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La CEDU su media e libertà di espressione
(CEDU, sez. IV, sent. 12 novembre 2024, ric. n. 37398/21)

La Corte Edu si pronuncia sul caso riguardante l'obbligo imposto ad Associated Newspapers Limited – editore del Daily Mail e del Mail on Sunday – di pagare costi molto elevati a seguito di una denuncia per violazione della privacy e diffamazione. Avendo uno dei ricorrenti stipulato un *contingency fee agreement* (CFA) con il suo legale ed entrambi i ricorrenti anche un'assicurazione "dopo l'evento" (ATE), l'editore si era trovato a dover pagare non solo le spese di base, ma anche gli incrementi, in particolare le "commissioni di risultato" previste dal TUF, nonché i premi assicurativi dell'ATE.
I Giudici di Strasburgo hanno constatato la violazione della libertà di espressione dovuta alle "results fees" che l'editore ha dovuto pagare e la mancata violazione dello stesso articolo relativamente all'obbligo imposto alla società, dopo che i ricorrenti avevano vinto la causa, a copertura dei premi assicurativi "after event" (ATE) da loro stipulati.

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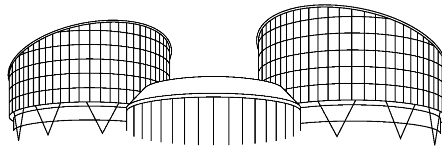

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF XXXXX v. THE UNITED KINGDOM

(Application no. 37398/21)

JUDGMENT

STRASBOURG

12 November 2024

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of XXXXX v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Gabriele Kucsko-Stadlmayer, *President*,
Tim Eicke,

Faris Vehabović,
Armen Harutyunyan,
Anja Seibert-Fohr,
Ana Maria Guerra Martins,
Sebastian Răduleţu, *judges*,
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 37398/21) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a limited company registered in the United Kingdom, Associated Newspapers Limited ("the applicant company" or "the applicant"), on 22 July 2021;

the decision to give notice to the United Kingdom Government ("the Government") of the application;

the parties' observations;

Having deliberated in private on 22 October 2024,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. Like *MGN Limited v. the United Kingdom* (no. 39401/04, 18 January 2011), the present case concerns the compatibility with Article 10 of the Convention of the recoverability of success fees where proceedings are brought against a media defendant by claimants who have entered into a conditional fee arrangement with their legal representatives ("CFA"). It also raises a separate issue about the Article 10 compatibility of the recoverability of After the Event ("ATE") insurance premiums, which underwrite a claimant's liability to pay the defendant's costs should his or her case be unsuccessful.

THE FACTS

2. The applicant company was incorporated in 1905 and has its registered office in London. It was represented by Mr K. Mathieson, a solicitor practicing in London with RPC LLP.

3. The Government were represented by their Agent, Mr M. Boulton of the Foreign, Commonwealth and Development Office.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

5. The applicant is the publisher of The Daily Mail and The Mail on Sunday newspapers. It also operates the website MailOnline where it publishes a selection of articles from The Daily Mail and The Mail on Sunday.

6. The present application concerns two sets of proceedings in which the applicant was sued by individuals in respect of whom it had published newspaper or online content.

II. THE PROCEEDINGS AGAINST THE APPLICANT

A. The proceedings brought by A.S.

7. A terrorist attack at the Manchester Arena on 22 May 2017 had resulted in the death of twenty-two people and injuries to more than 800. A.S. was a Libyan businessman who had been granted asylum in the United Kingdom and who worked for a company that transferred money between

Libya and the United Kingdom. In the days leading up to the Manchester Arena attack he had been contacted by the attacker, who wished to exchange Libyan Dinars for British Pounds. A.S. had refused the transaction but was subsequently arrested as part of the police investigation into the attacker's contacts. His home was raided and he was interviewed for six days, but he was released when it became clear that he had had no involvement in the attack. Although the police did not publish any information about him, the applicant named him in an article first published on MailOnline on 29 May 2017 entitled "Trainee Libyan pilot, 23, is 16th suspect arrested in connection with Manchester concert bombing as mourners flock to St Ann's Square to mark a week since the tragedy". A.S. alleged that, as a consequence, he lost his employment and suffered related distress.

8. On 21 December 2018 A.S. issued proceedings against the applicant for breach of privacy. He had entered into a CFA (see paragraph 1 above) on 2 March 2018. He had also purchased ATE insurance (see paragraph 1 above) on 18 July 2018.

9. Before trial A.S. had amended his claim for special damages in respect of some alleged losses, reducing his claim from 424,340 British Pounds (GBP) to GBP 230,227. The remainder of his claim for breach of privacy was heard on 2-4 December 2020, and was successful. In a judgment handed down on 25 February 2021, A.S. was awarded damages in the sum of GBP 83,000. This represented the sum of GBP 50,000 in respect of general damages, taking into account the distress caused by the publication of the articles, and GBP 33,000 in respect of special damages, representing A.S.'s financial loss. A primary head of loss, namely damage to reputation, was found to be irrecoverable and an abuse of process.

10. In a further judgment on costs handed down on 21 February 2021, the applicant was ordered to pay ninety percent of A.S.'s costs for those parts of the action that had proceeded to trial. The Judge ordered that this costs liability, if not agreed by the parties, should be determined by detailed assessments at a costs hearing. Pending this determination, the applicant was ordered to pay interim costs of GBP 770,670. In making the order the Judge stated the following:

"It is conceded that there should be an order for payment on account of costs. ... In my judgment the following represents a fair approach. The claimant should recover (i) 90% of the approved costs in the budget, that is to say the estimated costs, less an allowance for matter just mentioned. I estimate this at £270,000. In addition, (2) allowance should be made for 70% of the incurred costs claimed, which have not been approved and may be subject to reduction at the assessment stage. I put these at £51,000. I add (3) a figure at about 70% of the costs of the budget drafting and budget process which, on the figures mentioned, amount to £9,600. That adds some £6,700. The total this far is £327,700.

No specific points have been taken on the amount of the CFA uplift. But nor has the claimant addressed the issue of principle about how the court should approach that issue at this stage. The written submission simply seeks an interim payment based on an uplift of 100%. I have not been shown any material to justify this, and do not consider it appropriate to award a 100% uplift on these costs, at the stage of an interim payment on account. I shall award 75%. That increases the total figure to £573,475. I then allow 20% for VAT on that sum. The upshot is a total of £688,170. I shall make no reduction in the insurance premium of £82,500, hence the grand total of **£770,670**."

11. In November 2021 the applicant company settled A.S.'s claim for costs in the sum of GBP 822,421.79 (the sum of GBP 988,722 having originally been claimed). This sum comprised the interim

payment on account of GBP 770,670 and an additional sum of GBP 51,751.79 agreed between the parties.

B. The proceedings brought by E.H.

12. The proceedings brought by E.H. arose from a police investigation into historic child sex abuse known as "Operation Midland". The allegations of sex abuse were made by an individual ("C.B.") who was ultimately found to have fabricated his claims. Articles published by the applicant on 28 July 2019 in the Mail on Sunday and on the MailOnline named E.H. as the clinical psychologist who had given credibility to C.B.'s allegations.

