

FOUR NEW SQUARE LEGAL UPDATE

Naomi Campbell and success fees before the European Court of Human Rights:

MGN Limited v. United Kingdom

Introduction

On 18 January 2011 the European Court of Human Rights (“the ECtHR”) handed down its judgment in *MGN Limited v. United Kingdom* (Application No. 39401/04), a case involving the supermodel Naomi Campbell’s right to privacy, her lawyers’ rights to recover success fees under conditional fee agreements, and a newspaper publisher’s right to freedom of expression. The ECtHR’s decision adds little to the law on the right to privacy. Its importance is the Court’s ruling that CFA success fees are unlawful in defamation/privacy cases, with potential implications for costs in non-media civil cases.

Background

In February 2001, the *Daily Mirror* newspaper published a front page article about the Naomi Campbell’s addiction to drugs, including photographs of her leaving a meeting of Narcotics Anonymous that were secretly taken. Several related articles followed. Ms Campbell brought an action against the *Daily Mirror*’s publishers, MGN, for breach of confidence / misuse of private information. She won at first instance before Morland J. ([2002] EWHC 499 (QB)). The decision was overturned by a unanimous decision of the Court of Appeal ([2002] EWCA Civ 1373) but reinstated by a majority of the House of Lords ([2004] UKHL 22). Ms Campbell was awarded £3,500 in damages. In October 2004, MGN lodged an application to the ECtHR contesting the House of Lords’ decision.

Meanwhile Ms Campbell was awarded her litigation costs and MGN was served with a legal bill for just over £1 million. Approximately £600k of this sum related to the House of Lords appeal in which solicitors and counsel acting for Ms Campbell had acted on a CFA with success fees of 95% and 100% respectively. On 21 February 2005, MGN appealed 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 was so disproportionate as to infringe its right to freedom of expression under Article 10 of the European Convention on Human Rights (“Art.10”). The second appeal was conducted by Ms Campbell’s solicitors (but not counsel) on a CFA basis with a 95% success fee.

On 20 October 2005, the second appeal was unanimously dismissed ([2005] UKHL 61). Their Lordships found that the existing CFA regime with recoverable success fees was compatible with Art.10. They held that the deliberate policy of the Access to Justice Act 1999 (i.e. to impose the cost of all CFA litigation upon unsuccessful defendants as a class) was a proportionate measure to provide litigants with access to justice, notwithstanding the possible effects on publishers’ Art.10 rights. Further, this was not, according to their Lordships, a funding regime that became disproportionate when used by wealthy litigants such as Ms. Campbell. MGN was held liable for the costs of the second appeal, totalling approximately £250k. MGN lodged a further complaint to the ECtHR complaining that the award for costs in the underlying litigation constituted a disproportionate interference with Art.10. MGN subsequently settled all its costs liabilities of both appeals for £500k.

Article 10 (right to freedom of expression)

The article provides as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The issues

The issues before the ECtHR were:

- A. Did the award of damages for breach of confidence due to the publication of details concerning Ms Campbell's treatment for drug addiction, together with the impugned photographs, constitute a disproportionate interference with the MGN's right to freedom of expression?
- B. Did the award of costs, including the success fees, constitute a disproportionate interference with the MGN's right to freedom of expression?

The decision on breach of confidence

On the first issue the ECtHR found no violation of Art.10 (§156). The House of Lords' finding had constituted an interference with Art.10 but one which was prescribed by the law of tort for the legitimate aim of protecting others. That interference was necessary for the reasons given by the majority of the House of Lords which included: (i) the intimate and private nature of the additional information about Ms Campbell's physical and mental health and treatment; (ii) the fact that the publication of additional material had been harmful to Ms Campbell's continued treatment; (iii) the fact that the photographs were taken covertly and deliberately with a view to publication; and (iv) the lack of any compelling need for the public to have the additional information, the public interest being already satisfied by the publication of the core facts of her addiction and treatment (§151).

The decision on costs

MGN's complaint was that the claimed success fees totalling £365,077 of a total fees claim of £850,000 (based on 95%/100% uplifts on the first appeal to the House of Lords for Ms Campbell's solicitors/counsel respectively and a 95% uplift on the second appeal for the solicitors only) was disproportionate to the legitimate aim sought to be achieved by the CFA system. They further relied on the costs' disproportionality against a total damages award of £3,500. MGN did not contest the base costs, the use of CFAs in publication cases or the present case or the requirement to pay any ATE premiums. The Government opposed the claim principally on the ground that any disproportionality visited on an individual case by the CFA/recoverable success fee regime was justified by the need to adopt provisions of general application when pursuing broad social and economic policy objectives (§202).

