be rendered Convention compliant by the application of s 3(1)8. … In applying s 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament … Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament."

If primary legislation is not capable of being interpreted in a way that is consistent with ECHR rights and freedoms, the operation and enforcement of that legislation will continue to be valid[9]. Likewise, if secondary legislation is inconsistent as a result of it restrictions imposed by primary legislation, it too will continue to be valid. The same is not true, however, of other inconsistent secondary legislation which may be rendered invalid if it is incompatible with the ECHR; in those circumstances, it would be an option for the court to set aside the secondary legislation under section 6(1) of the Human Rights Act 1998.

A restriction on a freedom afforded by the Convention must be proportionate to the legitimate aim pursued[10]; moreover, there must be legitimate objectives which justify the means[11]. Three criteria can be identified in this regard[12]:

- The legislative objective must be sufficiently important to justify limiting a fundamental right;
- The measures designed to meet the legislative objective must be rationally connected to that objective; and
- The means used to impair the right or freedom must be no more than is necessary to accomplish the legitimate objective.

Whilst it is important to bear in mind that the proportionality in costs litigation is wholly different from proportionality in the human rights sense, it is worth noting that the factors that the ECtHR have identified as being relevant to the access to justice are very similar to those which would be relevant to proportionality in CPR rule 44.5 (namely the importance of what is at stake for the applicant in the proceedings and the complexity of the relevant law and procedure[13]). This, however, is the extent of the overlap (in the writer's opinion).

Whilst it is not for the UK courts to apply the margin of appreciation (that being a matter for the ECtHR), it is important that they recognise it existence; this is for two main reasons: firstly, it should be recognised that judges may lack the information or expertise to deal with the issue; and secondly, when the in question requires the balancing of political factors, the executive will generally be better

---

[7] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, at para 30, per Lord Nicholls
[8] *In Re S (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291, at paras 37–40, per Lord Nicholls
[9] HRA 1998, s 3(2)(b).
[10] *Handyside v United Kingdom* (1976) 1 EHRR 737, ECtHR, at para 49
[11] *Fayed v United Kingdom* (1994) 18 EHRR 393, ECtHR, at para 71
[12] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, PC, at 80C–H, per Lord Clyde
[13] *Airey v Ireland, 9 October* 1979, § 26, Series A no. 32; and Steel and *Morris v the United Kingdom*, no. 68416/01, at paragraph 61

placed to deal with such things than the judiciary because they are democratically accountable to the electorate[14].

CAMPBELL

The applicant (MGN Limited) originally applied to the House of Lords seeking a ruling that it should not be liable to pay the success fees as, in the circumstances; such a liability would be so disproportionate (in the human rights sense of that work) as to infringe its right to freedom of expression under Article 10 of the ECHR. Thus, the dispute arose out of costs yet to be incurred rather than out of a detailed assessment of costs which had already been incurred. The applicant did not seek a declaration of incompatibility before the House of Lords, but instead argued that domestic law regulating the recoverability of success fees should be read so as to safeguard its rights under Article 10. The applicant lost that application and subsequently applied to the ECtHR for a declaration that there had been a violation of Article 10 of the ECHR as regards the success fees.

The ECtHR reminded itself that the right of effective access to a court is a right inherent in Article 6 of the ECHR. While the ECHR does not require state assistance in all matters of civil litigation, it may compel the state to provide, for example, the assistance of a lawyer when such assistance proves indispensable for effective access to court. The ECtHR phrased the question in this way[15]:

> "The Court will examine whether success fees recoverable against unsuccessful defendants are 'necessary in a democratic society' to achieve that aim. In particular, it must consider the proportionality of requiring an unsuccessful defendant not only to pay the reasonable and proportionate costs of the claimant, but also to contribute to the funding of other litigation and general access to justice, by paying up to double those costs in the form of recoverable success fees. The applicant did not complain about having had to pay any ATE premiums of the claimant."

The court went on to say the following[16]:

> "This complaint also concerns the question of whether the authorities struck a fair balance between two values guaranteed by the Convention which may come into conflict with each other, 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."

