Hilary Term

[2017] UKSC 33

On appeals from: [2014] EWCA Civ 1574, [2016] EWHC 397 (QB) and [2016] EWHC 855 (Ch)

JUDGMENT

Times Newspapers Limited (Appellant) v Flood (Respondent)
Miller (Respondent) v Associated Newspapers Limited (Appellant)
Frost and others (Respondents) v MGN Limited (Appellant)

before

Lord Neuberger, President

Lord Mance

Lord Sumption

Lord Hughes

Lord Hodge

JUDGMENT GIVEN ON

11 April 2017

Heard on 24, 25 and 26 January 2017

Appellant (Times Newspapers Ltd)	Respondent (Flood)
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Ms Kate Wilson	William Bennett
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Appellant (Associated Newspapers Ltd)	Respondent (Miller)
Gavin Millar QC	William McCormick QC
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Appellant (MGN Ltd)	Respondents (Frost and ors)
Lord Pannick QC	Hugh Tomlinson QC
Jamie Carpenter	Simon Browne QC

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LORD NEUBERGER: (with whom Lord Mance, Lord Sumption, Lord Hughes and Lord Hodge agree)

1.
Each of these three appeals involves a challenge to an order for costs made by a High Court judge against a newspaper publisher after a trial. In two of the appeals, Flood v Times Newspapers Ltd and Miller v Associated Newspapers Ltd, the trial involved an allegation that the newspaper had libelled the claimant; in the third appeal, Frost and others v MGN Ltd, the trial involved allegations that the newspaper had unlawfully gathered private information about the claimants by hacking into their phone messages. In each case, the newspaper publisher lost and was ordered to pay the claimants' costs, and in each case the newspaper publisher contends that the costs order infringes its rights under article 10 of the European Convention on Human Rights. In Flood v TNL, the newspaper publisher also argues that the order for costs made against it was outside the ambit of what a reasonable judge could have decided.

2.
In all three cases, the proceedings against the newspaper publisher had been brought by claimants who were able to take advantage of the costs regime introduced by the Access to Justice Act 1999 and reflected in the provisions of the relevant Civil Procedure Rules then in force, in particular CPR 44. It is the provisions of this regime ("the 1999 Act regime") which found the basis of the contention that article 10 is infringed. The 1999 Act regime has now been largely replaced by a new regime, and, although the new regime has no bearing on the awards of costs in the present cases, it is of some relevance to the issues which have to be considered. Accordingly, I shall start by briefly describing the 1999 Act regime and its aftermath. I will then summarise the facts of each case before turning to the issues. I will deal first with the article 10 issues which apply in all three cases, and I will finally discuss the issue specific to Flood v TNL, which turns on its own facts.

The 1999 Act regime and its aftermath

The 1999 Act regime, Callery v Gray and Campbell v MGN

3.
Around 20 years ago, the government decided to curtail the availability of civil legal aid very substantially, and it appreciated that in order to do so a new system had to be introduced if people who were not particularly well off financially were to be able to enjoy access to legal advice and representation. After some, if limited, consultation, the government introduced a Bill into Parliament which became the 1999 Act. That statute severely cut down the availability of legal aid in the field of civil law and introduced the 1999 Act regime instead.

4.
The 1999 Act regime was described in a little detail in the leading judgment of this Court in Lawrence v Fen Tigers Ltd (No 3) [2015] 1 WLR 3485, paras 12-25, and its background is more fully explained in paras 65-69 of that judgment. In essence, under the 1999 Act and the rules made thereunder, a claimant could bring proceedings on terms which involved (i) the claimant's lawyers agreeing under a conditional fee agreement (a "CFA") to be paid nothing if the claim failed, but to be entitled to receive up to twice their normal rates if the claim succeeded, and/or (ii) the claimant taking out so-called after-the-event ("ATE") insurance against the risk of his having to pay the defendant's costs (and on

terms that the insurer was only paid if the claim succeeded), and (iii) the claimant being able to recover from the defendant the “success fee”, payable under the CFA, and the premium payable in respect of the ATE insurance, as part of his costs if his claim succeeded.

5.
The 1999 Act regime was considered by the House of Lords in two cases, Callery v Gray (Nos 1 and 2) [2002] 1 WLR 2000, and Campbell v MGN Ltd (No 2) [2005] 1 WLR 3394. In the former case, which involved a successful personal injury claim, the defendant challenged the level of success fee and the ATE premium which had been held to be recoverable by the claimant, in circumstances where the level of success fee had been reduced by the Court of Appeal. It was said that the success fee was too high and that the ATE insurance had been taken out prematurely. Both arguments failed. However, while accepting that the system introduced by the 1999 Act improved access to justice for claimants, all members of the panel were plainly concerned about the possibility of abuse of the 1999 Act regime.

6.
In Campbell (No 2), the newspaper publisher, MGN, which had lost a privacy infringement claim and had been ordered to pay Ms Campbell’s costs, contended 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” - para 6, per Lord Hoffmann. In para 22, he explained that this argument was based in part on the disproportionality of the level of costs bearing in mind what was at stake in the litigation, and in part on the fact that the particular claimant did not need to fund the litigation with the benefit of a CFA and ATE insurance. Lord Hoffmann then proceeded to reject both contentions in paras 23-28, and made the point that the 1999 Act regime had to be considered as a whole, because “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” (para 26). However, he went on to express considerable reservations about the level of recoverable costs engendered by the 1999 Act regime in relation to claims against the press.

The Jackson Review, the Leveson Inquiry, and subsequent legislation

7.
The concern about the 1999 Act regime expressed in those two cases had started to become widespread by the time Campbell (No 2) was decided. In 2008, the then Master of the Rolls, Sir Anthony Clarke, asked Sir Rupert Jackson to investigate the costs of civil litigation, and this resulted in the Review of Civil Litigation Costs: Final Report (December 2009), which was published in 2010. In the Review, Sir Rupert was very critical of the 1999 Act regime, and proposed substantial changes, most of which have now been implemented by and pursuant to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), and which (as a broad generalisation) apply to proceedings begun after 1 April 2013. However, some of his proposals have not been adopted, although it is clear that the implementation of a new regime to replace the 1999 Act regime is still work in progress.

8.
Some of the principal changes to the 1999 Act regime effected by LASPO did not apply to defamation and privacy claims - see article 4 of the LASPO (Commencement No 5 and Saving Provision) Order 2013 (SI 2013/77). Thus, such claims are now an exception to the general rule which excludes the recoverability of success fees and ATE premiums by successful claimants. (The only other current

exception is mesothelioma claims). This was justified by the fact that such claims would be covered by other legislation. Another recommendation made by Sir Rupert, namely qualified one-way costs shifting, has also been introduced, but only to a limited extent, in that it only extends to personal injury claims, and therefore does not apply to defamation or privacy claims.

