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Supreme Court rules that newspapers have to pay victim's success fees and ATE premiums in defamation and phone hacking cases

Times Newspapers Limited v. Flood
Miller v. Associated Newspapers Limited
Frost & others v. Mirror Group Newspapers Limited
[2017] UKSC 33

Article by David Bowden

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Times Newspapers v. Flood, Miller v. Associated Newspapers & Frost v. Mirror Group - [2017] UKSC 33

Executive speed read summary

The Supreme Court has handed down its ruling in these 3 appeals. In all cases the newspaper publishers challenged the liability to pay a success fee and after the event insurance (together '*additional liabilities*') in litigation where the publishers had lost. *Flood* and *Miller* had brought libel claims but the *Frost* litigation involved the legion victims of phone hacking. These victims were all represented by solicitors and counsel who acted for them on a '*no win, no fee*' conditional fee agreement. The House of Lords had previously ruled such an arrangement to be valid in the *Naomi Campbell* case but the European Court of Human Rights in Strasbourg later held there has been a violation of article 10 of the ECHR as regards the success fees. Lord Neuberger PSC gives the unanimous judgment in which he rules that the UK government was in an awkward position when it decided to reduce drastically the availability of legal aid while wishing to ensure access to justice, and that defamation and privacy cases had been excluded from the major changes effected by LASPO. He said there were great difficulties involved in balancing access to justice for claimants and the article 10 rights of defendants and the UK government enjoyed a wide margin of appreciation.

The Supreme Court refused to amend any of the costs orders because to do so would interfere with rights that solicitors, counsel and insurers had under article 1 of the 1st Protocol to the ECHR. Lord Neuberger said amending costs orders would undermine the rule of law because it was 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 and they are secure in the further assumption that the law will not be changed retroactively. Lord Neuberger PSC ruled that the 'just and appropriate' order to make under section 8 (1) of the Human Rights Act 1998 was to dismiss the publishers' appeals.

For the *Frost* phone hacking victims, Lord Neuberger said their rights to privacy were more important than the media's right to freedom of expression and it was unrealistic to give them the same weight as in *Naomi Campbell*. The *Frost* litigants had their phone records unlawfully hacked or blagged by agents of MGN on a persistent and systematic basis and the newspaper had not hoped that the end would justify the means. The publisher's conduct was persistent, pervasive and flagrant in the hacking and blagging. There was a lack of any public significance of the information it revealed.

The Supreme Court refused to give a declaration that the CFA scheme under the Access to Justice Act 1999 was incompatible with the Human Rights Act 1998. Finally it refused to interfere with the judge's discretion in *Flood* where she ordered the newspaper to pay all the costs even though *Flood* had not won on all issues. Lord Neuberger PSC ruled that a first instance judge was entitled to award costs on the basis that *Flood* was the overall winner rather than making an issues-based order.

Times Newspapers Limited v. Flood
Miller v. Associated Newspapers Limited
Frost & others v. Mirror Group Newspapers Limited
[2017] UKSC 33 11 April 2017
Supreme Court of the United Kingdom (Lord Neuberger PSC, Lords Mance, Sumption, Hughes and Hodge JJSC)

What are the facts in *Flood*?

On 2 June 2006, Times Newspapers Limited ('TNL') published an article, in print and on its website, stating that there were strong grounds to believe that Mr Gary Flood (a detective sergeant with the Metropolitan Police Extradition Unit) had been corrupt. Mr Flood brought libel proceedings in May 2007. He was subsequently exonerated by the Directorate of Professional Standards of the Metropolitan Police in its report made available on 5 September 2007.

TNL did not report the outcome of this investigation or update its online article until 21 October 2009. In the libel proceedings, TNL relied on a *Reynolds* defence of public interest - **[1999] UKHL 45**. This was tried as a preliminary issue. Following appeals all the way to the Supreme Court, the result was that TNL could rely on the *Reynolds* defence before 5 September 2007 but not afterwards. This meant that the *Reynolds* defence was successful in relation to the printed copies as well as 3,777 publications on its website.