Thus, it is implicit in these two paragraphs that the ECtHR was considering two issues: firstly, whether success fees were necessary for ensuring access to justice, and secondly, whether a fair balance had been struck between the right to freedom of expression and the right of access to justice. It should be borne in mind that all ECtHR decisions are fact-sensitive, and as such, it does not necessarily follow that the answers to these questions will give rise to matters of general principle.

That said, the ECtHR took into account material which went much further than the facts of the case before them, and in particular, they took into account the recent reviews carried out by Sir Rupert Jackson. In this regard, they had the following to say[17]:

---

[14] *Secretary of State for Home Department v Rehman* [2001] UKHL 47.
[15] At paragraph 198.
[16] At paragraph 199.
[17] At paragraph 203.

> "[O]ne of the particularities of the present case is that this general scheme and its objectives have themselves been the subject of detailed and lengthy public consultation notably by the Ministry of Justice since 2003. While most of this process transpired after the House of Lords judgment in the second appeal in the present case (2005), it highlighted fundamental flaws underlying the recoverable success fee scheme, particularly in cases such as the present."

It seems, therefore, that the ECtHR believed that there were flaws in the *system* of recoverable success fees rather than just on the facts of this case. (It has to be stressed, however, that other analyses of the ECtHR's judgment are possible; what is set out herein is only the writer's view; moreover, even if this was the ECtHR's analysis, it does not follow that any such analysis would be accepted by domestic courts.) Nonetheless, the general phraseology used by the court suggests that it was dealing with issues which went wider than the case before it. Here is another example[18]:

> "The Ministry of Justice acknowledged in that process that, as a result of recoverable success fees, the costs burden in civil litigation was excessive and, in particular, that the balance had swung too far in favour of claimants and against the interests of defendants. This was particularly so in defamation and privacy cases."

The nub of the judgment relied on criticisms that went to the principle of recoverable success fees generally (or, more accurately, the principle of very high recoverable success fees) rather than the success fee in this particular case. The relevant passage reads as follows[19]:

> "The Government relied on the domestic courts' ability to control costs in publication proceedings through the provisions of the CPR and the Costs Practice Directions. However, the second flaw highlighted in the Jackson Review indicates that those safeguards were undermined by a combination of an uncontrolled 'costs race' provoked by the impugned scheme during an action and the difficulty of a court in effectively assessing those costs after the action."

As to proportionality (in the costs sense) the court had this to say[20]:

> "While those provisions [in the CPR and the CPD] addressed the reasonableness of base costs given matters such as the amount at stake, the interests of the parties and the complexity of the issues, Lord Hope underlined that the separate control of the reasonableness of success fees essentially concerned the review of the percentage uplift on the basis of the risk undertaken in the case and that, in an evenly balanced case such as the present, success fees were inevitably 100% … Such safeguard provisions could not, therefore, as Lord Hoffman confirmed, address the applicant's rejection in principle of recoverable success fees calculated as a percentage of reasonable base costs."

As to the relevance of the Jackson reforms, the court had this to say[21]:

> "Moreover, these safeguards relied on by the Government were available throughout the period of public consultation at the end of which the Ministry of Justice accepted that costs were disproportionate, especially in publication cases, so that a drastic reduction in the maximum success fee was required."

Those who take the view that the decision was intended to be of general application will also draw support from the following passage, in which the court referred expressly to "the system"[22]:

---

[18] At paragraph 215.
[19] At paragraph 216.
[20] *Ibid*.
[21] *Ibid*.
[22] At paragraph 217.

> "However, the Court considers that the depth and nature of the flaws in the system, highlighted in convincing detail by the public consultation process, and accepted in important respects by the Ministry of Justice, are such that the Court can conclude that the impugned scheme exceeded even the broad margin of appreciation to be accorded to the State in respect of general measures pursuing social and economic interests."

That said, it should not be forgotten that in so far as they relate to the system in general, the court's comments were *obiter*.