13. On 14 November 2019 E.H. issued proceedings against the applicant company alleging that the articles published by it were false and defamatory of her and had caused her distress, embarrassment and humiliation. E.H. had not entered into a CFA. However, she had purchased ATE insurance (see paragraph 1 above) on 13 November 2019 and increased her level of cover on 26 August 2020. According to her insurance contract, further insurance premiums would be payable at different stages of the proceedings: if the case settled up to a 120 days after proceedings were issued; if it settled at any time after 120 days following the issuing of proceedings but more than forty-five days before the date listed for the commencement of the trial; if the action settled forty-five days or less before the beginning of the trial; if it settled during the course of the trial; and if the case was finally determined by a court during or after trial.

14. On 25 January 2021 E.H. accepted the applicant's settlement offer of GBP 65,000. The applicant also agreed to take down the article and refrain from republishing it, and it published an apology to E.H. in its print and online editions. The applicant's offer was made under Part 36 of the Civil Procedure Rules and as a consequence the applicant became liable under the self-contained procedural code in Part 36 to pay E.H.'s costs of the proceedings up until the date of acceptance.

15. On 18 January 2021 E.H. submitted a bill of costs for GBP 825,089.85.

16. On 1 April 2021 a letter was sent to the applicant on E.H.'s behalf setting out her total costs in the proceedings. The breakdown of costs listed the "grand total" of the "inter-partes bill of costs" at GBP 825,164.40, of which GBP 335,160 represented the ATE premium. In that same letter E.H. indicated that she was prepared to accept GBP 709,095.15 in full and final settlement of her costs claim.

17. On 22 April 2021 the applicant company accepted E.H.'s offer to settle her costs claim.

RELEVANT DOMESTIC LEGAL FRAMEWORK AND PRACTICE

18. The relevant domestic law and practice concerning costs, CFAs, success fees and ATE insurance is set out in detail in *MGN Limited v. the United Kingdom* (no. 39401/04, §§ 89-120, 18 January 2011, hereinafter referred to also as "the *MGN Limited* judgment") and *MGN Limited v. the United Kingdom* ((dec.), no. 72497/17, §§ 21-31, 20 September 2022, hereinafter referred to also as "the *MGN Limited* decision"). A summary is set out below.

I. LEGISLATIVE BACKGROUND

A. The Courts and Legal Services Act 1990 ("the 1990 Act").

19. Section 58 of the 1990 Act permitted lawyers, for the first time, to enter into CFAs (see paragraph 1 above). This was designed to address two problems: the fact that progressively fewer members of the public were eligible for legal aid to bring civil proceedings; and the fact that the cost of providing

legal aid was growing year on year. At the same time CFAs were being developed, the Law Society created a new form of insurance (ATE insurance) to underwrite a claimant's liability to pay the costs of another party to the litigation.

B. The Access to Justice Act 1999 ("the 1999 Act")

20. The 1999 Act allowed a successful claimant to recover from the defendant both the success fee payable under the CFA and the premium payable in respect of the ATE insurance as part of his or her costs.

21. Rule 44.4 of the Civil Procedure Rules ("CPR") set out the basis of assessment of costs. It included, for the first time, the concept of using proportionality to assess costs. It provided:

"(1) Where the court is to assess the amount of costs ... it will assess those costs -

(a) on the standard basis; or

(b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(2) Where the amount of costs is to be assessed on the standard basis, the court will -

(a) only allow costs which are proportionate to the matters in issue ...."

22. Rule 44.5 of the CPR set out the factors to be taken into account in deciding the amount of costs. It provided:

"(1) The court is to have regard to all the circumstances in deciding whether costs were -

(a) if it is assessing costs on the standard basis -

(i) proportionately and reasonably incurred; or

(ii) were proportionate and reasonable in amount.

(b) if it is assessing costs on the indemnity basis -

(i) unreasonably incurred; or

(ii) unreasonable in amount. ...

(3) The court must also have regard to -

...

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case; and

(g) the place where and the circumstances in which work or any part of it was done."

23. An amended costs practice direction was promulgated to supplement CPR Parts 43 to 48. Paragraph 9.1 stated that

"[u]nder an order for payment of 'costs' the costs payable will include an additional liability incurred under a funding arrangement."

24. Section 11 included the following:

"11.1 In applying the test of proportionality the court will have regard to rule 1.1(2)(c). The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide ...

11.2 In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute ...
11.5 In deciding whether the costs claimed are reasonable and (on a standard basis assessment) proportionate, the court will consider the amount of any additional liability separately from the base costs.
11.6 In deciding whether the base costs are reasonable and (if relevant) proportionate the court will consider the factors set out in rule 44.5.
11.7 Subject to para 17.8(2), when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.
11.8 (1) In deciding whether a percentage increase is reasonable relevant factors to be taken into account may include:
(a) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur;
(b) the legal representative's liability for any disbursements;
(c) what other methods of financing the costs were available to the receiving party.
...
11.9 A percentage increase will not be reduced simply on the ground that, when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate.
11.10 In deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account include:
(1) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely cost of funding the case with a conditional fee agreement with a success fee and supporting insurance cover;
(2) the level and extent of the cover provided;
(3) the availability of any pre-existing insurance cover;
(4) whether any part of the premium would be rebated in the event of early settlement;
(5) the amount of commission payable to the receiving party or his legal representative or other agents."
25. Pursuant to paragraph 23A.1, the court would only make a cost-capping order in exceptional circumstances.

C. The Jackson Review

26. In late 2008 Jackson LJ was appointed to conduct a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.
27. In January 2010 the Jackson Review was published. In relation to CFAs, it noted that England and Wales differed from all other jurisdictions in having success fees payable not by the lawyer's own client but by the losing party. It found that the benefits of CFAs had been achieved at massive cost, especially in cases which were fully contested. That cost was borne by tax payers, insurance

premium payers and by those defendants who had the misfortune of being neither insured nor a large, well-resourced organisation.

28. While Jackson LJ concluded that CFAs were not objectionable in themselves, he considered that there were four flaws in allowing success fees to be recovered from the losing party, and thereby generating disproportionate costs: 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; the absence of any incentive on the part of a claimant to control the incurring of legal costs on his or her behalf, and the fact that judges assessed those costs only at the end of the case, when it was too late to control what had been spent; the "blackmail" or "chilling" effect due to the fact that the costs burden on the opposing parties was so excessive that often a party was driven to settle early despite good prospects of a successful defence; and the fact that the regime allowed solicitors and barristers to "cherry pick" winning cases to conduct on CFAs with success fees.

D. Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO")

29. Following the *MGN Limited* judgment (cited above), section 44 of the LASPO precluded, as a general rule, the recoverability of success fees and ATE premiums by successful claimants from the losing party. However, although section 44 was, for the most part, brought into force in April 2013, the Government opted not to bring it into force in respect of "publication and privacy proceedings" (see Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 ("the 2013 Order")).

30. Article 1(2) of the 2013 Order defined "publication and privacy proceedings" as encompassing proceedings for (a) defamation; (b) malicious falsehood; (c) breach of confidence involving publication to the general public; (d) misuse of private information; or (e) harassment, where the defendant is a news publisher.

31. However, certain changes introduced following the Jackson Review (see paragraphs 26-28 above) did apply to defamation and privacy cases. These included more muscular case management by the courts to deal with cases proportionately; costs budgeting and costs management, which involved the parties and the court controlling the level of recoverable costs at the start of the proceedings; costs-capping; and new provisions which limited the level of overall recoverable costs to what was proportionate.