TNL subsequently admitted liability for publications between 5 September 2007 and 21 October 2009 during which approximately 550 publications took place. At the assessment of damages hearing, Mr Flood was awarded damages of £60,000 and his costs incurred for both the preliminary issue and the damages trial to be assessed at a later date.

Mr Flood had a Conditional Fee Agreement ('CFA') with his lawyers. His claim for costs includes both success fees and an '*after the event'* ('ATE') insurance premium (collectively called '*additional liabilities'*). The total costs claimed are £1,698,192 plus interest.

What are the facts in Miller?
A newspaper printed an article about Mr Miller and his business dealings. Mr Miller started defamation proceedings about that article. He succeeded at trial and was awarded £65,000 damages. The newspaper's appeal was unsuccessful. Mr Miller's base costs of trial and the appeal were agreed at £633,006.08 and paid by the newspaper.

The newspaper submits that these costs orders are incompatible with its right to free speech under Article 10 of the European Convention on Human Rights (ECHR). The High Court ruled in Mr Miller's favour on this issue. The High Court granted a leapfrog certificate under s.12(1) of the Administration of Justice Act 1969.

What are the facts in *Frost*?
A number of celebrities and other public figures believed that their phones had been hacked which resulted in sensational stories being published about their private lives in Sunday or tabloid newspapers. They instructed various firms of solicitors to make claims for breach of privacy. The newspapers denied liability initially saying there had only been 1 rogue reporter. Eventually criminal charges were brought. . Claims were tried by Mann J and damages were awarded. The claims of representative claimants were treated as test cases and judgment was handed down in their favour with an award of damages by Mann J on 21 May 2015. This was subsequently upheld by the Court of Appeal on 17 December 2015.
The solicitors acted on a 'no win, no fee' basis. The solicitors having achieved success asked for the court to assess their costs. Mann J declared that recovery by the phone hacking victims of *'additional liabilities' was* not incompatible with the publisher's rights under article 10 of the ECHR.

The newspaper has also been ordered to pay the phone hacking victim's costs. Their lawyers also acted under CFAs and most clients had also taken out an ATE policy. In principle they are entitled to recover *'additional liabilities'.* The phone hacking victims made an application to the Mann J for a declaration that the framework which permits the phone hacking victims to recover these '*additional liabilities'* is not incompatible with article 10 of the ECHR. Since Mann J felt clearly bound by the prior House of Lords in *Naomi Campbell* the publisher also seeks to make a 'leapfrog' appeal direct to the Supreme Court.

What did the Court of Appeal rule in *Flood*?
In the Court of Appeal, Lady Justice Sharp on 4 December 2014 dismissed the newspaper's appeal **[2014] EWCA Civ 1574**. This appeal was from a libel decision made by Mrs Justice Nicola Davies **[2013] EWHC 4075 (QB)** who had to consider a '*Reynolds*' defence. The judge regarded Mr Flood as the successful party in the litigation and in Sharp LJ's view she was entitled to do so.

There were no CPR part 36 offers made by either side and the judge therefore had a discretion as to costs which fell to be exercised in accordance with CPR 44. 2. Sharp LJ ruled that '*the question of who was the successful party overall, the question of who should pay the costs of the privilege issue at the end of the litigation could not be answered simply by looking at the numbers in respect of which each side had won or lost*'. Nicola Davies J had ordered the newspaper to pay these costs of Mr Flood:

- His costs of the action,
- costs of the trial of damages, and
- reserved costs of the trial of a preliminary issue before Tugendhat J in July and October 2009, which dealt with TNL's defence of *Reynolds* privilege.

Sharp LJ ruled that '*Nicola Davies J could have made a different order on costs than she did, but her discretion on costs was a wide one. I do not accept she erred in exercising it'* and dismissed the appeal.

