



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

FOURTH SECTION

CASE OF COVENTRY v. THE UNITED KINGDOM

(Application no. 6016/16)

JUDGMENT

Art 6 § 1 (civil) • Equality of arms • Excessive and arbitrary burden on unsuccessful uninsured defendants in conditional fee arrangement litigation due to recoverability of success fees and insurance premiums

Art 1 P1 • Peaceful enjoyment of possessions • Scheme exceeding the wide margin of appreciation accorded to the State in matters of social and economic policy

STRASBOURG

11 October 2022

FINAL

06/03/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Coventry 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,

Iulia Antoanella Motoc,

Armen Harutyunyan,

Pere Pastor Vilanova,

Jolien Schukking, *judges*,

and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the application 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 British national, Mr David Michael Coventry (“the applicant”), on 20 January 2016;

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

the parties’ observations;

Having deliberated in private on 20 September 2022,

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

INTRODUCTION

1. The applicant was an unsuccessful defendant in a nuisance action which the claimants had funded through a conditional fee arrangement (a “CFA”, or “no win no fee” agreement) and “after the event” insurance (“ATE insurance”), which was intended to underwrite their liability to pay the defendants’ costs. He complains under Article 6 of the Convention and Article 1 of Protocol No. 1 about the fact that, by virtue of the Access to Justice Act 1999, the order for costs made against him included both the “success fees”, intended to compensate lawyers working under a CFA for unsuccessful cases for which they would not be paid, and the ATE premium.

THE FACTS

2. The applicant was born in 1954 and lives in Romford. He was initially represented before the Court by Ms J. Pooley of Pooley, Bendall & Watson Solicitors, a firm of solicitors based in Isleham. From June 2020 he has been represented by Mr S. Kokelaar of Three Stone Chambers. The United Kingdom Government (“the Government”) were represented by their Agents, Mr C. Wickremasinghe and Mr S. Linehan of what is now the Foreign, Commonwealth and Development Office.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE NUISANCE PROCEEDINGS

4. The applicant owned the freehold of a stadium which was used for various motor sports. In 2009 the owners of a house situated close to the stadium issued nuisance proceedings against the applicant and a number of other defendants. At first instance, the judge found that the operation of activities at the stadium constituted a noise nuisance to the claimants and granted them an injunction limiting the levels of noise which could be emitted from the site. In addition to the injunction, he awarded damages against the applicant and the third and sixth defendants in the sum of 10,325 British pounds (GBP), GBP 10,425 and GBP 100 respectively. The judge further ordered that the applicant and the third defendant pay 60% of the claimants' costs subject to detailed assessment.

5. The Court of Appeal quashed the judge's finding of nuisance, but the Supreme Court allowed the claimants' appeal and restored the judge's original order, including the order for costs. The Supreme Court ordered a further hearing to deal with a number of consequential matters, including whether the order for costs infringed either Article 6 of the Convention or Article 1 of Protocol No. 1. This hearing took place on 12 May 2014 and judgment was given on 23 July 2014.

II. THE COSTS ISSUE

6. Prior to 1995, the only means of funding litigation (apart from legal aid) was to agree an ordinary retainer with a lawyer. However, section 58 of the Courts and Legal Services Act 1990 ("the 1990 Act" – see paragraphs 30-33 below) permitted lawyers, for the first time, to enter into a conditional fee arrangement (a "CFA", or "no win no fee" agreement), under which the lawyer was only to be paid if a client won a case. In return for agreeing to act on a CFA, the lawyer could receive a percentage uplift to his fees (otherwise known as a "success fee"). The riskier the claimant's case, the higher the percentage uplift the lawyer could legitimately charge. At the same time that CFAs were introduced, "after the event" insurance ("ATE insurance") was developed. A person involved in, or contemplating, litigation could pay an insurer an ATE premium to underwrite his liability to pay the costs of another party.