9.
However, certain changes introduced following Sir Rupert Jackson's "Review" do apply to defamation and privacy cases. They include more muscular case management by the courts to deal with cases proportionately, costs budgeting and costs management, which involve the parties and the court controlling the level of recoverable costs at the start of the proceedings (see CPR 3.12(1)), costs-capping (by virtue of PD 3F para 1), and new provisions which limit the level of overall recoverable costs to what is proportionate (pursuant to CPR 44.3(2)(a)).

10.
There are two other statutes which should be mentioned in the present context. The Defamation Act 2013 contained provisions which afforded a degree of substantive protection to potential defendants in defamation actions; however, that statute did not deal with costs. The Crime and Courts Act 2013 ("the CCA 2013") on the other hand did concern itself with costs (among many other issues). The CCA 2013 was enacted in part to give effect to the recommendations of Sir Brian Leveson in his An Inquiry into the Culture, Practices and Ethics of the Press (November 2012) (HC 780). Section 40 of the CCA 2013 (which is not in force) provided that if a newspaper publisher became a member of an approved press regulator, it would have a measure of protection against an adverse costs order in any court proceedings brought against it which could have been brought under the regulator's arbitration scheme, but any publisher which was not a member of such a regulator would be at greater risk of adverse costs orders than before. The Government has launched a public consultation as to whether section 40 of the CCA 2013 should be implemented, and this has led to a sharp difference of views.

MGN v UK and Lawrence v Fen Tigers

11.
Meanwhile, MGN was dissatisfied with the House of Lords' decision in Campbell (No 2), and applied to the Strasbourg court, who, on 18 January 2011, decided that MGN's article 10 rights were infringed by having to reimburse the claimant the success fee and the ATE premium which Ms Campbell had incurred - MGN v United Kingdom (2011) 53 EHRR 5 ("MGN v UK"). The Strasbourg court acknowledged that the 1999 Act regime "sought to achieve the legitimate aim of the widest public access to legal services for civil litigation funded by the private sector" (para 197). However, at paras 207 to 210 of its judgment, the Strasbourg court discussed a number of flaws in the system that Sir Rupert Jackson had identified in his Review; to quote from Lawrence (No 3), para 43:

"The flaws were (i) the lack of focus of the regime and the lack of any qualifying requirements for appellants who would be allowed to enter into a CFA; (ii) the absence of any incentive for appellants to control the incurring of legal costs and the fact that judges assessed costs only at the end of the case when it was too late to control costs that had been spent; (iii) the 'blackmail' or 'chilling' effect of the regime which drove parties to settle early despite good prospects of a defence; and (iv) the fact that the regime gave the opportunity to 'cherry pick' winning cases to conduct on CFAs. At para 217, the court concluded that:

'… the depth and nature of the flaws in the system … 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.'"

Accordingly the Strasbourg court held that the order for costs upheld by the House of Lords in Campbell (No 2) infringed the article 10 rights of MGN. In a subsequent judgment, the Strasbourg court awarded MGN compensation in a figure the precise basis for whose quantification is impossible to assess - (2012) 55 EHRR SE9.

12.
In Lawrence (No 3), this Court had to consider the contention that a substantial order based on the 1999 Act regime against unsuccessful defendants in a nuisance claim was incompatible with their rights under article 6 of the Convention (access to court) and/or article 1 of the First Protocol to the Convention (right to property - "A1P1"). The Supreme Court rejected the argument that this contention was supported by the reasoning of the Strasbourg court in MGN v UK. In the leading judgment, Lord Dyson MR and I said that the criticisms of the 1999 Act regime in MGN v UK were made in "the context" of the Strasbourg court's "concern about the effect of the scheme in defamation and privacy cases", and that "the balancing of the article 6 rights of [claimants] against those of [defendants] is an exercise of a wholly different character", and the same applied to A1P1 - para 52.

13.
The leading judgment then went on to address the defendants' further contention that, even if MGN v UK was not of assistance to their case, the 1999 Act regime, at least in so far as it applied in the case of Lawrence v Fen Tigers was incompatible with their article 6 and/or A1P1 rights. After considering the question in some detail, Lord Dyson and I rejected that contention also, concluding in para 83:

"We accept that, in a number of individual cases, the scheme might be said to have interfered with a defendant's right of access to justice. But … it is necessary to concentrate on the scheme as a whole. The scheme as a whole was a rational and coherent scheme for providing access to justice to those to whom it would probably otherwise have been denied. It was subject to certain safeguards. The government was entitled to a considerable area of discretionary judgment in choosing the scheme that it considered would strike the right balance between the interests of appellants and respondents whilst at the same time securing access to justice to those who would previously have qualified for legal aid."

A summary of the facts of each case

Flood v TNL

14.
Mr Flood was a detective sergeant with the Metropolitan Police, although he retired during the currency of these proceedings. Following an allegation of corruption against him, a police investigation was begun in April 2006, and he was suspended from his duties. On 2 June 2006, an article was published in the Times newspaper, both in hard copy and on the Times website, suggesting that there were strong grounds to believe that Mr Flood had been guilty of corruption. The investigation resulted in a report which was made available internally only in December 2006, which found no evidence against Mr Flood, and he returned to his duties that month.

15.
In July 2006, Mr Flood instructed solicitors in connection with the publication of the article, and in January 2007 they instructed junior counsel, who entered into a conditional fee agreement (a "CFA"). In May 2007, Mr Flood issued proceedings claiming damages for libel against the publisher of the Times, TNL. In July 2007 TNL served its Defence advancing, inter alia, a defence based on (i) justification and (ii) the principle in Reynolds v Times Newspapers Ltd [2001] 2 AC 127 - ie that, even

if Mr Flood was innocent of any wrong-doing, the article had been properly researched and was in the public interest (the "Reynolds defence"). A Reply was served on behalf of Mr Flood in August 2007.

16.
On 5 September 2007, TNL received a letter from the Metropolitan Police informing them that Mr Flood had been exonerated by the investigation. Despite this, TNL did not take down the story from the Times website. Between mid-September and mid-November 2007, the parties tried to settle the claim in negotiations which were expressed to be "without prejudice save as to costs". When those negotiations came to nothing, Mr Flood took out ATE insurance in connection with his claim. In January 2007, he entered into a CFA with his solicitors and a second CFA with junior counsel. He also entered into a CFA with leading counsel in early 2010. Meanwhile, after procedural hearings and further attempts at settlement, there was a four-day hearing before Tugendhat J of TNL's Reynolds defence. In a judgment given on 16 October 2009, he held that the defence succeeded albeit only up to 5 September 2007 - [2010] EMLR 169. The Court of Appeal allowed Mr Flood's appeal, but the Supreme Court restored the judgment of Tugendhat J - [2011] 1 WLR 153 and [2012] 2 AC 273. The parties have reached agreement as to the costs of these two appeals.