What did the High Court rule in *Miller*?
On 5 February 2016, Mitting J handed down his reserved judgment - **[2016] EWHC 397 (QB).**

There remained a dispute as to Mr Miller's claim for '*additional liabilities'*. Mitting J made an order that the newspaper should pay success fees due to the Mr Miller's solicitors and counsel as well as the ATE premium. These additional liabilities totaled £835,379.60. On ATE, Mitting J concluded:

> *'I am satisfied, that it is necessary in a democratic society that a scheme such as this should exist. It is necessary to permit a claimant who contends that he has been defamed by a newspaper article to vindicate his rights under Article 8, because his reputation is a feature of his private life, by litigation where the risks of the litigation for him are not unacceptably high. I am satisfied that the burden imposed by the ATE premium scheme on defendant publishers is not so large and not so lacking in appropriate controls as to amount to a disproportionate interference in their right to freedom of expression. I do not, on the material which I have considered, believe that the Strasbourg Court, when faced with this as a discrete issue, would conclude that the UK scheme was outwith the margin of appreciation allowed to the United Kingdom. For those reasons, my answer to the question referred to me is that the award of additional liabilities to the claimant would not be incompatible with the defendant's right of expression as a publisher under Article 10.'*

What did Mann J rule in the underlying litigation in *Frost*?
Following a 13 day hearing in March 2015, Mr Justice Mann handed down his reserved judgment **[2015] EWHC 1482 (Ch)**. In it he decided on the appropriate amount of damages to be awarded to 8 people who claimed that their telephones had been hacked by the Mirror Group Newspapers (MGN) who publish the Daily Mirror, the Sunday Mirror and The People newspapers. Many of these claimants were well known public figures including Sadie Frost, Paul Gascoigne and Alan Yentob. There are reporting restrictions still in place. The newspapers had initially denied liability, then made a series of non-admissions and denied that there had been any systematic phone hacking. The judge ruled against the newspaper and determined the appropriate amounts of compensation for breach of privacy.

What did the Court of Appeal rule on MGN's appeal in *Frost*?
The Court of Appeal unanimously rejected all challenges made by Mann J in its judgement dated 17 December 2015 - **[2015] EWCA Civ 1291.** MGN argued that there could not be an award of damages solely on the grounds of an infringed right to privacy. It was argued that there had to be some damage limited to distress or hurt to feelings which could be proved before damages were awarded. MGN said damages could not be awarded simply to punish a party for infringing someone else's rights. The Court of Appeal agreed that depriving the claimants of their right to control their own privacy was a separate head of damage and that damages were not limited to distress *'the respondents are entitled to be compensated for that loss of control of information as well as for any distress.'*

How were these cases funded in *Frost*?
These cases were funded by means of a 'no win, no fee' conditional fee agreement ('CFA'). In some cases a CFA-lite had been entered into. Most, but not all, of the CFAs were entered into before April 2013 such that success fees and 'after the event' ('ATE') premiums were recoverable from the other side in the event of success. The CFAs adopted the Law Society model wording in relation to the definition of '*success*'.

The ATE policies were all arranged by Temple Legal Protection Limited and the policy offered was a 'Temple Litigation Advantage' one. There was no challenge made by MGN as to the selection of ATE policy because it was unable to say that another product should have been chosen. MGN accepted there is a limited market for ATE policies for this sort of litigation.

What did the senior costs judge rule in *Frost* were the appropriate success fees for the claimants' solicitors?
The costs judge (Master Gordon-Saker) had to assess 60 separate success fees relating to the various claimants, the different firms of solicitors and counsel. His judgement is reported here **[2016] EWHC B29 (Costs).** In summary the costs judge allowed these success fees:

- **100%** - for CFAs entered into **before** February 2013,
- **75%** - for Ms Alcorn's CFA for costs after September 2014,
- **67% -** for the CFAs entered into between February 2013 to September 2014,
- **50%** - for Ms Gibson's CFA as stage 5 of her ATE premium was not engaged,
- **5% additional** success fee – post-2013 claims with staged success fees, and
- **3% additional** success fee – where solicitors or counsel had assumed a CPR part 36 risk,

In arriving at the 100% success fee figure, the costs judge ruled at that time these cases were very risky because the defendant denied liability and there had been no arrests or prosecutions of journalists engaged in phone hacking.