Thus, whilst other interpretations are possible, it would be reasonable to interpret the ECtHR decision in the following way:

- In the context of publication cases, the system of allowing very high success fees between opposing parties is an interference of the rights of expression guaranteed by Article 10 of the ECHR; and
- That interference did have a legitimate aim (namely, to facilitate access to justice), but the requirement that the applicant pay success fees to the claimant was disproportionate having regard to that legitimate aim of achieving access to justice, and that this was for the following reasons:

    - Firstly, they the CPR and the CPD were not adequate for the purposes of limiting the success fee because they fostered "costs races";
    - Secondly, the separate control of success fees (i.e., on the basis of risk rather than proportionality) was did not meet the court's concerns; and
    - Thirdly, it was relevant that the Ministry of Justice had accepted (via the reasoning set out in the Jackson reforms) that costs were disproportionate.

THE EFFECT OF THE DECISION IN THE UK COURTS

The following outcomes are possible:

- Prompt legislation
- Immediate judicial response as to the principle of success fees
- Delayed judicial response as to the principle of success fees
- Immediate judicial response as to the amount of success fees
- No response

Each is dealt with in turn. It is worth bearing in mind that the profession may know the answer sooner rather than later because the Court of Appeal has recently invited written submissions on the point in a matter concerning success fees[23].

Legislation

[23] That case being *De Souza*, which concerns the recoverability of success fees by defendants.

Where a statutory provision has been found to be incompatible with the rights guaranteed under the ECtHR, section 10 of the Human Rights Act 1998 provides a route by which amendments may be rapidly made. Commentators have observed that UK government is not obliged to support or propose such an amendment, but it would usually choose to do both[24].

It is not unlikely that legislation will be made dealing with privacy cases, the question arises, therefore, as to whether legislation will deal with other cases. No-one knows the answer to that, but if general changes are to be made, they will be made more promptly than would have been the case if the ECtHR had not decided *MGN* in the way that it did.

Immediate judicial response as to the principle of success fees

It is possible (but unlikely in the writer's view) that the UK courts will immediately stop allowing success fees, either generally, or in privacy cases or other selected types of case. It is unlikely because the lower courts will be bound by domestic authority. Moreover, whilst it is possible to read MGN as being a damning comment on the system of recoverable success fees generally, many other interpretations are also possible, so it cannot be said that (in this regard) the decision is "clear and constant".

Delayed judicial response as to the principle of success fee

The Court of Appeal will not be bound by its previous decision, but it will be bound by the House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22. That said, certain decisions (such as *Crane v Cannons Leisure* [2007] EWCA Civ 1352) are looking distinctly vulnerable.

If this matter were to reach the Supreme Court it is entirely possible that it would simply say that it was a matter for the executive (especially in the context of the Jackson review being so far advanced). Again, no one can tell at this early stage.

Immediate judicial response as to the amount of success fees

The lower courts will be bound by UK authority only to the extent that it exists and cannot be distinguished. There is ample scope for the court to take MGN into account. The following are merely examples.

- **CPD article 11.9:** This is the provision that says that the success fee will not be reduced merely because the total appears disproportionate when added to the base costs. There is no domestic authority which binds the court to follow it[25], and (in the writer's view) the lower courts would be acting unlawfully if they followed it in publication cases. Even if one were to regard the ECtHR's decision as relating only to publication cases, it would be if CPD article 11.9 were to apply to non-publication cases but not to publication cases; that would create to wholly different bases of assessment.
- **Simple quantum:** The assessment of a success fee is (on the whole) a matter of discretion rather than principle, and as such, the lower courts will not be particularly bound by any UK authority (save, perhaps, than by cases such a *Crane*). Thus, it would be possible for the lower

[24] *Lester, Pannick & Herberg*: Human Rights Law and Practice, 3rd ed, LexisNexis at paragraph 2.10.
[25] The CPD is not a source of law itself; it is merely a practice direction.

courts to read *MGN* as requiring them not to allow success fees that are so high that they give rise to violation of human rights. Whether they do this (and if so, the extent to which they do this) is likely to be dependent on the nature of the case. Thus, in a publication case (where the right is a clear one articulated by article 10 of the ECHR), very low success fees might be appropriate, but in other cases (where the paying parties are likely to argue that *they* have an article 6 right to access to justice), higher success fees may be appropriate.

No response

Finally, it is possible that *MGN* will have no effect (save, perhaps, beyond privacy cases). Almost all commentators agree that this is unlikely.