17.
The consequence of Tugendhat J's judgment was that the only publications of the article in respect of which Mr Flood's case could succeed were those that remained on TNL's website after 5 September 2007. On 25 July 2013, Tugendhat J gave judgment in favour of Mr Flood as to the meaning of the words used in the article, and ordered TNL to pay Mr Flood's costs of that issue - [2013] EWHC 2182 (QB). On 1 October 2013, TNL withdrew its defence of justification. Accordingly, the way was clear for Mr Flood to succeed in his claim for damages in respect of the continuing publication of the article on TNL's website. Following a two-day hearing, Nicola Davies J handed down judgment awarding Mr Flood £60,000 damages – [2013] EWHC 4075 (QB). In arriving at that figure, she took into account the attitude of TNL in open correspondence with Mr Flood, which she described as "aggressive and unpleasant", and she said that it had "increased the distress and anxiety of [Mr Flood]" - paras 27, 76. She also characterised TNL's attitude as "oppressive and high-handed" and concluded that it "serve[d] to aggravate the award of damages" - para 78. It is also worth mentioning that the Judge considered that "TNL's conduct meant that [Mr Flood] had no choice but to pursue these proceedings in order to clear his name" - para 79.

18.
There followed a hearing on costs, and Nicola Davies J ordered TNL to pay all Mr Flood's costs of the proceedings (other than those which had been the subject of a prior order or agreement) - [2013] EWHC 4336 (QB). TNL's appeal to the Court of Appeal was dismissed - [2014] EWCA Civ 1574. TNL now appeals against that decision.

19.
In this Court, TNL runs two arguments. The first is that, despite the Court of Appeal holding otherwise, the Judge's order that TNL pay all Mr Flood's costs was, in all the circumstances "illogical, factually unsustainable and unjust", to quote from its printed case. Secondly, TNL argues that, relying on MGN v UK, the order for costs, insofar as it requires TNL to reimburse Mr Flood any success fee or ATE premium, constitutes an infringement of its article 10 rights, and should be set aside. As already mentioned, I propose to deal with the first point at the end of this judgment.

Miller v ANL

20.

On 2 October 2008, the Daily Mail published an article suggesting that Mr Miller's management consultancy had received "contracts … worth millions of pounds of public money" as a result of "improper conduct and cronyism". In September 2009, Mr Miller instructed solicitors and counsel, all of whom entered into CFAs, and he took out ATE insurance. In the same month, Mr Miller's solicitors issued proceedings for libel against the publishers of the Daily Mail, ANL. After various discussions and a hearing as to the meaning of the article in question and the issue of an amended particulars of claim, the claim was met by ANL with a formal defence of justification, served in July 2010.

21.
Thereafter, there were further discussions, during which Mr Miller warned ANL that he would have to increase his ATE cover unless ANL agreed to limit their recoverable costs if they were to win, a proposal to which they did not agree. Accordingly, Mr Miller increased his ATE cover in June 2011 (and negotiated a further increase in June 2012). In December 2011, Mr Miller offered to settle the case for £18,000 pursuant to CPR Part 36, and this was met by an offer from ANL in March 2012 in the sum of £5,000 with no apology. Following further discussions, the case did not settle and there was a full trial before Sharp J. In her judgment given on 21 December 2012, she rejected the defence of justification and awarded Mr Miller £65,000 - [2012] EWHC 3721 (QB). As this exceeded the sum he had offered to accept, he was awarded his costs on a standard basis until January 2012 and on an indemnity basis thereafter.

22.
Mr Miller's base costs (ie his costs ignoring any success fees or the ATE premium) have been agreed at £633,006.08. However, he claimed in addition £587,000 in respect of success fees and £248,000 in respect of his ATE premium. While not challenging the reasonableness of these figures as such, ANL contended that, following the reasoning in MGN v UK, it would infringe their article 10 rights if they had to reimburse these sums. That issue was referred to Mitting J, who held that he was bound by the reasoning in Campbell (No 2) to reject ANL's arguments, although he also said that reimbursement of the ATE premium was justified under article 10(2) - [2016] EWHC 397 (QB). He granted a "leapfrog" certificate. The issue on this appeal is whether this Court should reverse Mitting J's order that ANL should reimburse Mr Miller the success fees and the ATE premium.

Frost v MGN

23.
A number of individuals had their phones hacked by MGN, the publisher of the Daily Mirror, Sunday Mirror and the People. More particularly, this involved MGN or its agents hacking, ie unlawfully listening to voicemails on mobile phones, and blagging, ie masquerading as the individuals concerned or as other people legitimately entitled to obtain telephone call data, and then MGN publishing articles in its newspapers based on the information so obtained. Many of these individuals began proceedings against MGN; they included eight "wave one" claimants, whose claims were ordered to be heard together. Those claimants proceeded to the trial of their claims, which succeeded, in sums varying between £72,500 and £260,250, for reasons given by Mann J in a comprehensive judgment in May 2015 against whose decision the Court of Appeal dismissed MGN's appeal - see sub nom Gulati v MGN Ltd [2016] FSR 12 and [2017] QB 149 respectively. The other 15 claimants settled their claims prior to the hearing before Mann J. Each of the 23 claimants is entitled to recover his or her costs from MGN.

24.

On various dates between August 2011 and October 2014, each of the 23 claimants entered into CFAs with their lawyers, and 18 of them took out ATE insurance. The parties were able to agree (subject to an issue on proportionality) as to the reasonable base costs in each of the 23 cases, varying between £22,000 and £210,000. The Costs Judge determined a reasonable success fee in each case, varying between 25% and 100%, and the ATE premiums incurred by the claimants varied between £13,515 and £87,450. MGN contended that, following the reasoning of the Strasbourg court in MGN v UK, it would be an infringement of their article 10 rights to require them to reimburse the claimants the success fees or the ATE premiums. Mann J rejected that argument - [2016] EWHC 855 (Ch). MGN was granted a "leapfrog" certificate to appeal to this Court against that conclusion.

25.
Similar arguments arise in relation to the costs in the Court of Appeal, where the claimants are seeking from MGN £739,456.87 by way of base costs, £645,799.88 by way of success fees and £318,000 for their ATE premium.

Overview of issues and conclusions

26.
As explained in para 19 above, the appeal in Flood v TNL raises a discrete and case-specific issue, namely whether the first instance judge's decision to award Mr Flood all his costs of the proceedings (other than those which had already been awarded or agreed) was a permissible exercise of her discretion, and I propose to deal with that point at the end of this judgment.