What did the senior costs judge rule in *Frost* in relation to 'after the event' ('ATE') premiums?
The premiums for the Temple Litigation Advantage ATE policies were allowed in full. He assessed in detail the staged ATE policy provide for Mr Ashworth's claim. This provided for 7 stages of premium and a limit of indemnity of £100,000 plus the ATE premium. The costs judge allowed these stage premiums:

- **£1850** – stage ai – claim settled in pre-action protocol period,
- **£82,500** – stage ciii – claim proceeded to judgement.

The costs judge concluded on ATE premiums that there was nothing to enable him '*to conclude that these policies were purchased unreasonably nor that the premiums were staged unreasonably. Accordingly the premiums must be allowed as claimed.*'

What did High Court rule on 'additional liabilities' in *Frost*?
On 19 April 2016, Mann J handed down his reserved judgment on costs - **[2016] EWHC 855 (Ch).** He ruled that on the basis of binding English authority, the English legislative regime which permits the recovery of the '*additional liabilities'* is not incompatible with article 10 of the ECHR. Were he wrong on that, he went on to rule that the newspaper was not entitled to rely on any incompatibility to resist recovery of success fees in relation to the eight lead cases. He granted a leap frog certificate to allow an appeal to proceed directly to the Supreme Court.

What were the issues for the Supreme Court?
In *Flood* there was only 1 issue, namely whether

- having to pay the entire costs of the other side in a libel case, including success fees and ATE insurance premiums under a CFA, in which it was partly successful violated the publisher's rights under articles 6 and 10 of the European Convention on Human Rights (ECHR).

In *Miller* there was only 1 issue, namely whether

- costs orders made in defamation proceedings requiring a publisher to pay the other side's success fees and ATE insurance premium are incompatible with its rights under article 10 of the ECHR.

In *Frost* there were these 2 issues, namely whether:

- the recoverability of '*additional liabilities'* (a collective term for success fees under a CFA and ATE premiums) is incompatible with the publisher's rights under Article 10 of ECHR, and
- the publisher should be precluded from arguing that the recovery of success fees is incompatible with Article 10 in the set of representative claims.

What had the House of Lords previously ruled in *Naomi Campbell*?
On 6 May 2004 the House of Lords handed down its opinions in *Naomi Campbell v. MGN Limited* **[2004] UKHL 22**. The House of Lords allowed Campbell's appeal and ruled that her breach of privacy claim succeeded due to the publication by a newspaper of photographs of her leaving a narcotics anonymous meeting. By a petition presented to the House on 21 February 2005, MGN sought a ruling of the Appeal Committee that they should not be liable to pay any part of the success fee on the ground that such a liability is so disproportionate as to infringe their right to freedom of expression under article 10 of the ECHR. In a further ruling dealing with costs handed down on 20 October 2005 **[2005] UKHL 61** the House of Lords dealt with costs payable under a CFA and ruled that the publisher had to pay both a success fee and ATE premium under a CFA. In that case total costs claimed in all costs were over £1million with success fees which amounted to £280k.

Lord Hoffman gave the main judgement in which he concluded that:

> '*Of course, one object of extending CFAs to defamation and breach of confidence claims was to enable people of modest means to protect their reputations and privacy from powerful publishers who previously did not have to fear litigation even if their publications were totally unjustified. Henceforward they would be able to vindicate their rights, which are also Convention rights, in the way that the rich and powerful have always been able to do. … But the rich and powerful have also had to pay the price of failure. Finding ways of ensuring that the impecunious claimant can also do this may be more of a challenge. In the end, therefore, it may be that a legislative solution will be needed to comply with article 10.*'

What ruling did the Strasbourg court make in *Naomi Campbell*?
On 18 January 2011 the European Court of Human Rights (4th section) handed down its judgement - **[2011] ECHR 66.** It held unanimously that there has been a violation of article 10 of the ECHR as regards the success fees under a CFA payable by the unsuccessful publisher.