7. Neither success fees nor ATE premiums were recoverable from the losing party under the 1990 Act. However, the Access to Justice Act 1999 ("the 1999 Act" – see paragraphs 34-38 below) provided that an order for costs made by a court against a losing party could include both the success fees payable under a CFA and any ATE premium. The Civil Procedure Rules

(“CPR” – paragraphs 39-40 below) were amended accordingly. Rule 44.4 provided that the court would only allow costs, including any additional liability incurred under a funding arrangement, which were proportionate to the matters in issue. The CPR were supplemented by a Costs Practice Direction (“CPD” – see paragraph 41 below). Pursuant to the CPD, in deciding whether the costs claimed were reasonable and proportionate, the court had to consider the amount of any additional liability separately from the base costs, and success fees could not be reduced simply on the ground that, when added to base costs which were reasonable and proportionate, the total appeared disproportionate.

8. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (see paragraph 49 below) subsequently abolished the recoverability of success fees and ATE premiums from the losing party. However, the 1999 Act scheme applied to the present case. Therefore, as the claimants had engaged their lawyer under a CFA, the applicant and third defendant were liable to pay 60% of their base costs, success fees, and ATE premiums. In its judgment of 22 July 2015 the Supreme Court noted that the claimants’ base costs at first instance amounted to GBP 307,642; the 100% success fee amounted to GBP 215,007; and the ATE premium was in the region of GBP 305,000. Furthermore, the claimants’ base costs in the Court of Appeal and Supreme Court were GBP 103,457 and GBP 204,226, respectively; their success fees were GBP 71,770 in the Court of Appeal and GBP 92,115 in the Supreme Court; and their ATE premiums were GBP 70,141 in the Court of Appeal and GBP 126,588 in the Supreme Court.

III. THE SUPREME COURT JUDGEMENT OF 23 JULY 2014

9. Before the Supreme Court the applicant, together with the third defendant, argued that the order that they pay 60% of the success fee and the ATE premium had infringed both Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention. Although they anticipated challenging the base costs on the ground that they were not reasonably and proportionately incurred, they conceded that the recovery of base costs by a winning party was in principle a lawful interference with Article 6 and Article 1 of Protocol No. 1. They accepted that the costs scheme under the 1999 Act had a legitimate aim, but in their submission it was – as demonstrated by the judgment of the European Court of Human Rights in *MGN Limited v. the United Kingdom* (no. 39401/04, 18 January 2011) – an unjustified and irrational means of achieving that aim.

10. The Supreme Court considered that it would be inappropriate for it to consider whether the costs awarded against the applicant and third defendant infringed either Article 6 or Article 1 of Protocol No. 1 without giving the Government an opportunity to address it on the issue. It therefore adjourned the issue for further hearing.

11. However, in his leading judgment, Lord Neuberger of Abbotsbury, the President of the Supreme Court, observed that the level of costs in the case were “very disturbing”. He continued:

“They give rise to grave concern even if one ignores the success fee and ATE premium. The fact that it can cost two citizens £400,000 in legal fees and disbursements to establish and enforce their right to live in peace in their home is on any view highly regrettable. The point is reinforced when one takes into account the value of their home, which is less than £300,000 (coupled with the effect of the nuisance on that value, £74,000 at the most) and the fact that there will have been very significant further “base costs” incurred as a result of four-day appeals in the Court of Appeal and this Court. The point can equally forcefully be made from the point of view of the respondents. As relatively small business operators, they are not only having to fund their own costs, which presumably would be of the same order, but in addition they are going to have to pay some £240,000 towards the appellants’ costs. It is true that the respondents lost, but they were seeking to defend their businesses and they plainly had a reasonable case, as is evidenced by the fact that they won in the Court of Appeal.

... ..