27.
The main focus of this judgment is on the issues raised in all three appeals arising from the engagement of article 10 by the costs orders made by each first instance judge. In that connection, there are four issues to be considered. The first is whether, as ANL contends (with the support of TNL and MGN), the domestic law should reflect the Strasbourg court's decision in MGN v UK to the extent of laying down a general rule ("the Rule"). That rule is that, where a claim involves restricting the defendant's freedom of expression, then at least where the defendant is a newspaper or broadcaster, it would, as a matter of domestic law, normally infringe the defendant's article 10 rights to require it to reimburse the success fee and ATE premium for which the claimant is liable under the 1999 Act regime. If we reject the existence of the Rule, then the remaining article 10 issues fall away, whereas if we accept its existence, those remaining issues are as follows.

28.
The second issue is whether the effect of the Rule should be that the costs orders made by Mitting J and Nicola Davies J in Miller v ANL and in Flood v TNL respectively must be amended to exclude the defendant in each case paying the success fee and the ATE premium for which the claimant is liable. The third issue is whether the Rule could be relied on by MGN in Frost v MGN, so that the orders for costs against MGN made by Mann J and by the Court of Appeal should be amended to exclude any liability for the claimants' success fees and ATE premiums. The fourth issue is whether this Court should make a declaration of incompatibility under section 4 of the Human Rights Act 1998 in relation to the 1999 Act regime, or indeed the costs regime which applies following LASPO and the 2013 Act.

29.
For reasons which are set out in paras 42 to 63 below, I consider that, even if the answer to the first of those issues is that the Rule applies, so that it would normally infringe a newspaper publisher's article 10 rights to require it to reimburse the claimant's success fee and ATE premium under the 1999 Act regime in a case involving freedom of expression, the orders for costs made in the three cases should

not be varied to remove the defendant's liability for the claimant's success fee and ATE premium. In those circumstances, I believe that it would not be appropriate to express a concluded view on the first issue, because the party who would be, at least potentially, most detrimentally affected by the decision is not before us. That party is of course the United Kingdom government. If we were to conclude that the Rule is part of domestic law, it would not technically bind the government, but it would make it difficult for the government to re-open the question in this country, and it could make it more difficult for the government to challenge the conclusion and reasoning in MGN v UK in Strasbourg. Although we are not being asked to make a declaration of incompatibility, a decision that the Rule applies but cannot assist the appellants in the three appeals could have very similar consequences, and section 5 of the Human Rights Act 1998 requires the government to be notified if a declaration of incompatibility is sought in any proceedings.

The article 10 arguments

Should MGN v UK be applied domestically?

30.
I turn now to the issue of whether ANL's (and TNL's) article 10 rights are infringed by the order for costs made by Mitting J (and Nicola Davies J). In this section and the next section (starting with para 42 below) of the judgment, I shall concentrate on Miller v ANL, as the article 10 argument was advanced in relation to that appeal, but my comments apply equally to Flood v TNL.

31.
It is, of course, open to a domestic court to refuse to follow the Strasbourg court's analysis and conclusion in MGN v UK, especially as it is a single decision of one section of the Strasbourg court. It is not as if there is a number of section decisions to the same effect or a decision of the Grand Chamber; it is also of some possible relevance that there was no oral argument in MGN v UK.

32.
However, there is undoubtedly a very powerful argument for concluding that we should effectively follow the Strasbourg court's approach in that case. The judgment was full and careful, and the ultimate decision was based on a report which was prepared by a senior United Kingdom judge and was largely acted on by the UK government. The 1999 Act regime gave rise to some concern in the House of Lords in Campbell (No 2) and was criticised in this court in Lawrence (No 2) [2015] AC 106, para 37. The UK government did not try to have the decision in MGN v UK reconsidered by the Grand Chamber. Indeed, the UK government relied on the decision in MGN v UK to justify its initial decision to forbid recovery of success fees and ATE premiums in defamation and privacy actions (see the Joint Committee on Human Rights Legislative Scrutiny: Defamation Bill Seventh report of Session 2012-2013 (HLP84: HC 810), para 64). It also appears to have been assumed (albeit without expressly deciding the point) by the five Justices in the majority in Lawrence (No 3) that MGN v UK represented the domestic law, and the conclusion reached by the two dissenting Justices was based on the proposition that it did represent domestic law.

33.
Nonetheless, in a spirited and impressive argument on behalf of Mr Miller, Mr McCormick QC contended that there were good reasons for this court to refuse to follow the Strasbourg court's decision.

34.

I would reject his first argument, namely that the Strasbourg court merely decided that the imposition of reimbursement of the success fee and the ATE premium represented an infringement of MGN's article 10 rights on the facts of the particular case. It seems to me clear that the decision of the Strasbourg court was based on the 1999 Act regime in principle. In paras 217 and 218, the court said that it was "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" which led the court to "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" and that this "conclusion is indeed borne out by the facts of the present case". This does not mean that article 10 is automatically infringed in every case involving freedom of expression where an unsuccessful defendant has to reimburse the claimant the success fee and ATE premium, but it does mean that it will normally be the case.

35.
There is perhaps a little more force in the contention that the Strasbourg court did not have regard to the wide range of civil cases to which the 1999 Act regime applied. The Strasbourg court concentrated on civil claims where article 10 was engaged, rather than looking at civil claims across the board, which were subject to the 1999 Act regime. However, in my view, they were entitled, and arguably bound, to do that. The principle that claims involving article 10 were in a special category for present purposes was accepted by Lord Hoffmann in Campbell (No 2), para 19, where he emphasised the importance of freedom of expression and the "special position of the media as defendants to actions for defamation and wrongful publication of personal information".

36.
There is more force in the contention that the Strasbourg court does not appear to have taken into account that the 1999 regime could actually assist defendants who wished to defend claims involving article 10, as they could enter into CFAs and take out ATE insurance, as pointed out in Lawrence (No 3), para 68. It is also a fair criticism of the judgment in MGN v UK that the Strasbourg court accepted at para 208 the argument that under the 1999 Act regime, "there was no incentive on the part of a claimant to control the incurring of legal costs on his or her behalf". In fact, in many cases claimants could often find themselves liable for at least some costs which were held to be irrecoverable from the defendants, and in other cases the defendants might not be financially able to meet a costs order, which would leave a claimant out of pocket. Another criticism of the judgment in MGN v UK which has some, if limited, force is in relation to its reliance on the "blackmail" effect of the 1999 Act regime (in para 209). In most cases, a claimant under that scheme will have ATE insurance which would reduce this factor significantly by allowing a successful defendant to recover its costs (and the cases cited in footnote 73 to para 209 were cases where the claimant had not taken out ATE insurance).