E. Subsequent developments

32. On 29 November 2018 the Government, in a consultation response on Costs Protection in Defamation and Privacy Proceedings, announced that section 44 of LASPO (see paragraph 29 above) would be commenced in relation to defamation proceedings so that success fees would not be recoverable.

33. Recoverable success fees in publication and privacy proceedings were subsequently abolished with effect from 6 April 2019. However, this did not prevent a costs order from including provision in relation to a success fee payable by a claimant under a CFA which was entered into before the day on which that provision came in to force if (a) the agreement was entered into specifically for the purposes of the provision to the claimant of advocacy or litigation services in connection with the matter that was the subject of the proceedings in which the costs order was made, or (b) advocacy or litigation services were provided to the claimant under the agreement in connection with that matter before the commencement day.

34. ATE insurance premiums continued to be recoverable.

35. Section 40 of the Crime and Courts Act 2013 ("the CCA 2013") 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 launched a public consultation as to whether section 40 of the CCA 2013 should be implemented. However, there was a sharp difference of views and the provision has not yet been implemented.

II. CASE-LAW

A. *Flood v. Times Newspapers Ltd (No. 2), Miller v. Associated Newspapers Ltd and Frost and others v. MGN Ltd (No. 2)* ([2017] UKSC 33) (*"Frost and Others"*)

36. The Supreme Court delivered its judgment in the *Frost and Others* case on 11 April 2017. It accepted that the reasoning of the Court in the *MGN Limited* judgment (cited above) was full, careful and largely soundly based, and reflected widespread criticism of the 1999 Act regime which had subsequently led to significant changes in law and practice. As such, there was a powerful argument for following it. However, as the Government was not a party to the proceedings before it, the Supreme Court did not consider it appropriate to determine whether domestic law should reflect the *MGN Limited* judgment to the extent of laying down a general rule that where a defendant was a newspaper or broadcaster, the recoverability of the success fee would normally infringe its Article 10 rights. The Supreme Court accepted that in the absence of any good reason to the contrary, if such a rule applied at the domestic level the applicant would be entitled to require that the costs order be amended so as to remove the success fee and ATE premium from its scope. However, the Supreme Court considered that even if such a general rule applied at the domestic level it would be wrong to deprive the claimants in the cases before it of the ability to recover the success fees and ATE premiums for which they were liable to their legal advisors and ATE insurers respectively. Not only would this amount to a plain injustice, but it would also risk infringing the claimants' rights under Article 1 of Protocol No. 1 to the Convention as they had a legitimate expectation of a legal right. In addition, it could infringe their rights under Article 6 of the Convention. It was a fundamental principle of any civilised system of government that citizens were entitled to act on the assumption that the law was set out in legislation and would not be changed retroactively. While freedom of expression was also a fundamental principle, it was not centrally engaged in these cases as the *MGN Limited* judgment was based on the indirect chilling effect on freedom of expression of a very substantial costs order.

37. Unlike the claimants in the *Flood* and *Miller* cases, the claimants in the *Frost* case had all entered into CFAs and taken out ATE insurance after publication of the *MGN Limited* judgment. Nonetheless, the majority of the Supreme Court indicated that they would have reached the same conclusion since the CFA regime had been lawful under domestic law at the relevant time. However, the majority considered there to be another, more fundamental, reason why it was not open to the defendant in *Frost* to rely on any general rule laid down in the *MGN Limited* judgment; namely, the rule could have no application where information was obtained illegally by or on behalf of a media organisation. On the facts of that case the court was not merely concerned with the complaint that the defendant had published, or threatened to publish, information which had infringed the

claimants' privacy rights. It was also concerned with the complaint that the information in question had been obtained unlawfully by or on behalf of the defendant. It would therefore have been "quite unrealistic" to give the defendant's Article 10 rights anything like the sort of weight they were given in the *MGN Limited* judgment.

38. With regard to the changes implemented following the Jackson Review (see paragraph 31 above), Lord Neuberger, with whom Lord Mance, Lord Sumption, Lord Hughes and Lord Hodge agreed, said the following:

"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. 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.

38. 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]'.
39. 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.
40. 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 [namely, 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] does apply."

B. *Lachaux v. Independent Print Ltd* [2021] EWHC 2636 (QB)

39. In this case the claimants were awarded damages at trial after they had made unsuccessful offers to settle the matter. As the damages they were awarded were greater than the amount offered, the CPR required the court (unless it considered it unjust to do so) to order that the claimant was entitled to (a) interest on the whole or part of any sum awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired; (b) costs on the indemnity basis from the expiry of the relevant period; (c) interest on those costs at a rate not exceeding 10% above base rate, and (d) an additional amount (not exceeding £75,000) calculated by applying the prescribed percentage to the amount of damages awarded.
40. The defendant argued that the court should not award any of the aforementioned enhancements because to do so would represent an unjustifiable and disproportionate interference with its Article 10 rights as a publisher. In rejecting this argument, the High Court said the following:
"The principles that have been set out by the European Court of Human Rights in *MGN Limited v United Kingdom* and *Times Newspapers Ltd v Flood* have moved on somewhat since they were decided. The main reasons why the ECtHR considered that the sums imposed, as a result of the costs orders made in those cases were disproportionate, was a result of significant base costs that were not properly controlled at that stage and a regime of CFAs that allowed recovery of a further sum of up to 100% of base costs. The Court now takes active steps through costs budgeting properly to manage the costs that are being incurred by parties to ensure, so far as possible, that they are proportionate and reasonable".

41. The court did not consider that it would be disproportionate to award the enhancements. It noted that "by far the most significant element is the potential liability for any CFA uplift, but that is not something that is being ordered under [the CPR]." It further noted that "[a]ny challenge to the recovery of an uplift under a CFA and/or ATE premiums on the grounds that they represent a disproportionate interference with the Defendants' Article 10 rights can be made during the assessment of costs."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

42. The applicant company complained that its liability to pay the success fees and/or After the Event ("ATE") insurance premiums incurred in the cases brought by A.S. (see paragraphs 7-11 above) and E.H. (see paragraphs 12-17 above) violated Article 10 of the Convention, which, in so far as relevant, reads 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. ...

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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

43. The Government invited the Court to declare the application inadmissible, either because the applicant had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention, or because the applicant was not a victim of the alleged violation within the meaning of Article 34 of the Convention.

1. The Government's objection of non-exhaustion of domestic remedies

(a) The parties' submissions

(i) The Government

44. The Government argued that domestic remedies were available to the applicant company, which were capable of providing redress. It could have sought to challenge its liability in both sets of proceedings, and it had not come close to demonstrating that this remedy was "bound to fail" or had "no reasonable prospects of success".

45. In both cases the relevant means of redress would have been the costs hearing which would have taken place if the applicant had not agreed to a settlement. In *Frost and Others* (see paragraphs 36-38 above) the majority in the Supreme Court had accepted 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". Moreover, in that case the parties had conceded that if the rule in *MGN Limited v. the United Kingdom* (no. 39401/04, 18 January 2011) applied, "in the absence of a good reason to the contrary" a media defendant would be "entitled to require [a] costs order to be amended so as to remove the success fee and ATE premium" (see paragraph 36 above). It would have been open to the applicant

to rely on the first proposition in both sets of proceedings, and to argue that there was no good reason to the contrary in either case. Such a case could have been pursued through the appellate courts, even to the Supreme Court.