EXAMPLES OF ARGUMENTS

The arguments will become more sophisticated over time, but the following example gives a flavour of the type of arguments that might be raised. ***The arguments are only rough-and-ready fictitious examples, and a great deal more work would be required before either of them could be placed before a court.*** They are *intentionally weak in certain areas* (this being to allow the counter-argument to be put so as to illustrate the type of points that may be raised).

The example relates to a modest value personal injury claim where costs are assessed rather than fixed. The paying party is arguing that CPD article 11.9[26] is no longer good law. The paying party asserts that in the context of the claim in question (i.e., a modest claim in which the base costs already exceed the value of the claim), it would be wrong to allow anything but a notional success fee. This assertion is made on the basis that a high success fee would deny access to justice for defendants who seek to defend or challenge modest claims. Put another way, the paying party is seeking to rely on Article 6 of the ECHR.

The argument is at first instance; entirely different arguments would be deployed on appeal.

The paying party's argument

1. In *MGN v United Kingdom* (Case No. 39401/04) ("the ECtHR decision"), the ECtHR says that in some circumstances, payments of success are incompatible with the rights and freedoms guaranteed under the ECHR ("guaranteed rights"); three questions arise:

    a. Firstly, whether the court is bound by any domestic law not to follow the ECtHR decision;

    b. Secondly, whether the ECtHR's decision extends beyond publication cases in which a high success fee is claimed; and

    c. Thirdly, whether the court should give effect to the guidance in the ECtHR decision.

    Each question is dealt with in turn.

[26] This is the provision that says that the success fee will not be reduced merely on the grounds that when added to the base costs, the total appears disproportionate.

The first question: the effect of domestic law

2. The decision in *Campbell v MGN Ltd (Costs)* [2004] UKHL 22 ("the House of Lords decision") is binding on this court, but their Lordships addressed a very narrow question, namely[27]:

> "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."

Lord Nicholls went on to say this[28]:

> "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."

Thus, any ratio will relate to the *principle* of recovery of the success fee rather than the ascertainment of the *quantum* of the success fee. Thus, any comments concerning quantum (at, for example, paragraphs 44 to 47) are obiter and therefore not binding[29].

3. In any event, the ascertainment of costs in these circumstances is a peculiarly fact-sensitive issue rather than a matter of law; indeed, in the House of Lords decision Lord Hope specifically mentioned that each case will turn on the circumstances of the parties[30].

4. Thus, the House of Lords decision does not bind this court as to the judicial method of assessment, nor (save for an irrelevant exception that is relegated to the footnotes[31]) does it bind the court as to which factors are to be taken into account when carrying out that assessment.

5. The ECtHR confirms that guaranteed rights are capable of having a bearing on the issue of recoverability of a success fee. In this instance, the guaranteed right in question is Article 6 (the right to a fair trial). Here (i.e., in litigation under the CPR) that right is inextricably linked to the parties' conduct (i.e., what they do in the litigation). This is because they are required to act proportionality, and any award of costs in their favour will be based on the premise that they have acted proportionately. Thus, whilst the two concepts are wholly distinct, there is a nexus between the CPR concept of proportionality and the human rights concept of proportionality[32].

6. In particular, in a modest value claim such as this, it must be the case that access to justice would be denied if it came at a cost (or a potential cost) that was out of all proportion to the

---

[27] See paragraph 6.
[28] See paragraph 18.
[29] Moreover, they are distinguishable because Lord Hope was dealing with a situation in which the client would pay the shortfall of any success fee not recovered from the paying party, and as such, he must have been dealing with a very unusual type of conditional fee agreement: see paragraph 47.
[30] See paragraphs 46 and 47.
[31] Their Lordships dealt with the very narrow issue of whether the court should take into account the financial status of the parties where one of the parties was supposedly wealthy enough to fund the litigation privately; that issue does not arise here.
[32] It must not be forgotten that the costs concept of proportionality and the human rights concept of proportionality are entirely different; the link is only a factual link based on the fact that they both turn on very similar factual issues.

amounts in dispute. In other words, 'access' to a type of justice in which the costs destroy the benefit is no access to justice at all. This concept referred to in this paragraph can be referred to as "proportionate access".