37.
Although the points discussed in the immediately preceding paragraph have some force, it seems to me that they are not particularly powerful. They represent qualifications to some of the factors relied on by the Strasbourg court, but it seems to me unlikely that they would have caused the Strasbourg court to reach a different conclusion if they had been raised. However, there are other points relied on by Mr Miller.

38.
In particular, it is argued that events after the decision in MGN v UK justify this Court not applying the reasoning in that decision. There is nothing in this point in so far as it relies on changes in the law - ie the changes which have been made by and pursuant to LASPO and which have been mooted in the

CCA 2013. Those changes do not apply to any of the instant three cases, and there is therefore no basis for relying on them to justify the regime which does apply.

39.
However, there is somewhat more force so far as other matters which occurred after the decision in MGN v UK are concerned: they provide some support for the notion that the 1999 Act regime could reasonably have been thought to be the least bad option to enable access to justice in relation to defamation and privacy claims. Thus, the UK government failed to persuade the House of Commons to include in the Defamation Act 2013 a provision which reduced the potential exposure of defendants to costs in defamation and privacy actions. And the Joint Committee in its report referred to in para 32 above expressed concern about any "change to CFAs and ATE" as it "may prevent claimants and defendants of modest means from accessing the courts, a particularly pertinent concern when the action is one of defamation" - para 68. Sir Brian Leveson's Inquiry expressed similar concerns at Part J, Chapter 3, paras 3.7 and 3.13, suggesting that simply removing recoverability of success fees and ATE premium would risk "turning the clock back to the time when, in reality, only the very wealthy could pursue claims [for defamation or breach of privacy]".

40.
These points demonstrate the difficulty in which the government found itself after deciding to reduce drastically the availability of legal aid, while wishing to ensure access to justice. The exclusion of defamation and privacy cases from some of the major changes effected by LASPO and the politically controversial nature of section 40 of CCA 2013, and indeed the decisions in Campbell (No 2) and MGN v UK, demonstrate the even greater difficulties involved in balancing access to justice for claimants and the article 10 rights of defendants in such actions.

41.
I rather doubt, however, that these points, even taken together with the points made in para 36 above, would justify a domestic court refusing to follow the reasoning and conclusion of the Strasbourg court. The Strasbourg court accepted that the government enjoyed a "broad" or "wide" margin of appreciation in this connection. However for reasons which were largely sound and reflected Sir Rupert Jackson's criticisms, and which have led to significant changes and projected changes as explained above, the court decided that the article 10 rights of MGN had been infringed. However, as explained in para 29 above, I consider that we should leave the point open, and proceed to the remaining article 10 issues on the assumption that we should follow MGN v UK, and so the Rule as defined in para 27 above does apply.

Would the Rule prevent Mr Miller and Mr Flood recovering the success fee and ATE premium?

42.
As just explained, in this and the next section of this judgment (starting at para 57), I am assuming that the effect of MGN v UK is that, where a claim involves restricting a defendant's freedom of expression, it would normally be a breach of its article 10 rights to require it to reimburse the claimant any success fee or ATE premium which he would be liable to pay. Even if that contention is correct, it is argued on behalf of Mr Miller (and Mr Flood) that it would be wrong to invoke it to deprive him of the ability to recover from ANL (and TNL) the success fee and ATE premium for which he is liable to his legal advisers and ATE insurers respectively.

43.
If the Rule applies, it was effectively conceded on behalf of Mr Miller that, in the absence of any good reason to the contrary, it would mean that this Court should ensure that any order for costs should not

impose such a liability on ANL. That is because section 6(1) of the Human Rights Act 1998 provides that it is “unlawful for a public authority to act in a way which is incompatible with a Convention right”, and subsection (3) provides that “public authority” includes “a court or tribunal”.

44.
I am prepared to proceed on the basis that this concession is correct, although it may be that Mr Miller could have invoked section 6(2) of the Human Rights Act, which provides:

“(2) Subsection (1) does not apply to an act if

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.”

On the face of it, this does not assist Mr Miller, as the primary legislation merely provides that an order for costs “may, subject in the case of court proceedings to rules of court, include” any success fee or ATE premium payable by the party in whose favour a costs order is made - see section 58A(6) of the Courts and Legal Services Act 1990, as inserted by section 27 of the 1999 Act, and section 29 of the 1999 Act, set out in Lawrence (No 3), paras 16 and 17. Accordingly, there is obvious force in the point that the provisions which would have the effect of infringing the article 10 rights of ANL in the instant case are in the CPR and Practice Directions (whose relevant provisions are set out in Lawrence (No 3), paras 19 to 25), and they can, indeed, at least normally, should, be disapplied by a court to the extent that they infringe the Convention. However, all these provisions are part of a single statutory scheme, as Lord Dyson MR and I explained in Lawrence (No 3), paras 76-78, and it may be arguable that section 6(2) of the Human Rights Act could be invoked on the basis that disapplying provisions which enable Mr Miller to recover the success fee and ATE premium from ANL would “imperi[l] the whole scheme which had been put in place by the 1999 Act” to quote from Lawrence (No 3), para 78. It is right to add that Lord Clarke’s view as expressed in para 136 of his dissenting judgment in that case (with which Lady Hale agreed) is to the contrary. Whatever the right analysis, I am prepared to proceed on the basis that, if the Rule applies as a matter of domestic law, ANL would in the absence of a good reason to the contrary, be entitled to require the costs order made by Mitting J to be amended so as to remove the success fee and ATE premium from the scope of that order.

45.
On behalf of Mr Miller it is argued that there is a good reason to the contrary, in that, if we were to order that ANL should not have to pay the success fee or the ATE premium for which Mr Miller is liable, we would be wreaking a plain injustice on him. He embarked on his claim against ANL, and in particular he incurred liabilities to his lawyers for any success fee and to his insurer for the ATE premium, in the expectation that, if the claim succeeded and he obtained an order for costs, ANL would be liable to reimburse not only the base costs but also the success fee and ATE premium. And he did so in 2009, to the knowledge of ANL and at a time when that expectation not only reflected the law according to the relevant legislation (ie the 1999 Act and the consequential provisions of the CPR), but also when that law had been held by the House of Lords in Campbell (No 2) to be consistent with the Convention, and in particular with article 10.

46.