46. The applicant had not demonstrated that such a remedy would have been bound to fail. In the *Flood* and *Miller* cases the majority of Supreme Court Justices considered that it would be wrong to deprive the claimants of the ability to recover the success fees and ATE premiums when they had entered into those contracts before publication of the *MGN Limited* judgment. In *Frost*, the claimants had entered into CFAs and taken out ATE insurance after publication of the *MGN Limited* judgment (see paragraph 37 above). Although the majority indicated that they would have reached the same conclusion, since the CFA regime had been lawful under domestic law at the relevant time, they considered there to be another, more fundamental, reason why it was not open to the defendant in *Frost* to rely on any general rule laid down in the *MGN Limited* judgment; namely, the rule could have no application where information was obtained illegally by or on behalf of a media organisation. In the present case the applicant insisted that the proceedings brought by A.S. and E.H. were unexceptional defamation/privacy cases connected to ordinary journalistic activities. As such, the applicant could not rely on *Frost*, since the fundamental reason why remedies were not available in that case bore no relation to its circumstances in the case at hand.

47. According to the Government, the domestic case-law demonstrated that the decision in *Frost and Others* was recognised as open to challenge. For instance, the High Court considered in *Lachaux v Independent Print Ltd* ([2021] EWHC 2636 (QB)) that the "principles that have been set out by the European Court of Human Rights in *MGN Limited v United Kingdom* and *Times Newspapers Ltd v Flood* have moved on somewhat since they were decided" (see paragraph 40 above). There was therefore no reason for the applicant to consider its remedies exhausted by virtue of the Supreme Court's decision in *Frost and Others*.

(ii) The applicant company

48. While the applicant company accepted that it could in principle have sought to challenge its liability to pay the success fee and/or ATE premiums in the domestic courts on the grounds that such liability was contrary to Article 10 of the Convention for the reasons given by the Court in the *MGN Limited* judgment (cited above), it submitted that any attempt to do so would have been bound to fail in light of the Supreme Court's dismissal of those arguments in *Frost and Others* (see paragraphs 36-38 above). Accordingly, there was no effective domestic remedy available to the applicant for the United Kingdom's alleged breaches of Article 10.

49. The applicant claimed that it was in an analogous position to the defendant in the *Frost* case, in which the claimants had entered into CFAs and taken out ATE premiums after the *MGN Limited* judgment, and in which the Supreme Court reached the same conclusions regarding the recoverability of additional liabilities as it had in *Flood* and *Miller*.

50. Insofar as the Government sought to rely on *Lachaux* (see paragraph 47 above), the applicant argued that in that case the High Court had implied that due to developments in how costs were managed, it would be harder for a defendant to show that there had been a breach of Article 10. If correct, that would make it harder, not easier, for a defendant to challenge success fees domestically.

(b) The Court's assessment

51. The relevant principles on exhaustion of domestic remedies can be found in *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], no. 21881/20, §§ 139-43, 27 November 2023:
"139. The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of these remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Vučković and Others* [*v. Serbia (preliminary objections)* [GC], nos. 17153/11 and 29 others], § 71, [25 March 2014]). To be effective, a remedy must be capable of directly redressing the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004; *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II; *Vučković and Others*, cited above, § 74; and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 85, 9 July 2015).
140. The Court has frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism. It has further agreed that the rule on exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Gherghina*, cited above, § 87, and the case-law cited therein).
141. Thus, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Akdivar and Others v. Turkey*, 16 September 1996, § 67, *Reports of Judgments and Decisions* 1996-IV, and *Vučković and Others*, cited above, § 73). In this connection, the Court has considered, for example, that applicants were dispensed from the obligation to exhaust a remedy referred to by the Government where it was bound to fail and there were objective obstacles to its use (see *Sejdovic*, cited above, § 55); or where its use would have been unreasonable and would have constituted a disproportionate obstacle to the effective exercise of the right of individual application under Article 34 of the Convention (see *Vaney v. France*, no. 53946/00, § 53, 30 November 2004; *Gaglione and Others v. Italy*, nos. 45867/07 and 69 others, § 22, 21 December 2010; and *Fabris and Parziale v. Italy*, no. 41603/13, § 57, 19 March 2020).
142. That being said, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 70, 17 September 2009, and *Vučković and Others*, cited above, § 74).
143. As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy advanced by them was an effective one, available in theory and in practice at the relevant time. Once this burden of proof has been satisfied it falls to the applicant to establish that the remedy was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Demopoulos and Others v. Turkey (dec.)* [GC], nos. 46113/99 and 7 others, § 69, ECHR 2010, and *Vučković and Others*, cited above, § 77)."
52. There is no doubt that the applicant company in the present case could have challenged its costs liability before the domestic courts by reference to Article 10 of the Convention. The question of whether it has exhausted domestic remedies therefore turns on whether this was an effective remedy which it was required to exhaust in order to comply with Article 35 § 1 of the Convention.

53. In the *Frost and Others* case the Supreme Court accepted that the reasoning of the Court in the *MGN Limited* judgment was full, careful and largely soundly based, and that there was a powerful argument for following it (see paragraph 36 above). However, contrary to what the Government appears to argue (see paragraph 45 above), the Supreme Court ultimately held that even if a general rule such as that found in the *MGN Limited* judgment applied at the domestic level, it would be wrong to deprive the claimants in the cases before it of the ability to recover the success fees and ATE premiums for which they were liable to their legal advisors and ATE insurers respectively (see paragraph 36 above).

54. In the proceedings which gave rise to the present application, A.S. entered into a CFA in 2018, after the *MGN Limited* judgment but while success fees were still recoverable under domestic law (see paragraphs 8 and 33 above). Both A.S. and E.H. purchased ATE insurance after the *MGN Limited* judgment (see paragraphs 8 and 13 above), while the ATE premiums were recoverable under domestic law (see paragraph 34 above). In *Frost and Others*, the claimants in the *Frost* case had entered into CFAs (and taken out ATE insurance) after publication of the *MGN Limited* judgment (see paragraph 46 above). However, while the Supreme Court considered the illegality of the defendant's conduct in that case to be a "more fundamental" reason why it was not open to it to rely on any general rule laid down in the *MGN Limited* judgment before the domestic courts, it was nevertheless clear that the fact that the CFA regime was lawful at the time the claimants entered into their CFAs and took out their ATE insurance premiums would have been a sufficient reason in and of itself (see paragraph 37 above). The outcome in the *Frost* case does not, therefore, support the Government's plea that a challenge to its costs liability, based on Article 10 of the Convention and on the Court's conclusions in the *MGN Limited* judgment, would have been an effective remedy in the applicant's case.

55. Moreover, the Government have drawn the Court's attention to the *Lachaux* case (see paragraph 39-41 above). However, that case did not concern the recoverability of success fees or ATE insurance premiums. Furthermore, while the High Court did state that "[t]he principles that have been set out by the European Court of Human Rights in *MGN Limited v United Kingdom* and *Times Newspapers Ltd v Flood* have moved on somewhat since they were decided" (see paragraph 40 above), when read in the context of that paragraph as a whole this statement seemed to be suggesting that the Court might now decide the *MGN Limited* judgment differently in light of subsequent developments in how costs are managed. It does not follow that the Supreme Court would have decided the *Frost* case differently. On the contrary, it would suggest that any challenge by the applicant to the recoverability of the success fees and ATE premiums – as opposed to a challenge to the proportionality of any costs order – by reference to Article 10 of the Convention would have had fewer, rather than greater, prospects of success.