7. For the reasons set out below, the paying party says that CPD article 11.9 (as it is presently applied) does not permit the court properly to examine the issue of proportionate access; this is because it requires the court to look at the costs piecemeal and in separate parts, rather than as a whole and in the round. Thus, the paying party says that CPD article 11.9 is unlawful (or, at least, may be unlawful in certain circumstances). The first issue is whether there is anything in the House of Lords decision that binds this court on that point.

8. The paying party says that there is nothing within the House of Lords decision that is capable of binding the court in this way. The decision is based on principle of recoverability of the success fee, not the amount. There is mention of the CPD article 11.9, but it is necessarily obiter[33]. Moreover, for the reasons set out in the footnotes, those comments are distinguishable[34].

The second question: the ambit of the ECtHR decision

9. As to the second question, the issue is not whether the case in question is a publication case (Article 10) but whether it is a case in which the success fee is capable of unlawfully interfering with *any* guaranteed right; in this case, the relevant right is the paying party's access to justice (Article 6) (i.e., a right to proportionate access).

10. Whilst ECtHR and the House of Lords were concerned with the effect which the threat of heavy liability may have upon the conduct of a newspaper in deciding whether to publish a story, in this case the court is concerned with the effect that the same threat may have upon the conduct of a defendant when deciding whether to contest the claim (or part of it). That right is no less important than those pertaining to publication. Indeed, given the prevalence of this type of litigation, the cumulative impact of denying that right to defendants with this type of claim would be far greater than the impact of a publication case concerning a celebrity.

11. It stands to reason that the right of access to justice will be interfered with if it comes at a cost which is disproportionate and uncommercial. It is now known from the ECtHR decision that in examining that issue, the court is able to look at the effect of the success fee on the parties' conduct. Moreover, it is now known that an excessive success fee can make all the difference between legitimate intervention and unlawful interference.

12. As such, whilst the facts of the ECtHR decision are very different from the present case, the principles are broadly the same; that principle is that when considering whether there has been unlawful interference with a guaranteed right, the court looks at *all* the circumstances, one of which will be the extent to which the success fee adds to the overall cost of litigation and the effect that that might have on the parties' conduct.

---

[33] See paragraphs 46 and 47.

[34] This is because Lord Hope was dealing with a situation in which the client would pay the shortfall of any success fee not recovered from the paying party; those are wholly different circumstances to the present.

13. In any event, CPD article 11.9 is unnatural and counter-intuitive; it is the judicial equivalent of looking at the world through rose tinted spectacles. If the court will not tolerate CPD article 11.9 in publication claims, it would be startling if it were to be tolerated in other types of claims. This is another reason why the principle set out in paragraph 12 above applies to claims other than publication claims.

14. Thus, the Defendant says that in so far as the principle set out in paragraph 12 herein is concerned, the ambit of the decision in the ECtHR decision extends widely.

The third question: the application of the ECtHR decision

15. As to the third question above (i.e., whether the court should follow the guidance in the ECtHR decision), it is respectfully submitted that that decision has done nothing more than demonstrate that CPD article 11.9 was always incongruous and unreal. It is respectfully submitted that when one is considering the effect that costs might have on the parties' conduct (be that in the context of proportionality in the costs sense or in any other way), it is obvious that the court should look at the whole of the costs rather than just selected parts. Moreover, it is also worth pointing out that CPD article 11.9 is only a practice direction, and as such, is not and has never been a source of law (see *A Local Authority v A Mother and Child* [2001] 1 Costs LR 136 at 144).

16. As such, the court should identify all the relevant factors and weigh them in such a way as to arrive at a reasonable overall result. Those factors include (on the one hand) the risk of losing, the risk posed by Part 36 Offers and the factors set out in the risk assessment, and (on the other hand) the effect that the success fee might have on the paying party's access to justice and the fact that the costs fall to be assessed on the standard basis.

17. This was a modest claim in which the damages were never going to exceed £10,000; the base costs have been assessed at £11,000. If the court were to allow a significant success fee on top, this would be a denial of the paying party's right to access to justice. This could have had serious consequence because it is not only unmeritorious claims that a defendant might want to contest, but also exaggerated claims (or even just claims that mistakenly claim too much); if, however, the cost of going to court were to exceed the potential savings, then that would be no system of justice at all.