In this connection, I consider that it would not simply be a plain injustice on Mr Miller to deprive him of the ability to recover the success fee and the ATE premium; it would in my view infringe his rights under A1P1, and that is a factor which can, indeed which must, be taken into account when considering how to dispose of ANL's appeal. That view derives direct support from the concurring judgment of Lord Mance (with whom Lord Carnwath agreed) in Lawrence (No 3), para 106, where he said that claimants who had entered into a CFA and taken out ATE insurance under the 1999 Act regime must "have had a legitimate expectation that the system would apply and be upheld", especially as "appellate courts have repeatedly endorsed the system". Accordingly, he said:

"[The claimants'] legitimate expectation that the system would be enforced is one which falls to be taken into account at the present stage [ie when deciding whether to extend the costs order to payment of the success fee and ATE premium] and is not merely a matter that might (being itself a protected possession within A1P1) be raised as against the United Kingdom in Strasbourg."

47.
Support for the notion that Mr Miller can rely on A1P1 in the instant circumstances appears to me to be found in the discussion on A1P1 in Simor and Emmerson on Human Rights Practice para 15.010, which includes the proposition that "where in reliance on a legal act, an individual incurs financial obligations, he may have a legitimate expectation that that legal act will not be retrospectively invalidated to his detriment". Strasbourg jurisprudence also supports this proposition. Pine Valley Developments v Ireland (1991) 14 EHRR 319, Pressos Cia Naviera SA v Belgium (1995) 21 EHRR 301, and Stretch v United Kingdom (2003) 38 EHRR 12 are all cases where the applicant's disappointed legitimate expectation of a legal right was held to justify his A1P1 claim. In Pine Valley (assumed validity of a planning permission) and Stretch (assumed validity of a contractual option), the basis of the claim was not as strong as here, where it is based on primary legislation whose validity was approved by the Law Lords; on the other hand, both cases related to loss of land-related rights rather than a money claim. Pressos provides a closer analogy for present purposes, as it involved retrospective amendment of legislation which deprived the applicant of an accrued statutorily based claim for damages.

48.
Having said that, not all retrospective deprivations of accrued rights will offend A1P1. As the Strasbourg court pointed out in Pressos, para 38, the question of proportionality will normally arise, and this typically involves balancing "the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". Even bearing that factor in mind, I find it very difficult to see how Mr Miller's A1P1 claim could be defeated. Parliament did not see fit to render the LASPO regime retrospective: on the contrary, as explained above, the 1999 Act regime applies to all proceedings begun before 1 April 2013. Parliament thereby correctly recognised that, while the 1999 Act regime was unsatisfactory, it would be wrong to disapply it to proceedings which had been issued in the expectation that that regime would continue to apply to those proceedings.

49.
In addition to A1P1, although this was not raised in argument, it seems to me that, especially given that the purpose of the 1999 Act regime (as the Strasbourg court accepted in MGN v UK at para 197) was to enable people to get access to the courts, to hold that Mr Miller could not recover the success fee and the ATE premium could infringe his rights under article 6 of the Convention. As Lord Dyson MR and I said in Lawrence (No 3), para 77, recovery of success fee and ATE premium was "integral to the means of providing access to justice in civil disputes in what may be called the post-legal aid

world", and "necessary in order to secure access to justice", so that "[i]f it were otherwise, there would have been a real danger … that litigants who previously qualified for legal aid would have been unrepresented and the fundamental and legitimate aim of the 1999 Act scheme would have been frustrated".

50.
In MGN v UK at paras 142 and 199, the Strasbourg court unsurprisingly accepted that a claimant's article 6 rights were engaged in a case such as Miller v ANL. In those circumstances, given that the 1999 Act regime was intended to enable potential claimants to obtain access to the courts, and that the recoverability of the success fee and ATE premium was an essential ingredient of the regime, it appears to me that a decision which deprives a successful claimant of the right to recover such sums retrospectively would probably serve to infringe his article 6 rights. I note that in Stankov v Bulgaria 49 EHRR 7, paras 53 and 54, the Strasbourg court accepted that "the imposition" on a successful claimant of "a considerable financial burden due after the conclusion of the proceedings" infringed his article 6(1) rights even though he "had 'access' to all stages of the proceedings".

51.
Further, it may be that such a decision would infringe Mr Miller's article 8 rights as well, given that the purpose of his bringing the proceedings was for the purpose of restoring or maintaining his personal dignity.

52.
However, no argument based on article 6 or article 8 was raised at all on behalf of Mr Miller (or Mr Flood). In those circumstances, I prefer to base my conclusion on Mr Miller's A1P1 right not to be deprived of his accrued rights and his legitimate expectations.

53.
It follows from all this that upholding Mitting J's costs order would infringe ANL's article 10 rights for the reasons given by the Strasbourg court in MGN v UK and would therefore involve an injustice, but amending that costs order in the way sought by ANL would not only involve an infringement of Mr Miller's A1P1 rights: it would undermine the rule of law. It is a fundamental principle of any civilised system of government that citizens are entitled to act on the assumption that the law is as set out in legislation (especially when its lawfulness has been confirmed by the highest court in the land), secure in the further assumption that the law will not be changed retroactively - ie in such a way as to undo retrospectively the law upon which they committed themselves. To refuse the costs order which Mr Miller seeks would directly infringe that fundamental principle. While freedom of expression is, of course, another fundamental principle, it is not so centrally engaged by the issue in this case: the decision in MGN v UK is essentially based on the indirect, chilling, effect on freedom of expression of a very substantial costs order.

54.
In these circumstances, whether we allow or dismiss this appeal, a Convention right would be infringed. When deciding what to do in such circumstances, section 6 of the Human Rights Act does not assist ANL any more than it assists Mr Miller. However, section 8(1) of that Act seems to me to be in point. It provides:

"In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."

It appears clearly to follow from this that the “just and appropriate” order is to dismiss ANL’s appeal because to allow the appeal would involve a graver infringement of Mr Miller’s rights than the infringement of rights which ANL will suffer if we dismiss the appeal.

55.
It is right to record that we were pressed with the argument that Mr Miller would not in fact suffer if the costs order did not entitle him to recover the success fee or ATE premium, because his lawyers and insurance company would not in practice press for payment of, respectively, the success fee or ATE premium, if they knew that he could not recover them from ANL. That was an argument which was also raised in Lawrence (No 3), and it was rejected - see the first point discussed in each of paras 91 and 92. In any event, it must be at least arguable that lawyers who conducted their professional practices on the basis that the 1999 Act regime was lawful, could claim that their A1P1 rights were infringed if they were, in practice, deprived of their success fees by a determination that the CFAs into which they had entered into with their clients were not fully enforceable.

56.
In summary, then, in the present case either ANL or Mr Miller has to suffer an injustice (including infringement of Convention rights), and it is clear to me that it should be ANL that suffers, as the injustice on Mr Miller would be significantly more substantial. Accordingly, I would dismiss the appeal in Miller v ANL, and, at least on the article 10 ground, the appeal in Flood v TNL.