At the hearing, what did the Supreme Court decide the common issues were in all 3 cases?
Lord Neuberger PSC in his judgement ruled that the commons issues are as follows, namely whether:

- UK law should reflect the Strasbourg court decision in *Naomi Campbell* so that it lays down a general rule?
- the costs orders in *Miller* and *Flood* should be amended to exclude '*additional liabilities"*?
- the costs orders in *Frost* should be amended to exclude '*additional liabilities"*? and
- a declaration of incompatibility should be made under the Human Rights Act 1998 about the costs scheme laid down by the Access to Justice Act 1999 (AJA 1999)?

What ruling did the Supreme Court give on the 'general rule' issue?
Lord Neuberger PSC gave the unanimous judgement of the court. He defined the '*general rule'* as whether '*the domestic law should reflect the Strasbourg court's decision in* MGN v. UK *to the extent of laying down a general rule'* which he said was '*where a claim involves restricting the defendant's freedom of expression*', then '*where a 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*'.

Neuberger PSC started by noting pointedly that it was open to the Supreme Court '*to refuse to follow the Strasbourg court's analysis and conclusion in* MGN v. UK' observing that it was only *'a single decision of one section of the Strasbourg court*', it was not a Grand Chamber ruling and there had been no oral argument in the case. However this is not the approach Lord Neuberger PSC was going to take because there was **'***undoubtedly a very powerful argument for concluding that we should effectively follow the Strasbourg court's approach in that case'* because it was a '*full and careful*' judgment which was '*based on a report which was prepared by a senior United Kingdom judge and was largely acted on by the UK government'*. He wryly observed not also that the '*UK government did not try to have the decision in* MGN v. UK *reconsidered by the Grand Chamber*' but also that it relied on it '*to justify its initial decision to forbid recovery of success fees and ATE premiums in defamation and privacy actions'*.

Lord Neuberger rejected an interpretation of *Naomi Campbell* that it '*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'*. This was too bold because it did '*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'*. Neuberger noted that the Strasbourg court '*concentrated on civil claims where article 10 was engaged, rather than looking at civil claims across the board, but in his view it was 'entitled, and arguably bound'* to do so. He said Article 10 cases were '*in a special category'* because of the '*importance of freedom of expression'*.

Neuberger noted that the Strasbourg ruling in *Naomi Campbell* '*could actually assist defendants who wished to defend claims involving article 10'* because they '*could enter into CFAs and take out ATE insurance*'. He noted that Strasbourg accepted that '*there was no incentive on the part of a claimant to control the incurring of legal costs on his or her behalf*'. Neuberger agreed that there was some *'blackmail effect of the 1999 Act regime'* but that where a claimant had ATE this '*would reduce this factor significantly by allowing a successful defendant to recover its costs'*.

Lord Neuberger PSC rejected a submission that events after *Naomi Campbell* justified the court in not applying its reasoning because any changes did '*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'*. Lord Neuberger categorized the CFA/ATE scheme under the AJA 1999 as '*the least bad option to enable access to justice in relation to defamation and privacy claims*' for these reasons:

- the House of Commons failed to include in the Defamation Act 2013 a provision which reduced the potential exposure of defendants to costs in defamation and privacy actions,
- the Parliamentary Joint Committee on Human Rights in its 7th report in 2012-3 expressed concern about any '*change to CFAs and ATE'* as it '*may prevent claimants and defendants of modest means from accessing the courts*', and
- The Report of Sir Brian Leveson's Inquiry expressed similar concerns.

Lord Neuberger PSC pragmatically recognized the awkward position the UK government was in when '*deciding to reduce drastically the availability of legal aid, while wishing to ensure access to justice'* and noting that defamation and privacy cases had been excluded from '*major changes effected by LASPO'*, which was compounded by '*politically controversial nature'* of section 40 of the Crime and Courts Act 2013 which all demonstrated '*the even greater difficulties involved in balancing access to justice for claimants and the article 10 rights of defendants'*.

