Date 11 April 2017

PRESS SUMMARY

Times Newspapers Limited (Appellant) *v* Flood (Respondent)
Miller (Respondent) *v* Associated Newspapers Limited (Appellant)
Frost and others (Respondents) *v* MGN Limited (Appellant)
[2017] UKSC 33
On appeals from [2014] EWCA Civ 1574, [2016] EWHC 397 (QB) and [2016] EWHC 855 (Ch)

JUSTICES: **Lord Neuberger, (President**), **Lord Mance**, **Lord Sumption**, **Lord Hughes**, **Lord Hodge.**

BACKGROUND TO THE APPEALS

These three appeals each involve a challenge to an order for costs made by a High Court judge against a newspaper publisher following trial. *Flood v Times Newspapers Limited* ("*Flood*") and *Miller v Associated Newspapers Ltd* ("*Miller*") each involved an allegation that the newspaper had libelled the claimant, and *Frost and others v MGN Ltd* ("*Frost*") involved allegations that the newspaper had unlawfully gathered private information about the claimants by hacking in to their phone messages. In each case, the newspaper publisher lost at trial and was ordered to pay the claimants' costs.

The claimants had each taken advantage of the costs regime introduced by the Access to Justice Act 1999 and reflected in the Civil Procedure Rules then in force, in particular Rule 44, ("the 1999 Act regime"). This regime enabled: (i) the claimant's lawyers to agree under a conditional fee agreement (a "CFA") to be paid nothing if the claim failed but to receive up to twice their normal fee if it succeeded; and/or (ii) the claimant to take out after-the-event ("ATE") insurance against the risk of having to pay the defendant's costs (with the insurer only being paid if the claim succeeded); and (iii) the claimant being able to recover from the defendant the "success fee" payable under the CFA, and the ATE insurance premium, if his claim succeeded. Following widespread criticism, the regime has now largely been replaced for claims commenced after 1st April 2013 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, but not for defamation or privacy claims. A public consultation as to whether s.40 of the Crime and Courts Act 2013, which would introduce a new scheme for costs recovery for privacy and defamation claims against newspapers, has been launched.

In *Flood*, Times Newspapers Limited ("TNL") had defeated Mr Flood's defamation claim in relation to hard copies of the publication, but had failed in relation to the electronic version, which they had failed to take down when they should have done. Nicola Davies J awarded Mr Flood damages of £60,000 and ordered TNL to pay all Mr Flood's costs of the proceedings (including success fees and ATE premium), and this was upheld by the Court of Appeal. In *Miller*, Associated Newspapers Limited ("ANL")'s defence was rejected by Sharp J, and Mitting J subsequently concluded that he was bound by the decision of the House of Lords in *Campbell v MGN Ltd (No 2)* to hold that recovery of the success fee and ATE premium did not infringe ANL's Article 10 rights and ordered that ANL should reimburse Mr Miller his costs. In *Frost*, having found for the claimants, Mann J ordered MGN to pay their costs, including reasonable success fees and ATE premiums which they had incurred, as determined by the Costs Judge, and this was upheld by the Court of Appeal.

The newspaper publishers appealed to the Supreme Court. In each appeal, the newspaper publisher relies upon the decision of the European Court of Human Rights in *MGN Ltd v United Kingdom* ("*MGN*

v UK"), where the Court held, contrary to the decision of the House of Lords in *Campbell v MGN Ltd (No2),* that MGN's right to freedom of expression under Article 10 of the European Convention on Human Rights was infringed by the order to reimburse the success fee and ATE premium incurred by the claimant. The newspaper publishers now contend that the costs orders in the present appeals similarly infringe their rights under Article 10. In *Flood*, TNL also contend that, given their partial success, the costs order was so unreasonable as to be outside the ambit of the trial judge's discretionary powers.

JUDGMENT

The Supreme Court unanimously dismisses the newspaper publishers' appeals. Lord Neuberger gives the lead judgment, with which the other Justices agree.

REASONS FOR THE DECISION

The reasoning of the Strasbourg court in *MGN v UK* was full, careful and largely soundly based, and reflected widespread criticism of the 1999 Act regime which has led to significant changes **[32 and 41]**. However, as the UK Government is not a party to these appeals, it would be inappropriate to express a concluded view as to whether there is a general rule of domestic law that it would normally infringe a newspaper publisher's rights under Article 10 to require it to reimburse the claimant's success fee and ATE premium in a defamation or privacy case, unless it was necessary so to decide, and it is not **[29]**. It would be similarly inappropriate to grant a declaration of incompatibility of legislation containing the 1999 Act regime or the statutes which supersede it **[64]**.

Assuming that there is such a general rule, to deny the claimants in *Miller* and *Flood* the ability to recover the success fee and ATE premium which they had incurred would infringe their rights under Article 1 of the First Protocol to the Convention. They had incurred financial obligations in reliance on a statute and had a legitimate expectation that the statute would not be retrospectively repealed or otherwise invalidated to their detriment **[46-48]**. It may be that the claimants' Article 6 and 8 rights would also thereby be infringed as the regime aimed to enable access to the courts, and the present proceedings were brought to restore personal dignity **[49-52]**. Even if upholding the costs order in *Miller* and *Flood* would infringe the newspaper publishers' article 10 rights for the reasons given in *MGN v UK*, the fundamental principle that citizens are entitled to assume that the law will not change retroactively would be directly infringed by the order sought. Freedom of expression is also a fundamental principle, but one which is less centrally engaged by the issue in this case: the infringement of the newspaper publishers' rights is based on an indirect chilling effect **[53]**. The just and appropriate order under section 8(1) of the Human Rights Act is therefore to dismiss the appeals, as to allow them would be a graver infringement of the claimants' rights than the infringement which the newspaper publishers will suffer if the appeals are dismissed **[53-54]**. In the appeal in *Frost*, such a rule could in any event have no proper application to facts. The information was obtained illegally and there could have been no real expectation that its publication would be in the public interest. The Article 10 rights of the newspaper publishers have greatly reduced weight in this context as compared with those of MGN in *MGN v UK* **[58-63]**.

The trial judge in *Flood* was correct to start with the proposition that, *prima facie,* Mr Flood was the winner and ought to receive his costs **[67]**. In considering whether to alter this, the judge was entitled to regard TNL's aggressive and unconstructive attitude in correspondence as militating against departure **[70-71]**, and to find that the costs of TNL's defence would have been incurred even if Mr Flood had conceded the part of his claim that was eventually unsuccessful **[73]**. The weight to be given to the fact that Mr Flood was only partially successful was a matter for the first instance judge, as was the decision to award costs on the basis that he was the overall winner rather than making an issues-based order **[74]**.

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html