If MGN v UK applies, can Ms Frost recover the success fee and ATE premium?

57.
The claimants’ argument in Frost v MGN to the same effect as that just discussed in Miller v ANL is weaker in that they all entered into CFAs and took out ATE insurance after publication of the judgment of the Strasbourg court in MGN v UK. Despite that, I would reach the same conclusion as in Miller v ANL. Notwithstanding the judgment in MGN v UK, until LASPO came into force, the 1999 Act regime, as approved by the House of Lords in Campbell (No 2), was lawful in domestic terms, and, with all its flaws, it represented the domestic policy whereby citizens could get access to the courts to vindicate their civil legal rights. Parliament could have enacted that decisions of the Strasbourg court had direct effect on UK law, but, for good reasons, it did not do so: such decisions are, of course, simply to be “take[n] into account” by a UK judge when they are “relevant to the proceedings” before him or her - see section 2(1) of the Human Rights Act.

58.
However, in my view, there is another, more fundamental, reason why it is not open to MGN to rely on the Rule when it comes to the costs orders in Frost v MGN. In order to rely on the Rule, MGN would have to establish that the principle laid down in MGN v UK applies in cases where information is obtained illegally by or on behalf of a media organisation. Although I accept that article 10 is engaged in such a case, I cannot accept that the Rule can have any application, at least on facts such as those in Frost v MGN.

59.
When it comes to a costs order in a successful claim against a media organisation in proceedings where the 1999 Act regime applies, there are two applicable principles at play. The first is that, where article 10 is not engaged, there is normally no Convention basis for refusing to order an unsuccessful defendant to reimburse the claimant’s success fee and ATE premium - see Lawrence (No 3). The second principle is that in such proceedings where article 10 is engaged, the Rule applies and so it is

normally a breach of such a defendant's Convention rights if he is required to pay the success fee and ATE premium.

60.
In Frost v MGN, the court was not merely concerned with the complaint that MGN had published, or threatened to publish, information which infringed the claimant's privacy rights. It was also concerned with the complaint that the information in question had been obtained unlawfully by or on behalf of MGN. Thus, as Mann J said in his judgment at [2016] FSR 12, paras 1, 13 and 702,

"In all [eight] cases the infringements of privacy rights were founded in what has become known as phone hacking, though there are also claims that confidential or private information was also obtained in other ways (principally from private investigators). In all cases except [one], there is also a claim that infringements of privacy rights led to the publication of articles in the various newspapers just described, which articles were themselves said to be an invasion of privacy rights and which would not have been published but for the earlier invasions which provided material for them. …

[T]he claimants make claims which are said to fall into three main categories - wrongfully listening to private or confidential information left for or by the claimant, wrongfully obtaining private information via private investigators, and the publication of stories based on that information. MGN admits all those activities …

None of the articles in respect of which I have awarded compensation would (on the admitted case) have been published had it not been for the underlying prolonged phone hacking that went on, which was known to be wrongful. That hacking existed in all cases whether or not an article resulted. The length, degree and frequency of all this conduct explains why the sums I have awarded are so much greater than historical awards. People whose private voicemail messages were hacked so often and for so long, and had very significant parts of their private lives exposed, and then reported on, are entitled to significant compensation."

61.
When the Judge assessed damages, he awarded seven of the eight claimants separate sums for (i) hacking, (ii) blagging, and (iii) (save in one case) publications, (iv) general distress, and (v) (in one case) aggravated damages. The remaining claimant, who was subjected to hacking and blagging, but not publication, was awarded a single figure which included a modest sum for aggravated damages. The awards of these sums were upheld by the Court of Appeal, in a judgment which includes a schedule which sets out the details of the damages awarded to each of the eight claimants.

62.
I accept that this is a case where MGN's article 10 rights are engaged, in the sense that an aspect of the complaints of most of the claimants is that their private information was published in MGN newspapers. However, to treat this case as one where the newspaper publisher's article 10 rights are not merely engaged, but should be given anything like the sort of weight which they were given in MGN v UK seems to me quite unrealistic. The fundamental complaint of all the claimants is that their phone records were unlawfully hacked or blagged by agents of MGN on a persistent and systematic basis. It is true that this hacking and blagging was done with a view to obtaining information which might be published in MGN's newspapers. However, this was not a case where there can be any suggestion of MGN or its agents even hoping, let alone intending or expecting, that the end would justify the means, as might be the case where unlawful means are used in the expectation, or even the reasonable hope, that it may yield information which it would be in the public interest to reveal. The claimants were generally celebrities, footballers, television personalities and the like; people whose

private lives may be of interest to the public, but the revelation of whose private lives is not normally in the public interest.

63.
I accept that the courts must be careful before deciding that a particular case of this sort involves newsgathering whose nature is so extreme as to lie outside the territory which should be subject to the Rule. However, bearing in mind the persistence, pervasiveness and flagrancy of the hacking and blagging, and the lack of any public significance of the information which it would be expected to and did reveal, it appears to me that this is not a case where the Rule can properly be invoked by MGN. As the Strasbourg court explained at para 201, its decision that the liability for costs in MGN v UK offended article 10 was based on the proposition that "the most careful scrutiny on the part of the Court is called for when measures taken by a national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern". I cannot accept that such a proposition applies in relation to claims based on a defendant's unlawful hacking and blagging of the phone records of individuals such as the 23 claimants in Frost v MGN.

A declaration of incompatibility?

64.
For the reasons given in para 29 above, it would be inappropriate to grant a declaration of incompatibility. In addition, it would not be right to grant such a declaration in relation to legislation which contains the 1999 Act regime, because that regime has been superseded by other legislation, including LASPO, the Defamation Act 2013 and CCA 2013. And it would plainly be inappropriate even to consider making a declaration of incompatibility in relation to those statutes, as their effect does not need to be, and was not, considered in any detail in order to dispose of the instant appeals.

The exercise of the Judge's discretion in Flood v TNL

65.
The final issue is whether TNL is right in its contention that, in ordering it to pay Mr Flood's costs of the proceedings (other than those costs which had already been the subject of an order of the court or agreement between the parties), Nicola Davies J acted outside the ambit of her discretionary powers. This is not a point which would normally come before this court: it is a one-off issue relating to the exercise of a discretionary power where the first instance judge's decision has been upheld by the Court of Appeal. It is only before this Court because the article 10 issues in relation to the costs order are before us, and it seemed sensible not to shut out TNL from pursuing its contention that Nicola Davies J had erred in principle when making that order.