The amount of the base costs in this case is however dwarfed by the total potentially recoverable costs, which are nearly three times as much. The figures illustrate the malign influence of the amendments made to the 1990 Act by Part II of the 1999 Act, and as implemented through CPR rule 44 and CPR44 PD – now fortunately repealed and replaced by the provisions of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, following Sir Rupert Jackson’s *Review of Civil Litigation Costs* (2010), referred to above. As Sir Rupert pointed out in his *Review*, and as is explained in *Zuckerman on Civil Procedure Principles and Practice* (3rd ed 2013), the system introduced in 1999 had a number of unique and regrettable features, four of which are worth mentioning for present purposes. First, claimants had no interest whatever in the level of base costs, success fee or ATE premium which they agreed with their lawyers, as, if they lost they had to pay nothing, and if they won the costs would all be paid by the defendants, who, on the other hand, had no say about the costs (other than retrospectively on an assessment). Secondly, in many cases, unsuccessful defendants found themselves paying, in addition to the whole of their own costs, three times the claimants’ ‘real’ costs. Thirdly, while proportionality had a part to play when assessing the recoverability of base costs (albeit a limited part – see *Home Office v Lownds* [2002] 1 WLR 2450), it was excluded from consideration in relation to the recovery of success fee or ATE premium (which were simply required to be reasonable) – see CPR44 PD, paras 11.7-11.10. Fourthly, the stronger the defendants’ case, the greater their liability for costs would be if they lost, as the size of the success fee and the ATE premium should have reflected the claimants’ prospects of success.”

IV. THE SUPREME COURT JUDGEMENT OF 22 JULY 2015

12. Before the Supreme Court the applicant and the third defendant contended that the 1999 Act scheme was incompatible with both Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention. They recalled that in his *Review of Civil Litigation Costs* (“the Jackson review” – see paragraphs 46-48 below) Jackson LJ had identified four “flaws” in the scheme: namely, its lack of focus and the lack of qualifying requirements for being allowed to enter into a CFA; the absence of any incentive for claimants

to control the incurring of legal costs and the fact that judges only assessed costs at the end of a case when it was too late to control costs that had been spent; the “blackmail” or “chilling” effect which drove parties to settle early despite good prospects of a defence; and the fact that it gave lawyers the opportunity to “cherry pick” winning cases to conduct on CFAs. In *MGN Limited* (cited above, § 217) the Court had considered these flaws to be sufficiently serious to conclude that the impugned scheme exceeded even the broad margin of appreciation to be accorded to the State in respect of general measures pursuing social and economic interests, and therefore held that it was incompatible with Article 10 of the Convention. The applicant and third defendant argued that the same reasoning necessarily required the Supreme Court to hold that the scheme was also incompatible with Article 6 and Article 1 of Protocol No. 1.

13. That being said, the applicant and third defendant contended that the real vice of the scheme lay in the CPD (see paragraph 41 below), which based the assessment of CFA uplifts and ATE premiums exclusively on the *ex ante* perspective of the CFA/ATE party (CPD 11.7), and expressly disallowed any reduction on the basis that the overall total of base costs and uplifts appeared to be disproportionate (CPD 11.9). It was therefore their contention that the scheme could be rendered compatible with Article 6 and Article 1 of Protocol No. 1 if CPD 11.9 were read down in accordance with section 3 of the Human Rights Act 1998 so as to provide a scheme incorporating provisions requiring considerations of all circumstances, including the proportionality of the total of base costs and uplifts and premiums, and the circumstances of the payer, including his means, whether he was insured, the importance of fighting the case and his reasonableness in fighting the case.

14. By a majority of five to two, the Supreme Court rejected the submissions of the applicant and third defendant. The leading judgment was handed down by Lord Neuberger and Lord Dyson (with whom Lord Sumption and Lord Carnwath agreed). Lord Neuberger and Lord Dyson distinguished *MGN Limited*, since in that case the Court’s criticisms of the system had been made in the Article 10 context, and it had always given particular weight to freedom of expression. The present complaint was therefore of a “wholly different character”. They further noted that of the four “flaws” identified in the Jackson review and referred to by the Court in *MGN Limited*, only the third – that is, the “blackmail” or “chilling” effect of the scheme which could drive parties to settle early despite good prospects of a defence, and which was also identified by Lord Neuberger in the Supreme Court judgment of 23 July 2014 as one of the scheme’s “unique and regrettable features” (see paragraph 11 above) – could have adversely affected the Article 6 or Article 1 of Protocol No. 1 rights of opposing parties. It was this “flaw” which lay at the heart of the present case.