56. Consequently, the Government have not satisfied the Court that a domestic challenge to its costs liability by reference to Article 10 of the Convention would have afforded the applicant company an effective remedy, in theory and practice, for its Article 10 complaint. Therefore, the applicant cannot be said to have failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention and the Government's objection in this respect should be dismissed.

2. The Government's objection of lack of victim status

(a) The parties' submissions

(i) The Government

57. The Government further submitted that the application was inadmissible because the applicant company was not a "victim" of the alleged violation within the meaning of Article 34 of the Convention.

58. In neither of the proceedings in question was the applicant's costs liability determined by a domestic court applying domestic law. Rather, it was determined by the parties amongst themselves, through a settlement. As the Court indicated in *Chagos Islanders v. the United Kingdom* ((dec.), no. 35622/04, § 81, 11 December 2012), where applicants accept a sum of compensation and renounce further use of local remedies, they are generally no longer able to claim to be victims in respect of those matters.

59. In respect of E.H.'s claim, in which the applicant had settled both the substantive claim and the claim for costs (see paragraphs 16-17 above), the Government further submitted that in order to have been affected directly by the costs regime, the decision to settle the substantive claim would have had to have arisen as a consequence of the chilling effect inherent in that regime, and not for any other reason, such as having no good prospect of a defence. There was no evidence to suggest this was the case. While the Government acknowledged that the applicant in the *MGN Limited* judgment (cited above) had settled the costs claim, it was the Government's contention that it did so for reasons related to the costs implications arising from the litigation, and the costs regime in particular.

(ii) The applicant company

60. The applicant argued that in respect of A.S. it became a victim on 21 February 2021, when it was ordered to pay the claimant's costs (see paragraph 10 above).

61. In respect of E.H., the applicant argued that it had succumbed to the very "blackmail effect" inherent in the costs regime which the Court had found to be incompatible with Article 10 of the Convention. Moreover, it would be inconsistent with the principle that futile domestic remedies do not have to be pursued to suggest that the settling of costs liability would deprive an applicant of victim status. In circumstances where the recoverability of success fees and ATE premiums was in principle a breach of Article 10 of the Convention, the ransom effect was in itself one of the fundamental problems of the costs regime, and the applicant had no rational or practical alternative to settling the claim for costs. As any domestic challenge would be futile, the applicant's rights had clearly been interfered with.

(b) The Court's assessment

62. In order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he or she was "directly affected" by the measure complained of (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 96, ECHR 2014, *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008, and *İlhan v. Turkey* [GC], no. 22277/93, § 52, ECHR 2000-VII). This is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 96, *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX, and *Fairfield and Others v. the United Kingdom* (dec.), no. 24790/04, ECHR 2005-VI).

63. In the *MGN Limited* judgment (cited above, § 217), the Court, in the context of Article 10 of the Convention, found the CFA regime to be disproportionate to the legitimate aims pursued and

concluded that it exceeded even the broad margin of appreciation accorded to the Government in such matters. In reaching this conclusion, it largely relied on four specific flaws first identified in the Jackson Review (see paragraphs 26-28 above): 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; the absence of any incentive on the part of a claimant to control the incurring of legal costs on his or her behalf, and the fact that judges assessed those costs only at the end of the case, when it was too late to control what had been spent; the "blackmail" or "chilling" effect due to the fact that the costs burden on the opposing parties was so excessive that often a party was driven to settle early despite good prospects of a successful defence; and the fact that the regime allowed solicitors and barristers to "cherry pick" winning cases to conduct on CFAs with success fees (see the *MGN Limited* judgment, cited above, §§ 206-10).

64. It follows that once proceedings were brought against a media defendant by a claimant who had entered into a CFA at a time when success fees were recoverable under domestic law, the media defendant was "directly affected" by the impugned regime and could therefore claim to be a "victim" within the meaning of Article 34 of the Convention. If the claim was ultimately dismissed, with the consequence that there was no order as to costs made against the defendant, it may well be that the defendant would cease to be a "victim" for the purposes of its Convention complaint. Contrary to the Government's submission (see paragraph 58 above), the simple fact of settlement, either of the substantive claim or the claim for costs, could not deprive the applicant company of its victim status. The risk that a defendant would be forced to settle early was one of the fundamental flaws in the regime (see the applicant's arguments summarised in paragraph 61 above) and it would therefore be illogical if the fact of settlement alone were to prove fatal to its Article 10 complaint before the Court. Moreover, regardless of the reason for any settlement, the amount agreed upon in respect of the claimant's costs would have to reflect the success fees, the recoverability of which was provided for under domestic law.

65. The *Chagos Islanders* case, cited by the Government (see paragraph 58 above), is readily distinguishable on its facts as the applicants in that case had settled the claims against the State that they later sought to rely on before the Court. In the case at hand, the claims settled domestically were proceedings between private entities governed by a costs regime that the Court has previously found not to be compliant with Article 10 of the Convention.

66. Finally, the Court notes that E.H. had not entered into a CFA (see paragraph 13 above), meaning that the only additional costs liability in respect of her claim was the ATE insurance premium. A.S. had also taken out ATE insurance (see paragraph 8 above). In the *MGN Limited* decision (cited above, §§ 63-65) the Court accepted that the recoverability of the ATE premiums had interfered with the applicant's rights under Article 10 of the Convention, noting that the amounts, while lower than the success fees, were nevertheless substantial. In E.H.'s case the ATE premiums were also substantial, and would have increased the longer the legal proceedings continued without a settlement (see paragraph 13 above). The Court would therefore accept that the applicant was also "directly affected" by the recoverability of the ATE premiums once the proceedings were brought against it by A.S. and E.H., both of whom had purchased ATE insurance. Any questions relating to the compatibility of this aspect of the CFA regime will fall to be considered as part of the merits.

67. It follows that the Government's objection of lack of victim status should be dismissed.

3. *Conclusion*

68. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) The applicant company

69. The applicant argued that the Court's analysis and conclusions in the *MGN Limited* judgment should also apply in this case, which concerned the same costs regime. The applicant was an unsuccessful media defendant in privacy and defamation proceedings which was required to pay enormous additional sums beyond the claimants' reasonable and proportionate costs in order to "contribute to the funding of other litigation and general access to justice" (see the *MGN Limited* judgment, cited above, § 198). For the reasons found in the *MGN Limited* judgment the scheme under which those additional liabilities were imposed was not apt to achieve its espoused aim of the widest possible access to justice, and the burdens placed on unsuccessful defendants were excessive and unfair. The threat of such liabilities was plainly capable of discouraging the participation of the press in debates over matters of legitimate concern.

70. Furthermore, as the Court recognised in the *MGN Limited* decision (cited above), questions about the particular circumstances of the case at hand played no part in the Court's analysis in the *MGN Limited* judgment (cited above). It would therefore only be in extreme circumstances, such as those which arose in the *MGN Limited* decision (cited above), that the general rule established in the *MGN Limited* judgment (cited above) would not apply. There were no such extreme circumstances in the present case.

71. The applicant argued that no reasonable distinction could be made between success fees and ATE insurance premiums. Both were part and parcel of the same regime. Indeed, Lord Justice Jackson had stated in the Jackson Review (see paragraphs 26-28 above) that "the issues of policy and principle in respect of (a) success fees and (b) ATE insurance premiums are very similar ...".