Concluding on this issue Lord Neuberger said he '*rather doubted'* that all these points together '*would justify a domestic court refusing to follow the reasoning and conclusion of the Strasbourg court'* because it had accepted that the UK government '*enjoyed a "broad" or "wide" margin of appreciation in this connection*'. Somewhat ominously though Lord Neuberger left the door open for further litigation in this field with his coda that '*we should leave the point open, and proceed to the remaining article 10 issues on the assumption that we should follow'* the Strasbourg decision in *Naomi Campbell.*

What ruling did the Supreme Court give on amending the *Miller* and *Flood* costs orders?
Lord Neuberger was sceptical about this noting that the AJA 1999 (as amended) provided 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*'. Although Neuberger said that this provision could '*be disapplied by a court to the extent that they infringe the Convention*', he cautioned against doing this in a vacuum because '*all these provisions are part of a single statutory scheme'* and referred back to the joint judgment that he wrote with Lord Dyson MR in *Coventry v. Lawrence (No 3)* **[2015] UKSC 50** for support. Lord Neuberger was '*prepared to proceed on the basis that, if the Rule applies as a matter of domestic law'* then the publisher would '*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'*.

Lord Neuberger was far more swayed by the contrary arguments and the adverse effects on *Mille*r and *Flood* if costs orders were varied. He said to rule in the publisher's favour '*would be wreaking a plain injustice on him*' because the litigation was started in 2009 '*at a time when that expectation not only reflected the law according to the relevant legislation*' and '*also when that law had been held by the House of Lords in* Naomi Campbell *to be consistent with the Convention'*.

Going further Lord Neuberger ruled that not only would this '*be a plain injustice on Mr Miller to deprive him of the ability to recover the success fee and the ATE premium'* but also it would '*infringe his rights under A1P1*' and that was a factor which '*must be taken into account'* when considering how to dispose of' the appeal. Going back to the *Coventry v Lawrence* costs ruling Lord Neuberger ruled that litigants must '*have had a legitimate expectation that the system would apply and be upheld'* and this was especially so where '*appellate courts have repeatedly endorsed the system'*. Lord Neuberger derived support from this from 3 other Strasbourg cases and an extract from the leading text book on '*Human Rights Practice'* which says '*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'*.

Applying this Lord Neuberger ruled that he found '*it very difficult to see how Mr Miller's A1P1 claim could be defeated'* noting that '*Parliament did not see fit to render the LASPO regime retrospective'* but on the contrary the AJA 1999 Act regime '*applies to all proceedings begun before 1 April 2013'.* Lord Neuberger went on to rule that '*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'*.

Lord Neuberger plumbed back to the printed case of the Attorney-General of Northern Ireland in *Coventry v. Lawrence* where (in supporting the paying party) he had referred to the Strasbourg case of *Stankov v. Bulgaria* **49 EHRR 7,** where it 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'*. Whilst *Stankov* did not convince the majority in *Coventry*, this time Lord Neuberger ruled 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'*.

As if this was not enough, Lord Neuberger also emphasized that '*the purpose of his bringing the proceedings was for the purpose of restoring or maintaining his personal dignity'.* Again Lord Neuberger left the door wide open for further litigation saying that '*no argument based on article 6 or article 8 was*

raised at all on behalf of Mr Miller or Mr Flood'. Neuberger limited his conclusion solely to Mr Miller's right under article 1 of the 1st protocol to the ECHR 'not to be deprived of his accrued rights and his legitimate expectations'.