18. On the facts of this case, the success fee should be no higher than 10 percent.

(An alternative, of course, would be to argue that the House of Lords decision is wrong in law; this would probably result in the assessment being stayed whilst these issues work their way up to the Supreme Court.)

For receiving parties (in response to the above)

1. This court is bound by domestic authority. The bald truth is that the House of Lords decision considered the issue of putative interference with of Article 10 (and, by extension other such rights) and, in the context of a very high success fee, found that there was *no* unlawful interference with the right asserted. Unless and until the Supreme Court revisits the issue, that

is the end of the matter. This is because it cannot be the case that a very high success fee would be compatible with those rights, yet a lower fee would not; that would be illogical and obviously wrong.

2. Whilst it may be true that the House of Lords was not specifically dealing with an issue of quantification, their Lordships were dealing with a case in which the success fee was as high (or nearly as high) as the law permits. If that level of success fee failed to give rise to unlawful infringement, then no success fee could. As such, issues of quantification do not arise.

3. In any event, Lord Hope dealt extensively with CPD section 11 (see paragraphs 44 to 47). It is wrong to dismiss those comments as mere obiter; this is because it would have been open to their Lordships to reduce the success fee to a level that avoided unlawful interference. As such, paragraphs 44 to 47 are ratio, not obiter.

4. Likewise, their Lordships did decide issues of quantum because they ruled on the issue of whether the court should take a person's ability to fund litigation into account[35]; that is an issue goes to quantum (i.e., was it reasonable to take a particular course of action) rather than principle.

5. Even if all this is wrong, the ECtHR decision is based upon the *special position* of the media as defendants to actions for defamation and wrongful publication of personal information. In the House of Lords decision, Lord Nicholls expressly confirmed that other types of litigation were simply not comparable[36]:

> "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."

Thus, it would be wrong to say that the ECtHR decision is of general application. This would be to ignore the express findings of their Lordships.

6. Finally, even if all this is wrong, the court must balance the rights of both parties to access to justice. The Claimant did not have any means of funding this claim other than via a conditional fee agreement. The Defendant, on the other hand, is well resourced, and its insurer is able to pass the success fee on to other policyholders. As such, the Claimant's need outweighs the Defendant's need. Moreover, the question is not – as the Defendant suggests -- a matter of simply balancing all the factors and arriving at a factor that is fair. This is because the issue of access to justice will impact on the amount of costs only if the Defendant can show that charging a success fee of the amount claimed would result in a violation of Article 6 of the ECHR. That is a threshold test rather than a matter of discretion. The Defendant has not reached that threshold.

7. For all these reasons, the court should assess the success fee in accordance with CPD article 11.9 and should allow the success fee as claimed.

---

[35] At paragraph 24.
[36] See paragraph 19.

RISK ASSESSMENTS

If the court is going to take human rights into account when assessing success fees, it is likely that the court would be assisted by a contemporaneous record of the factors that were taken into account at the time the success fee was set. Unless the success fee is fixed, those factors will, of course, include the merits of the case, but if the court is to examine issues concerning access to justice, the court is likely to want to know about the following:

- The estimated amount of the success fee (in terms of amount, rather than percentage) and how this compares with the amount in dispute;
- Whether the amount of the success fee could be reduced by using staged success fees and by giving the other side express notice of the trigger points;
- Whether the amount could be reduced by reducing the base costs (perhaps by limiting parts of the claim), or by seeking to settle certain issues at an early stage;
- Whether the amount could be reduced by using a discounted conditional fee agreement (where the client would bear some of the risk for unsuccessful cases);
- Whether the amount could be reduced by considering early ADR;
- Whether any other methods of funding the claim were available, and if so, what they were; and
- The alternatives to not charging the proposed success fee, and in particular, whether the claim could be brought if the success fee were not to be charged.

Receiving parties would do well to get into the habit of recording these things at the time that they set the success fee. Likewise, paying parties may benefit from making a similar record upon receipt of Notice of Funding.

Finally, nothing in this note constitutes legal advice. It would be foolhardily to rely on this note as being a correct statement of the law without carrying out corroborative legal research; this is because this note was written very shortly after the ECtHR handed down its decision, and as such, the writer is as new to the topics as the reader. It is intended solely as a framework for further academic study.

MARK FRISTON

January 2011