15. Lord Neuberger and Lord Dyson accepted that under the 1999 Act costs awarded to successful claimants who had the benefit of CFAs could be

very high indeed, and therefore had the potential to place opposing parties under considerable pressure to settle. Consequently, they accepted that “in a number of individual cases, the system might be said to have interfered with a defendant’s right of access to justice”. However, having regard to the approach adopted by the Court towards general measures in cases such as *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08, ECHR 2013 (extracts)), they noted that the system as a whole was a rational and coherent scheme for providing access to justice to those to whom it would probably otherwise have been denied, it had been made following wide consultation, and it fell within the area of discretionary judgment afforded to legislators and rule-makers.

16. Nevertheless, given that the Court had rejected such an argument in *MGN Limited*, albeit in the Article 10 context, Lord Neuberger and Lord Dyson proceeded to examine the position more critically. They observed that in creating the scheme the Government had been trying to find a solution to the problem created by the constraining of civil legal aid in 1999, but it proved impossible to come up with a solution that would meet with universal approval. However, the potential unfairness of the 1999 Act scheme was mitigated by the fact that district judges and costs judges would perform the role of “watchdog” to check any practices which might undermine its fairness. Thus, base costs were to be assessed by the court, having regard to their proportionality and reasonableness. As to any additional liability, a successful litigant was only entitled to a reasonable success fee and ATE premium. In an appropriate case, the court could make a cost-capping order, and defendants could themselves enter into CFAs and take out ATE insurance.

17. Lord Neuberger and Lord Dyson considered whether, in assessing costs under the 1999 Act scheme, courts should be required to take into account all the circumstances, including the proportionality of the total base costs, uplifts and premiums, and all of the payer’s circumstances. However, they found that such a requirement would have imperilled the whole scheme, since lawyers would have been unwilling to enter into CFAs for fear that, even if successful, the agreed uplift could be reduced or disallowed on assessment. Furthermore, since ATE insurance was integral to the provision of access to justice, if a premium was necessarily incurred it had to be regarded as proportionate. Finally, any requirement that the assessment of total costs take into account the financial position of the paying party would likely lead to satellite litigation, with the expenses, delays and uncertainties which such litigation normally involves.

18. For these reasons, Lord Neuberger and Lord Dyson were satisfied that the 1999 Act scheme struck a fair balance between the interests of different litigants. In reaching this conclusion, they noted that the merits of the applicant and third defendant’s case – that is, that they were individuals or small undertakings carrying on modest businesses without insurance and

faced with one-off litigation which involved them in eye-catchingly large costs exposure – were largely “untested”. In particular, there had been no investigation into whether they had, or could have had, insurance against nuisance.

19. Finally, with regard to remedy, Lord Neuberger and Lord Dyson noted that even if it had been possible to read down the CPD in the manner suggested by the applicant and third defendant, it would have been wrong to do so since litigants and their lawyers had a legitimate expectation that the court would not decide (at least not without reasonable notice) that additional liabilities were incompatible with the Convention. To find otherwise would have a serious impact on many thousands of ongoing cases to which the 1999 Act scheme still applied.

20. Lord Mance, with whom Lord Carnwath also agreed, similarly rejected the challenge of the applicant and the third defendant. He agreed with Lord Neuberger and Lord Dyson that the scheme had to be considered as a whole. He observed that the present case was an extreme and unusual one, and that it would be difficult to conceive of any solution that would cater for such cases without imperilling the whole scheme. Furthermore, the scheme had been endorsed by domestic courts for over a decade, and litigants and lawyers had justifiably relied on its validity. Therefore, legal certainty, consistency and the legitimate expectations generated all militated in favour of the Supreme Court upholding the scheme.