72. In *Coventry* (cited above, § 87) the Court had declined to distinguish between ATE premiums and success fees. While it acknowledged that ATE insurance could benefit successful defendants, in the applicant's opinion this omitted the full picture. ATE insurance typically covered adverse costs, the claimant's own disbursements, and the claimant's insurance premium. In the present case E.H.'s disbursements had included fees and expenses incurred on her behalf in connection with the action that were not the subject of any CFA; the premium, which was self-insured, with the premium deferred and only payable upon success; and interest and drawn down charges as a result of the claimant entering into a Consumer Credit Act Agreement with Temple Funding Limited. The policy was therefore only partly concerned with adverse costs. This was not merely a technical point: if the claimant had 50% prospects of success, the fact that the premium was self-insured would double its cost. It followed that half (and potentially more) of the premium would not benefit the defendant at all. It would also include the insurer's brokerage, profit and administration charges, which according to the Jackson Review could be in the region of 30-40%.

73. Furthermore, the premium payable would also depend on the perceived risk of the case. This had the perverse effect, identified in *Coventry*, that defendants were required to pay higher premiums when they settled claims which were considered weaker. In addition, ATE premiums did

not provide an absolute indemnity to claimants (and thus defendants). As with most insurance policies, they were subject to a limit of indemnity and exclusions. In E.H.'s policy there was a list of fourteen such exclusions.

74. The applicant further submitted that ATE insurers funded losing cases through successful cases in the same way as solicitors who entered into CFAs. Unsuccessful defendants were therefore also contributing to the funding of other litigation and general access to justice through the payment of ATE premiums. ATE premiums were also harder for defendants to challenge than success fees and there were no greater controls on ATE premiums. There was therefore no sound basis on which to distinguish recoverable ATE premiums from recoverable success fees.

75. Finally, the applicant submitted that changes to the domestic procedural rules after 2013 (see paragraphs 29-31 above) did not alter the balancing exercise. In fact, these changes had little or no effect in relation to additional liabilities and many commentators considered that costs budgeting had in fact led to increased (rather than reduced) costs. Neither success fees nor ATE premiums were costs budgeted or managed, and the old test for proportionality continued to apply to them in privacy and publication proceedings. In any event, whether assessed under the new or old proportionality test, both success fees and ATE premiums were ignored for the purposes of determining whether costs were proportionate. While the total amount of the success fee (but not the ATE premium) could be reduced if the underlying costs were reduced, it was far from clear that budgeting or costs management was more effective at controlling costs than detailed assessment. Base costs in defamation and privacy cases remained stubbornly high.

76. This was borne out by the two sets of proceedings at issue in the present case. Even though part of the base costs were budgeted, they remained excessive and were not controlled by the budgets. In E.H. the base costs claimed were GBP 409,231.67 plus VAT, against damages of GBP 65,000 (see paragraph 14 above). Had the full budget been exhausted, then the base costs (excluding detailed assessment costs) would have been at least GBP 735,418.97 plus VAT. In A.S. the base costs claimed were GBP 417,724.50 plus VAT, against damages of GBP 83,000 (see paragraph 9 above). Had the full budget been exhausted, the base costs (excluding detailed assessment costs) would have been at least GBP 453,323.60 plus VAT.

77. It was also incorrect to suggest that there had been any change in the assessment of success fees. Defendants had always been able to challenge the reasonable level of success fees and the approach of the courts had not changed at all.

(b) The Government

78. The Government argued at the outset that in respect of the proceeding brought by E.H. there had been no interference with the applicant's Article 10 rights. The applicant had settled the proceedings, therefore no finding of beach of confidence had been made against it, there had been no costs order, and no costs assessment had been carried out by a domestic court. On the other hand, the Government accepted that in respect of the proceedings brought by A.S. the applicant was an unsuccessful defendant in breach of privacy proceedings which was subject to an order that it pay costs, including a success fee and ATE premium, to the claimant's lawyers.

79. In any event, the Government argued that in respect of both sets of proceedings any interference was necessary in a democratic society. In this regard, they submitted that the application of Article 10 necessarily involved a balancing exercise to be undertaken by reference to the specific context of

each case. The *MGN Limited* judgment did not translate into an automatic infringement of Article 10 in every case. The *MGN Limited* decision demonstrated the need to conduct a careful balancing exercise.

80. On the facts of the case at hand, the Government considered the following factors to be relevant: E.H. did not enter into a CFA (see paragraph 13 above); A.S. was not a celebrity who enjoyed equality of arms with the media and could fund litigation without a CFA; the Judge found that the applicant's publications caused A.S. distress and financial loss (see paragraph 9 above); and unlike in the *MGN Limited* judgment, where success fees of 95 percent and 100 percent were chargeable, A.S.'s costs were uplifted by 75 percent to reflect the success fee (see paragraph 10 above). For these reasons, the Government argued that in this case the balancing exercise came out in favour of the two claimants.

81. The Government further submitted that in conducting the balancing exercise it was important to distinguish between CFA success fees and ATE premiums. In their view, a number of distinguishing features justified a finding that the reasoning in the *MGN Limited* judgment could not apply to ATE premiums. As the Court recognised in *Coventry* (cited above, § 87), ATE insurance afforded protection to successful defendants by providing them with the opportunity to recover costs, and did not therefore require them to contribute to the funding of other litigation and general access to justice (see also the *MGN Limited* decision, cited above, § 64). The Government further argued that controls on ATE premiums were greater than on success fees, and that the size of the premiums payable could be influenced by the defendants. For example, they could agree not to claim costs over a fixed amount, or remove the need for insurance at all by agreeing not to claim costs.

82. Finally, referring to *Lachaux* (see paragraphs 39-41 above), the Government argued that the impugned costs regime had developed following the *MGN Limited* judgment. Domestic courts now managed parties' costs budgets proactively to ensure that claimants could not take part in a costs race. Equally, as demonstrated by the A.S. proceedings, claimants could no longer expect to benefit from 100 percent success fee recoverability as a matter of course. Although A.S. had succeeded on all liability issues, and his claim for 100 percent CFA uptake was unopposed by the applicant, the Judge only awarded a 75 percent uptake (see paragraph 10 above). The approach of the domestic courts therefore demonstrated that the potential for the recoverability of the success fees to violate Article 10 of the Convention had been accounted for by methods other than simply barring claimants from recovering any sums in relation to these costs. Costs were kept reasonable and proportionate by active judicial costs management.

2. *The Court's assessment*

(a) Was there an interference with the applicant's Article 10 rights?

83. The Government have not contested that in respect of the proceedings brought by A.S. there was an interference with the applicant's rights under Article 10 of the Convention (see paragraph 78 *in fine* above). The Court does not see any reasons to hold otherwise.

84. In light of its conclusions at paragraphs 64 and 66 above, the Court would accept that the recoverability by E.H. of the ATE insurance premiums also interfered with the applicant's rights under Article 10 of the Convention, despite the fact that both the substantive claim and the claim for costs were settled. In this regard, the Court notes that in the *MGN Limited* decision (cited above, § 6)

fifteen of the twenty-three sets of proceedings against the applicant had settled before trial with orders as to costs, and in the *MGN Limited* judgment (cited above, §§ 55 and 82) the applicant settled the claimant's costs claim, albeit after she was awarded her costs. In neither case did the Government suggest that there had not been an interference with the applicant's Article 10 rights.