Lord Neuberger then turned to the balancing exercise noting that '*upholding Mitting J's costs order would infringe ANL's article 10 rights'* which '*would therefore involve an injustice'* but the quandary was that '*amending that costs order in the way sought by ANL would not only involve an infringement of Mr Miller's A1P1 rights'* it would be far worse because '*it would undermine the rule of law'*. He reinforced that saying that it was '*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'* and moreover to be '*secure in the further assumption that the law will not be changed retroactively'*. Lord Neuberger ruled that if he acceded to the newspaper's submissions and refused the costs order which Mr Miller seeks that this '*would directly infringe that fundamental principle*'. Lord Neuberger played down the importance of freedom of expression saying that whilst it was *'another fundamental principle'* it was '*not so centrally engaged by the issue in this case'*. Because *Naomi Campbell* was a decision '*essentially based on the indirect, chilling, effect on freedom of expression of a very substantial costs order'*.

To resolve the quandary Lord Neuberger had recourse to section 8(1) of the Human Rights Act 1998 which provides:

> '**8(1)** *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*.'

Applying this Lord Neuberger ruled that the '*just and appropriate'* order here was to dismiss the publisher's appeal because to '*allow the appeal would involve a graver infringement of Mr Miller's rights'*. Lord Neuberger also rejected a point made that '*lawyers and insurance company would not in practice press for payment of, respectively, the success fee or ATE premium'* saying this argument had been firmly rejected in *Coventry v. Lawrence*. He went further here noting that 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*'.

Concluding on this issue Lord Neuberger ruled that '*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'*

What ruling did the Supreme Court give on amending the *Frost* costs orders?
Having sharpened his knife on the Daily Mail and the Times, Lord Neuberger had no hesitation in going straight for the jugular for the News of the World and its phone hacking victims. Here Lord Neuberger said there was '*another, more fundamental, reason why it is not open to MGN to rely on the Rule'* and this was because 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'*. This was a step too far for Lord Neuberger who ruled that he could not '*accept that the Rule can have any application, at least on facts such as those in Frost*'.

He expanded on this observing that in *Frost* the courts below were '*not merely concerned with the complaint that MGN had published, or threatened to publish, information which infringed the claimant's privacy rights*' but also '*with the complaint that the information in question had been obtained unlawfully by or on behalf of MGN*'.

Whilst Lord Neuberger accepted that MGN's article 10 rights were 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*' but he went on to caution that it was '*unrealistic'* to accord these rights '*anything like the sort of weight which they were given in MGN v UK'*. He stressed that the *Frost* litigants' complaints was that '*their phone records were unlawfully hacked or blagged by agents of MGN on a persistent and systematic basis'* and for this reason there could not '*be any suggestion of MGN or its agents even hoping, let alone intending or expecting, that the end would justify the means'*. Lord Neuberger castigated the newspaper's conduct noting 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' concluding by ruling that it appeared to him that '*this is not a case where the Rule can properly be invoked by MGN*'.

What ruling did the Supreme Court give on the declaration of incompatibility issue?
Lord Neuberger PSC refused to give such a declaration.

He ruled that '*it would be inappropriate to grant a declaration of incompatibility'* and that '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'. He said the Court had not '*considered in any detail'* those other statutes.

Lord Neuberger also qualified his judgement on this in an earlier part of his judgement when he ruled that '*it would not be appropriate to express a concluded view'* on the issue because the United Kingdom government who would be '*most detrimentally affected by the decision is not before us'*. Lord Neuberger cautioned that if the Supreme Court concluded 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*'. Finally he noted that '*a decision that the Rule applies but cannot assist the appellants'* could '*have very similar consequences'* and that section 5 of the Human Rights Act 1998 '*requires the government to be notified if a declaration of incompatibility is sought in any proceedings*'.

What other ruling did the Supreme Court make on the *Flood* costs order?
Lord Neuberger refused to interfere with the trial judge's discretion where she ordered the publisher to pay the costs even though it had succeeded on some issues. He gave 4 reasons for this:

- the importance of freedom of expression,
- TNL adopted a 'very tough attitude' in the solicitors correspondence,
- There was no '*clear-cut win'* for the newspaper on the *Reynolds* defence because it failed in relation to the continuing website publication after 5 September 2007, and
- 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.

11 April 2017

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