21. Lord Clarke of Stone-Cum-Ebony (with whom Baroness Hale of Richmond agreed) disagreed with the majority, finding that the principles identified by the Court in *MGN Limited* in the context of Article 10 applied also to this case, where the applicant and third defendant were relying on their right of access to justice and to a fair trial under Article 6 and/or their right to protection of property under Article 1 of Protocol No. 1. For him, it was discriminatory and disproportionate to burden uninsured defendants with costs which vastly exceeded the fair and reasonable costs incurred by the claimant in order to encourage solicitors to act for other claimants in cases where the claim might fail. In particular, he noted that the way in which the success fee was calculated compounded the inequality and unfairness because the magnitude of the reasonable success fee was in inverse proportion to the strength of the claimant’s case: the riskier the claimant’s case, the greater the success fee his lawyer could legitimately charge. It therefore followed that the stronger the defendant’s prospect of success, the more he would have to pay the claimant in the event that the claimant won.

22. In addition, Lord Clarke considered it “a striking feature of a CFA” that it was available to rich as well as poor applicants. Thus, it was not only a means of providing access to justice for those who could not otherwise afford it, but also a “risk free means of providing access to lawyers for those who could fund it in other ways”. Whereas the claimant had a choice about whether to go to court, once that choice was made, the defendant had no

choice not to take part. Moreover, since ATE insurance was usually only available to litigants whose chances were “better than evens”, if the claimant had ATE insurance, the defendant would have little or no chance of obtaining it.

23. In Lord Clarke’s view,

“The system was arbitrary. It singled out from the class of unsuccessful litigants a subset of those who happened to have been opposed by CFA/ATE-funded litigants and imposed on that subset the burden of funding other unsuccessful cases which did not involve them at all. The real vice of the system lay in the CPD, which, so far as relevant, is quoted by Lord Neuberger and Lord Dyson in para 25 above. Paragraph 11.7 based the assessment of CFA uplifts and ATE premiums exclusively on the *ex ante* perspective of the CFA/ATE party; and para 11.9 expressly disallowed any reduction on the basis that the overall total of base costs and uplifts appeared to be disproportionate. Decisions on uplift therefore disregarded the financial circumstances of the payer, the importance to the payer of fighting the case and the reasonableness of his decision to fight.

The system was not redeemed by the fact that costs were subject to assessment at the end of the proceedings. By that stage, it was too late to control what was being spent. Nor is it an answer to say that the court had the power to cap the costs of a CFA-funded and ATE insurance-protected party at an early stage.”

24. Finally, with regard to remedy, Lord Clarke observed that it was the court’s duty to balance competing rights. The expectations of litigants were one factor relevant to this balancing exercise, but could not render proportionate the discriminatory treatment of a particular class of defendant. In this regard, although it was true that the strength of the applicant and third defendant’s claims were untested, they represented that class of defendant towards whom the scheme was discriminatory, disproportionate and disregarded their rights.

V. THE COSTS ASSESSMENT

25. The applicant’s liability for the claimants’ costs in the High Court and the Court of Appeal was assessed by the domestic courts on 14 September 2017. The applicant did not dispute the claimants’ bill of costs. A default costs certificate was issued ordering the applicant and the third defendant to pay the total sum of GBP 623,203.61 to the claimants in respect of their costs before the High Court; and GBP 223,634.66 in respect of their costs before the Court of Appeal. Before the High Court, the costs payable by the applicant and the third defendant included a success fee uplift of 100% on solicitors costs (GBP 74,176.49); a success fee uplift of 100% on counsel’s fee (GBP 102,528); and an ATE premium (GBP 212,422.32). Before the Court of Appeal, the costs payable by the applicant and the third defendant included a success fee uplift of 100% on solicitors costs (GBP 34,768.92); a success fee uplift of 100% on counsel’s fee (GBP 24,660); and an ATE premium

(GBP 77,643.98). The applicant and the third defendant were jointly and severally liable for these sums.

26. On the date of the latest information available to the Court (15 July 2020), the precise extent of the applicant's liability for success fees and ATE premiums incurred before the Supreme Court remained to be determined.