66.
The Judge formed the view that, as Mr Flood had established that he had been defamed and had obtained an order for substantial damages, "the starting point" was that he should have his costs, and there was no reason to depart from that position. She thought that this conclusion was supported by the fact that Mr Flood had vindicated his reputation, and she also considered that TNL's attitude in open and "without prejudice save as to costs" correspondence made it substantially harder for the case to settle. TNL complains that the Judge wrongly concluded that she was "not persuaded that there were good grounds to depart from" the starting point, notwithstanding (i) the importance of freedom of expression, (ii) the "without prejudice save as to costs" correspondence ("the correspondence"), (iii) the fact that Mr Flood had fought the Reynolds defence and lost, and (iv) the fact that TNL had successfully defeated the claim in respect of all publications apart from those posted on TNL's website after 5 September 2007.

67.
In my judgment, the Court of Appeal was correct in holding that Nicola Davies J made no error in her decision. She was clearly right to start with the proposition that the prima facie position was that, as Mr Flood was the winner, he therefore ought to get his costs. He had had to go to trial to vindicate his reputation, when TNL had accused him of corruption and had maintained a plea of justification for a substantial time, and to recover substantial damages, indeed substantially more than he had offered to accept. As Sharp LJ put it in the Court of Appeal, "[t]he outcome of the litigation could properly be described as a victory for Mr Flood" (para 27). In those circumstances, as the successful party, "the general rule" set out in CPR 44.2(2)(a) was that he should have his costs. However, as Nicola Davies J rightly acknowledged, that is only the starting point. It is thus necessary to consider whether any of the points raised on behalf of TNL justify its contention that the Judge could not reasonably have refused to depart from that starting point.

68.
First, the importance of freedom of expression. In my view, important though freedom of expression undoubtedly is, it cannot assist TNL in its challenge to the unqualified order for costs made in favour of Mr Flood (save, of course, in so far as MGN v UK assists its contention in relation to the success fee and the ATE premium as discussed above). There are many cases in domestic courts and in the Strasbourg court which emphasise the fact that potential and actual defamation actions have an inhibiting effect on freedom of speech, and the consequent need for the court to scrutinise orders which it makes in that connection (see eg Derbyshire County Council v Times Newspapers Ltd [1993] AC 534, 547F and 548D and Bladet Tromsø and Stenaas v Norway (1999) 29 EHRR 125, para 64). However, save in exceptional circumstances, it would be quite inappropriate to invoke that principle so that it renders it more difficult for claimants in defamation actions to obtain access to justice than claimants in other types of civil claim. As pointed out on his behalf, Mr Flood also had rights: just as TNL's rights are covered by the Convention (through article 10) so were his (through article 8).

69.
While such exceptional circumstances were found to exist in MGN v UK, it is worth noting that no complaint was ever made about the level of base costs in Campbell v MGN. And it is worth pointing out that, while, as already mentioned, Lord Hoffmann emphasised the importance of freedom of expression and the "special position of the media" in Campbell (No 2), para 19, he nonetheless refused to accept that even requiring MGN to reimburse the success fee and ATE premium payable by Miss Campbell offended freedom of expression.

70.
Secondly, the correspondence. Although we were taken to the correspondence in a little detail by counsel on behalf of each party, it is unnecessary to consider it in any detail. As is not uncommon in such correspondence, there were passages emanating from each side, which, at any rate with the benefit of hindsight, would have been better omitted. More importantly, I can see nothing in that correspondence which assists TNL's challenge to the Judge's award of costs. I accept that some people might characterise the attitude revealed by Mr Flood in that correspondence as intransigent, but I consider that description would be unkind. TNL were adopting a very tough attitude in the correspondence; some people might use a more critical adjective.

71.
Thus, as in the open negotiations alluded to in paras 16 and 17 above, TNL was making it very clear in the correspondence that it was maintaining its plea of justification and would be taking steps to find witnesses to support that case. TNL's plea of justification would have involved showing that there

were grounds to justify a police investigation, and it was a plea which was of course eventually abandoned after TNL lost on meaning. In addition, TNL suggested that Mr Flood would be likely to be financially ruined by the costs if he proceeded with his claim and lost, whereas TNL could easily take such a risk if it lost; the Judge not unfairly described TNL's approach as involving "unsubtle threats" (para 20). It is fair to emphasise that nothing said on behalf of TNL in the correspondence was improper, but, if the correspondence is to be relied on in relation to the issue of costs, in my view, and in agreement with the Judge (who described TNL's approach as involving a "die-hard attitude": para 20), it was undoubtedly TNL's negotiating stance far more than that of Mr Flood which prevented the claim from being settled. On any view, it is impossible to suggest that it assists TNL's case on costs. Indeed, in my view the Judge was entitled to regard TNL's attitude in the open discussions and in the correspondence as a reason which militated against departing from the prima facie position, namely an unqualified costs order in favour of Mr Flood.

72.
Thirdly, the Reynolds defence. It is true that Mr Flood contested TNL's Reynolds defence case very strongly. In so far as the costs attributable to that issue going to appeal are concerned, they have been disposed of by agreement or by court orders. As to the success of the Reynolds defence it was, as Nicola Davies J pointed out, "no clear-cut win for [TNL]", as the defence failed in relation to the continuing website publication after 5 September 2007.

73.
In any event, Tugendhat J, whose experience in this field was unrivalled, refused to make a costs order in favour of TNL following his judgment on the preliminary issue as to the availability of the Reynolds defence, on 25 July 2009 after a four day trial. He said that "having regard to the way the matter has been contested, I see no reason to doubt that the defendant would have conducted the trial of the preliminary issue very substantially, if not identically, to the way in which they did, even if the claimant had conceded that qualified privilege was a defence in respect of the print publication, and even if they had conceded it was a defence in respect of some of the website publications". To much the same effect, Nicola Davies J said that "the defences of Reynolds privilege and of justification could not easily be separated" (para 21). In other words the costs of arguing the Reynolds defence would have been incurred anyway.

74.
Finally, there is the fact that Mr Flood was only partially successful. There are, of course, cases where a claimant (or indeed a defendant) is successful, but the success is partial or limited to an extent which would make it unreasonable to award him all his costs. In the instant case, there is an initial attraction in the notion that the fact that Mr Flood succeeded on the material posted on TNL's website after 5 September 2007 but failed on the hard copy and website material published before that date, means that there should be some amendment in TNL's favour to the costs order made by Nicola Davies J. However, as Sharp LJ said in the Court of Appeal (para 41), the fact that TNL had "won on a significant part of the case, comprising numerically the greater proportion of the publications" was a factor to be taken into account when deciding what costs order to make, but the effect of that factor on the eventual decision was a matter for the first instance judge. As she also said, on the facts of this case, the first instance judge was entitled to resolve to award costs on the basis that Mr Flood was the overall winner rather than making an issues-based order.

Conclusion

75.

It follows from this that all three appeals must be dismissed.