85. Any such interference will breach the Convention if it fails to satisfy the criteria set out in the second paragraph of Article 10 and, in that respect, the Court must determine whether the interference was "prescribed by law", pursued one or more of the legitimate aims listed in that paragraph and was "necessary in a democratic society" in order to achieve that aim or aims (see, amongst many other authorities, the *MGN Limited* judgment, cited above, § 136).

(b) Was the interference prescribed by law for a legitimate aim?

86. The applicant has not contested the lawfulness of the interference, or the fact that it pursued a legitimate aim, namely the widest public access to legal services for civil litigation funded by the private sector.

87. The Court therefore considers that the interference was prescribed by law and pursued the legitimate aim of protecting "the ... rights of others" within the meaning of Article 10 § 2 of the Convention (see the *MGN Limited* judgment, cited above, §§ 194 and 197).

(c) Was the interference necessary in a democratic society?

88. In answering this question the Court considers it necessary to address the recoverability of success fees and ATE premiums separately. The applicable principles can be found in the *MGN Limited* judgment (cited above, §§ 139-43).

(i) Success fees

89. As noted in paragraph 63 above, in the *MGN Limited* judgment (cited above, § 217) the Court held that in the context of Article 10 of the Convention the recoverability of success fees was disproportionate to the legitimate aims pursued by the CFA regime and concluded that it exceeded even the broad margin of appreciation accorded to the Government in such matters. In the *MGN Limited* decision (cited above, § 51), the interpretation of the Court's conclusions in the *MGN Limited* judgment was an issue of contention between the parties. For the applicant, the Court set down a general rule concerning the recoverability of success fees against media defendants, whereas for the Government, the application of Article 10 involved a balancing exercise which had to be undertaken in different contexts and could produce different results depending on the nature of the activity complained of and the strength of the competing interests at play.

90. The same issue of contention arises in the present case. However, in the *MGN Limited* decision the Court, having considered the parties' submissions, held that its conclusions in the *MGN Limited* judgment could not be confined to the specific facts of that case. While it did not follow that the recoverability of success fees against media defendants would inevitably constitute a violation of Article 10 of the Convention (see the *MGN Limited* decision, cited above, § 53), the Court indicated that it "must be slow to find that a case involves newsgathering whose nature is so extreme as to lie outside the general rule established in [the] *MGN Limited* [judgment]" (ibid., § 59). It determining whether the case fell within or without that general rule, its focus was therefore on the newsgathering activities which gave rise to the proceedings, and not on other extraneous factors such as the situation of the claimant or the percentage of the success fees that was recoverable.

91. The facts of *MGN Limited* decision were "so extreme" because the applicant company's journalists had regularly, frequently and unlawfully hacked the mobile phones of their targets so as to listen to voice messages, and thereby become privy to private information, despite the fact that the private lives of those targets were not in the public interest (ibid., §§ 55-58). There is no evidence of any similarly egregious behaviour in the present case. As the Court held in the *MGN Limited* decision (cited above, § 54), the fact that a publication is subsequently found not to serve the public interest or contribute to a debate of general interest does not, in and of itself, imply that the journalist acted irresponsibly, or in bad faith.
92. The Court takes note of the Government's argument that the impugned costs regime has developed following the *MGN Limited* judgment (see paragraphs 32-35 and 82 above). It is true that in the *Lachaux* case the High Court noted that the domestic court "now takes active steps through costs budgeting properly to manage the costs that are being incurred by parties to ensure, so far as possible, that they are proportionate and reasonable" (see paragraph 40 above). While that case did not concern the recoverability of success fees or ATE insurance premiums, the Court would accept that the total amount of the success fee could be reduced if the underlying costs were reduced. However, contrary to what was suggested in that case (see paragraph 40 above), the Court did not find a violation in the *MGN Limited* judgment because it considered that the sums imposed were disproportionate as a result of significant base costs that were not properly controlled and a CFA regime that allowed recovery of a further sum of up to 100 percent of base costs. Rather, it found a violation because it considered that the depth and nature of the flaws in the system, in particular the four flaws highlighted in the Jackson review (see paragraphs 26-28 above), were such 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 (see the *MGN Limited* judgment, cited above, § 217; see also paragraphs 63 and 89 above). That conclusion was borne out by the particular facts of the case (see the *MGN Limited* judgment, cited above, § 218), but those facts were not integral to the finding of a violation.
93. Furthermore, it is not clear how significant the developments relied on by the Government have been in practice. In the A.S. case, for example, the Judge assessed 90 percent of the claimant's costs as GBP 327,700 plus VAT for base costs; GBP 245,775 plus VAT for the success fee; and GBP 82,500 for the ATE premium (see paragraph 10 above). The base costs were therefore extremely high. Moreover, although the court only awarded an uplift of 75 percent in respect of the success fee (compared to 95 percent and 100 percent in the *MGN Limited* judgment – see paragraph 80 above), the sum awarded was still "eyewatering". The Government have not pointed to any case in which a media defendant either successfully challenged the recoverability of a success fee, or significantly reduced the amount of such liabilities, by relying on these developments.
94. Finally, it is noteworthy that the Supreme Court in the *Frost and Others* case doubted that the domestic developments following the *MGN Limited* judgment would justify a domestic court refusing to follow the reasoning and conclusion of the Court in that judgment (see paragraph 38 above).
95. There is therefore insufficient evidence before the Court in the present case to enable it to depart from its findings in the *MGN Limited* judgment.

96. The foregoing considerations are sufficient for the Court to conclude that the requirement that the applicant company pay costs to A.S., which included success fees, was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to the Government in respect of general measures pursuing social and economic interests.

97. Accordingly, the Court finds that there has been a violation of Article 10 of the Convention as regards the success fees payable by the applicant company.

(ii) ATE premiums

98. In the *MGN Limited* judgment the applicant did not complain about the recoverability of ATE premiums. However, the applicants in the *MGN Limited* decision and *Coventry* did make such a complaint. In the *MGN Limited* decision the Court acknowledged that the case for the recoverability of ATE premiums was stronger than the case for the recoverability of success fees. However, it did not consider it necessary to determine whether the recoverability of ATE premiums would, in a case which otherwise fell to be considered under the general rule in the *MGN Limited* judgment, be disproportionate to the legitimate aims pursued. That was because, in view of the very limited weight to be accorded to the Article 10 rights of the applicant in that case, and the greater importance to be attributed to securing the claimants' right of access to court, the requirement that the applicant pay the ATE premiums did not exceed the broad margin of appreciation accorded to the authorities in such matters (see the *MGN Limited* decision, cited above, § 65). In *Coventry* (cited above, § 87), while the Court again recognised that a distinction had to be drawn between ATE premiums and success fees, on the facts of that case – which did not concern a media defendant – it held that the recoverability of both infringed the very essence of the principle of equality of arms as guaranteed by Article 6 § 1 of the Convention vis-à-vis an uninsured defendant.