VI. SUBSEQUENT DEVELOPMENTS

27. The third defendant was placed in a creditors' voluntary liquidation on 12 December 2014 and the company was dissolved on 11 December 2015. The only asset in the liquidation was cash in the sum of GBP 4,200, which was applied to the cost of the liquidation.

28. On 9 February 2021 the applicant's representative informed the Court that the lawyers who previously acted for the claimants in the noise nuisance proceedings had initiated legal proceedings in the Queen's Bench Division of the High Court on behalf of the applicant against Zurich Insurance Plc and Jelf Insurance Brokers Limited, who were successors to the applicant's brokers in 2009. In these proceedings it was asserted on behalf of the applicant that the policy wording covered the noise nuisance claim; and that Jelf's predecessors negligently failed to make a claim on the policy in 2009 and wrongly informed the applicant that the policy did not cover the noise nuisance claim brought against him by the claimants. According to the particulars of claim, the applicant and his representatives had contacted his insurance broker in 2009 to ask about insurance cover in respect of the claim made against him. In response, the broker had informed him that he had notified the insurer of the claim but that the insurance policies did not provide relevant cover in respect of it.

29. Those proceedings are still ongoing.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE COURTS AND LEGAL SERVICES ACT 1990

30. Section 58 of the Courts and Legal Services Act 1990 ("the 1990 Act") permitted lawyers in England and Wales, for the first time, to enter into CFAs (see *MGN Limited*, cited above, § 90). Section 17(1) of the 1990 Act stated that the general objective behind the change was the development of legal services in England and Wales "by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice".

31. At the same time as CFAs were being developed under the new statutory scheme, the Law Society developed ATE insurance, which enabled

a person involved in, or contemplating, litigation to insure against the risk that he would have to pay the costs of another party.

32. Success fees and ATE premiums were not recoverable from the losing party under the 1990 Act.

33. In *Callery v. Gray* (No. 1) [2001] EWCA Civ 1117, a case concerning personal injury litigation, Lord Woolf identified two problems which the 1990 Act was designed to cure:

“The introduction of the legislation which made conditional fees lawful was motivated primarily by two problems in relation to the provision of legal aid for civil litigation. The first was that progressively fewer members of the public were eligible for legal aid to bring civil proceedings. It was thought that the introduction of CFAs would have the effect of enabling those who could not afford to bring proceedings without the benefit of legal aid to do so. The second problem was that the cost of providing legal aid was growing year on year. Accordingly, the Government decided to reduce the areas of litigation which were funded by legal aid. It was considered that this would not reduce access to justice since those affected could bring proceedings using CFAs. The reason for reducing the areas of litigation eligible for legal aid was not, it was said, to reduce expenditure overall but rather to use the funds saved thereby to meet the need for publicly funded legal services to be provided in a different manner.”

II. THE ACCESS TO JUSTICE ACT 1999

34. In March 1998 the Government published a consultation paper entitled “Access to Justice with Conditional Fees”, in which it indicated that wider use of CFAs and ATE insurance would promote access to justice. The majority of those who responded to the consultation supported the proposal that both the success fee and ATE premium should be recoverable.

35. In December 1998 the Government published a White Paper, entitled “Modernising Justice”, in which it stated that it had decided to make it possible for the successful party to recover the success fee and ATE premium from the unsuccessful party in order to “make conditional fees more attractive and fairer, and allow respondents and appellants whose case is not about money to use them. This will be a further radical expansion of access to justice”.

36. The Access to Justice Act 1999 (“the 1999 Act”) gave effect to this policy decision (see *MGN Limited*, cited above, § 92). In particular, it added a new section 58 and a section 58A to the 1990 Act. Section 58A(6) and (7) provided as follows:

“(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.

(7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee).”

37. As to the recoverability of ATE premiums, section 29 of the 1999 Act provided:

“Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.”