It was common ground that the requirement for an unsuccessful defendant in breach of confidence proceedings to pay success fees was an interference with MGN's right to freedom of expression guaranteed by Art.10, that such interference was "prescribed by law" and that the interference had a legitimate aim, namely to promote the widest public access to legal services for civil litigation (inherent in the Article 6 right of effective access to a court) and constituted a protection of the rights of others within the meaning of Art.10(2).

The issue for the Court was whether the interference was "necessary in a democratic society" to achieve that legitimate aim and in particular, whether it was proportionate to require 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 funding up to double those costs in the form of recoverable success fees.

The ECtHR held that the requirement that MGN pay success fees to the claimant was disproportionate, exceeding even the broad margin of appreciation accorded to the Government in such matters, and constituted a violation of Art. 10 (§219). The principal reasons for so holding were “*the depth and nature of the flaws in the [current CFA] system*” which had been “*impugned*” in both the public consultation process undertaken by the Ministry of Justice and the Jackson Review (§217).

- (1) The ECtHR placed particular reliance on four flaws inherent in the recoverability of success fees in civil litigation highlighted in the Jackson Review i.e.
 - a. The lack of focus of the regime and the lack of any qualifying requirements for claimants who would be allowed to enter into a CFA;
 - b. The fact that there was no incentive on the part of a claimant to control costs and judges assessed costs only at the end of the case when it was too late to control what had been spent;
 - c. The fact the costs burden on opposing parties was so excessive that often a party was driven to settle early despite good prospects of a successful defence (the “ransom” effect);
 - d. That the regime provided the opportunity to ‘cherry pick’ winning cases to conduct on CFAs (which the ECtHR considered implied that recoverable success fees did not achieve the intended objective of extending access to justice to the broadest range of persons);

It also noted that Jackson LJ had concluded that these flaws produced in defamation and privacy cases the “*most bizarre and expensive system that it is possible to devise*” for reasons which essentially concerned the excessive costs burden imposed on defendants in such cases (§206-211).

- (2) It noted that some of those flaws (in particular the “ransom” or “chilling” effect) had been highlighted by the judiciary in other cases (*Turcu v News Group Newspapers Ltd* [2005] EWHC 799 and *King v Telegraph Group Ltd (Practice Note)* [2005] 1 WLR 2282) and in the judgments of the House of Lords in the instant case (§208-209).
- (3) Those flaws were accepted in important respects by the Ministry of Justice (i.e. that the costs burden in civil litigation was excessive, that the balance had swung too far in favour of claimants and against the interests of defendants, in particular in defamation and privacy cases and that a drastic reduction in the maximum success fee was required) but no legislative action had been taken (§215-217).
- (4) The flaws were borne out by the facts of the case since Ms Campbell was wealthy and accordingly not in the category of persons who would be excluded from access to justice for financial reasons, her representatives accepted that they did not do much CFA work which limited their potential to act for impecunious claimants with access to justice problems and yet MGN was obliged to discharge substantial success fees (§218).

The ECtHR reserved the issue of remedy (or “just satisfaction” pursuant to Art.41) (i.e. what amount of costs would be returnable/payable to MGN) to a further hearing.

Commentary

In holding that the success fees claimed in this case were unlawful, the judgment would appear to constitute a further nail in the coffin of the current CFA legislation. It will now be incumbent on the Government pursuant to its ECHR obligations to bring forward legislation to cure the unlawfulness, at least in defamation/privacy cases. It is also likely to give considerable impetus to the implementation of the Jackson Review recommendations, in particular regarding the abolition of the recovery of

success fees from the opposing party. In any event, the timing of this judgment could not be better or worse for opponents or supporters of success fees respectively given that the consultation period for the Government's consultation paper on the reform of civil costs ends on 14 February.

It seems inevitable that paying parties in non-defamation/privacy civil cases will want to develop the arguments considered in this case in a wider context but there will be considerable difficulty in doing so where the right to freedom of expression in Art.10 (which was competing with the Art.6 right underlying the CFA system) is not in play. Given the acknowledged "ransom" or "chilling" effect of success fees being recoverable against the unsuccessful party, it may be possible to argue that litigants have competing Art.6 rights which need to be balanced against one another. Limitations on the right of access to court do also involve considerations of proportionality (*Ashingdane v UK* (1985) 7 EHRR 528). It may also be possible, at least in media cases, to logically extend the arguments to other aspects of the CFA system such as the liability for ATE premiums or even base costs where these have been inadequately controlled.

Paying parties are also likely to try to develop the arguments in favour of purely discretionary arguments as to reasonableness and proportionality in costs assessments. However, it will have to be kept clearly in mind that "proportionality" for the purposes of the CPR (concerned with whether expenditure on litigation is proportionate to the amount at stake) is a different concept to proportionality for the purpose of the European Convention where the issue is whether a particular measure is proportionate to the legitimate aim to be achieved, having regard to the effect on competing (here Art.10) rights (§62).

Leigh-Ann Mulcahy Q.C.

Can Yeginsu