99. Therefore, while the Court appears to have accepted that the recoverability of ATE premiums may be capable of violating Article 10 of the Convention (together with Article 6 and Article 1 of Protocol No. 1), it has not found there to exist a general rule concerning the recoverability of ATE premiums similar to that which applies in respect of the recoverability of success fees. On the contrary, for the reasons it set out in the *MGN Limited* decision and in *Coventry* – namely, that ATE insurance afforded protection to successful defendants by providing them with the opportunity to recover their costs (see the *MGN Limited* decision, cited above, § 64, and *Coventry*, cited above, § 87) – the Court considers that the proportionality of the recoverability of an ATE premium will have to be considered on a case-by-case basis. In this regard, while it acknowledges the arguments made by the applicant at paragraph 72 above, the fact that ATE insurance covers more than just adverse costs does not alter the fact that, in contrast to success fees, it has the potential to offer considerable benefits to successful defendants who wish to recover their costs.

100. Turning, then, to the two sets of proceedings in the present case, the Court notes that after A.S. was awarded GBP 83,000 in damages and an interim costs order was made (see paragraph 9 above), the applicant settled his claim for costs in the sum of GBP 822,421.79. This sum comprised the interim payment on account of GBP 770,670 (which included GBP 327,700 plus VAT for base costs; GBP 245,775 plus VAT for the success fee; and GBP 82,500 for the ATE premium – see paragraphs 10 and 93 above) and an additional sum of GBP 51,751.79 agreed between the parties (see paragraph 11 above). The amount paid to the claimant in respect of the ATE premium (GBP 82,500) was therefore

approximately the same as the amount paid to him in damages (GBP 83,000), approximately one quarter of his base costs and a tenth of the total amount paid. Moreover, the evidence before the Court does not suggest that the claimant could have paid the applicant's costs, if his claim against it had been unsuccessful. Rather, the facts as presented by the parties indicated that he was a Libyan refugee who lost his employment as a consequence of the applicant's actions (see paragraph 7 above). In comparison, unlike the applicant in *Coventry*, the applicant in the present case was not an individual or small undertaking carrying on modest business without insurance which found itself faced with one-off litigation involving it in eye-catchingly large costs exposure (see *Coventry*, cited above, § 78). Rather, it was the publisher of a leading daily newspaper which could be expected to have insurance against exactly this kind of litigation.

101. Consequently, the Court cannot accept that in respect of A.S.'s claim the recoverability of the ATE premium was disproportionate having regard to the legitimate aims sought to be achieved, which included protecting the applicant company by significantly increasing the likelihood that it could have recovered its costs, had it successfully defended the claim.

102. E.H.'s substantive claim settled for GBP 65,000 (see paragraph 14 above). According to the applicant company, her initial claim for costs was for GBP 825,164.40, of which GBP 335,160 was comprised of the ATE premium (see paragraph 16 above). She subsequently accepted GBP 709,095.15 in full and final settlement of her costs claim (see paragraph 16 above). While the final settlement was not apportioned between base costs and additional liabilities, it would be surprising if the negotiated costs settlements did not reflect the substantial nature of the ATE premium. In fact, given that the ATE premium was a fixed cost charged by an external provider, it cannot be excluded that the amount originally claimed in respect of the premium (GBP 335,160) was discharged in its entirety in the final settlement.

103. On the other hand, there is no evidence to suggest that the claimant, a clinical psychologist, would have been in a position to pay the applicant's costs if her claim against it had been unsuccessful. Moreover, it is noteworthy that she did not enter into a CFA, thus absolving the applicant from any requirement to pay a success fee. Perhaps more importantly, this meant that contrary to the second flaw identified by the Jackson Review (see paragraph 26 above) in the course of the proceedings there was a strong incentive for her to control the incurring of legal costs on her behalf. Finally, as noted at paragraph 100 *in fine* above, the applicant, as a large publishing organisation, would be expected to have insurance against the kind of proceedings brought by E.H.

104. In such circumstances, the Court considers that also in respect of E.H.'s claim the recoverability of the ATE insurance premium was not disproportionate, having regard to the legitimate aims sought to be achieved.

105. Accordingly, the Court finds that there has been no violation of Article 10 of the Convention in respect of the ATE premiums payable by the applicant company.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

107. The applicant company did not claim any sum in respect of non-pecuniary damage. The Court is therefore not called upon to make any award in this respect.

108. In respect of pecuniary damage, the applicant claimed 319,977.92 British Pounds (GBP) in respect of the success fee paid to A.S. (comprising the success fee of GBP 294,930 paid as part of the interim payment, and a further GBP 25,047.92, which it claimed was the portion of the additional settlement sum representing success fees).

109. The Government invited the Court to reject the claim for just satisfaction since the applicant did not make a specific claim for an award in its application, in direct violation of Rule 60 § 1 of the Rules of Court. With regard to the amount claimed, the Government argued that the applicant should not be able to claim the full amount of the success fee as a lower success fee may not have violated Article 10 of the Convention. They further argued that the applicant had failed to mitigate its losses in any way, for example by settling the claim before trial.

110. Rule 60 § 1 of the Rules of Court requires an applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights to make a specific claim to that effect. According to paragraph 21 of the Practice Direction on just satisfaction claims, unless the parties are otherwise informed, the Court requires that clear, comprehensive claims are submitted within the time-limits fixed by the President of the Chamber and indicated to the parties in a letter. In the present case the applicant company was invited to submit its claims for just satisfaction, together with its reply to the Government's observations, by 20 December 2022. That deadline was subsequently extended to 20 February 2023, and the applicant's written observations and claim for just satisfaction were received on that date. As such, the applicant has complied with Rule 60 § 1 of the Rules of Court.

111. That being said, it is clear from the parties' submissions that the present case raises important questions about how to calculate pecuniary damages, and further submissions from the parties are necessary before the question of the application of Article 41 is ready for decision. This question must accordingly be reserved in so far as pecuniary damages are concerned and the further procedure fixed with due regard to the possibility of an agreement being reached between the Government and the applicant company.

B. Costs and expenses

112. In respect of costs and expenses, the applicant company claimed GBP 65,745.10 plus interest up to 15 February 2023. This figure includes counsels' fees of GBP 32,300, and in support of this claim it has submitted counsels' fee notes, none of which has been itemised. The applicant claimed a further GBP 140,000 in respect of "estimated future costs", based on the cost of leading and junior counsel appearing at a hearing.

113. The Government did not comment on the applicant's claim for costs and expenses.

114. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. It cannot, therefore, take into account estimated future costs.

115. Rule 60 § 2 of the Rules of Court further requires that the applicant submit itemised particulars of all claims, together with any relevant supporting documents. Moreover, according to the Practice Direction on just satisfaction claims, the Court will uphold claims for costs and expenses only in so

far as they relate to the violations it has found. It will reject them in so far as they relate to complaints that have not led to the finding of a violation, or to complaints declared inadmissible.

116. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of 15,000 euros (EUR), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses incurred to date.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention as regards the success fees;
3. *Holds* that there has been no violation of Article 10 of the Convention in respect of the ATE premiums;
4. *Holds*

(i) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses incurred to date, to be converted into the currency of the respondent State at the rate applicable at the date of settlement; and

(ii) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Holds* that the question of the application of Article 41 of the Convention in respect of pecuniary damages is not ready for decision; accordingly,

a) reserves the said question;

b) invites the Government and the applicant company to submit, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach; and

c) reserves the further procedure and delegates to the President of the Chamber the power to fix the same if need be;

6. *Dismisses* the remainder of the applicant company's claim for costs and expenses.

Done in English, and notified in writing on 12 November 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Gabriele Kucsko-Stadlmayer
Registrar	President