38. In *Callery v. Gray* [2002] UKHL 28, Lord Bingham described the three key aims of the funding regime under the 1999 Act as follows:

“2. ... One aim was to contain the rising cost of legal aid to public funds and enable existing expenditure to be refocused on causes with the greatest need to be funded at public expense, whether because of their intrinsic importance or because of the difficulty of funding them otherwise than out of public funds or for both those reasons. A second aim was to improve access to the courts for members of the public with meritorious claims. It was appreciated that the risk of incurring substantial liabilities in costs is a powerful disincentive to all but the very rich from becoming involved in litigation, and it was therefore hoped that the new arrangements would enable claimants to protect themselves against liability for paying costs either to those acting for them or (if they chose) to those on the other side. A third aim was to discourage weak claims and enable successful defendants to recover their costs in actions brought against them by indigent claimants.”

III. THE CIVIL PROCEDURE RULES

39. The Civil Procedure Rules (“CPR”) were amended by the Civil Procedure (Amendment No. 3) Rules 2000 to reflect the new approach to CFAs and ATE premiums (see *MGN Limited*, cited above, § 93). CPR Rule 44.4 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”

40. Rule 44.5 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.”

IV. COSTS PRACTICE DIRECTION

41. As envisaged by the amendments that were made to the CPR, an amended costs practice direction was promulgated to supplement CPR Parts 43 to 48 (“the CPD”) in order to give effect to section 58A(6) and (7) of the 1999 Act (see paragraph 36 above; see also *MGN Limited*, cited above, § 94). Paragraph 9.1 of the CPD stated that

“[u]nder an order for payment of ‘costs’ the costs payable will include an additional liability incurred under a funding arrangement.”

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:

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- (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."

42. Pursuant to paragraph 23A.1, the court would only make a cost-capping order in exceptional circumstances.

V. *LOWDNS V. HOME OFFICE* (PRACTICE NOTE) [2002] 1 WLR 2450

43. In *Lownds* the Court of Appeal gave guidance on the application of proportionality in an assessment of costs on the standard basis. It adopted the following approach:

"In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate spend on the various stages in bringing the action to trial and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality."

44. The court then continued:

"... what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will

want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This in turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.”

45. In *Rogers v. Merthyr Tydfil County Borough Council (Law Society Intervening) (Practice Note)* [2007] 1 WLR 808 the Court of Appeal adopted the *Lownds* approach in assessing whether an ATE premium was recoverable by a successful claimant. If the premium was necessarily incurred, it was proportionate, even if it was disproportionately high compared with the amount of damages reasonably claimed. The domestic courts similarly accepted that a success fee that was reasonable in amount was also necessary and, therefore, proportionate. In determining reasonableness, the courts had to consider whether it was proportionate to the litigation risk. A success fee proportionate to the risk of going unpaid was calculated by dividing the risk of losing by the prospect of winning and multiplying the product by 100 to yield a percentage (see, for example, *Atack v. Lee* [2005] 1 WLR 2643). Thus, if a solicitor only had a 50% chance of earning payment by winning, it was considered commercially appropriate for him to charge a success fee of 100%.

VI. THE JACKSON REVIEW

46. 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 (see *MGN Limited*, cited above, §§ 111-15).

47. 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. 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.

48. 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, the consequence of which was to generate disproportionate costs:

“(a) First flaw

4.8 Any person, whether rich or poor and whether human or corporate, is entitled to enter into a CFA and take out ATE insurance. All that such a person needs to do is to find willing solicitors and willing insurers. This gives rise to anomalies and unintended consequences on a grand scale. ...

... ..

4.12 The first flaw in the recoverability regime is that it is unfocused. There is no eligibility test for entering into a CFA, provided that a willing solicitor can be found.

(b) Second flaw

4.13 The second flaw is that the party with a CFA generally has no interest in the level of costs being incurred in his or her name. Whether the case is won or lost, the client will usually pay nothing. If the case is lost, the solicitors waive their costs and pay the disbursements, in so far as not covered by ATE insurance. If the case is won, the lawyers will recover whatever they can from the other side either (a) by detailed or summary assessment or (b) by negotiation based upon the likely outcome of such an assessment.

4.14 This circumstance means that the client exerts no control (or, in the case of a no win, low fee agreement, little control) over costs when they are being incurred. The entire burden falls upon the judge who assesses costs retrospectively at the end of the case, when it is too late to “control” what is spent.

(c) Third flaw

4.15 The third flaw in the recoverability regime is that the costs burden placed upon opposing parties is excessive and sometimes amounts to a denial of justice. If one takes any large block of cases conducted on CFAs, the opposing parties will end up paying more than the total costs of both parties in every case, regardless of the outcome of any particular case.

4.16 If the opposing party contests a case to trial (possibly quite reasonably) and then loses, its costs liability becomes grossly disproportionate. Indeed the costs consequences of the recoverability rules can be so extreme as to drive opposing parties to settle at an early stage, despite having good prospects of a successful defence. This effect is sometimes described as “blackmail”, even though the claimant is using the recoverability rules in a perfectly lawful way.

(d) Fourth flaw

4.17 If claimant solicitors and counsel are successful in only picking “winners”, they will substantially enlarge their earnings... As the Senior Costs Judge explained... it is not possible for costs judges effectively to control success fees retrospectively.

4.18 Of course, not all lawyers are good at picking winners and some suffer losses on that account. Nevertheless, one repeated criticism of the recoverability regime which I have heard throughout the Costs Review, is that some claimant lawyers “cherry pick”. In other words they generally conduct winning cases on CFAs, they reject or drop at an early stage less promising cases and thus generate extremely healthy profits. Obviously the financial records of individual solicitors firms and barristers are confidential. Moreover, even if one such set of accounts were made public, that would tell us nothing about all the others. Nevertheless, the one point that can be made about the CFA regime is that it presents the opportunity to cherry pick. If lawyers succumb to that temptation, they will greatly increase their own earnings and they will do so in a manner which is entirely lawful.

4.19 Having worked in the legal profession for 37 years, I have a high regard for my fellow lawyers, both solicitors and counsel. The fact remains, however, that lawyers are human. As Professor Adrian Zuckerman has forcefully pointed out both during the Woolf Inquiry and during the present Costs Review, work tends to follow the most remunerative path. In my view, it is a flaw of the recoverability regime that it presents

an opportunity to lawyers substantially to increase their earnings by cherry picking. This is a feature which tends to demean the profession in the eyes of the public.”

VII. LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

49. As a direct result of the criticisms of the 1999 Act scheme made in the Jackson review, section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) abolished the recoverability of success fees and ATE premiums from the losing party. However, although section 44 of LASPO was brought into force in April 2013, the Commencement Order did not bring it into force in respect of publication and privacy proceedings. In 2018 a further Commencement Order abolished the recoverability of success fees in publication and privacy proceedings, although ATE premiums continue to be recoverable in such proceedings.

VIII. *FLOOD V. TIMES NEWSPAPERS LTD (NO. 2)*, *MILLER V. ASSOCIATED NEWSPAPERS LTD AND FROST AND OTHERS V. MGN LTD* (NO. 2) [2017] UKSC 33

50. In this case, three newspapers had been sued by claimants with CFAs and ATE insurance. The cases were heard by the Supreme Court, which was asked to consider whether the Court’s judgment in *MGN Limited* (cited above) laid 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.

51. The Supreme Court handed down its judgment on 11 April 2017. In the leading judgment, Lord Neuberger of Abbotsbury PSC, with whom Lord Mance, Lord Sumption, Lord Hughes and Lord Hodge JJSC agreed, did not consider it appropriate to determine whether *MGN Limited* laid down such a general rule. In his view, even if such a general rule existed, in the cases at hand it would be wrong to deprive the claimants 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. According to the Supreme Court, 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 it was in the Court’s judgment in *MGN Limited*, which was based on the indirect chilling effect on freedom of expression of a very substantial costs order.

IX. *R (ON THE APPLICATION OF UNISON) V. LORD CHANCELLOR*
[2017] UKSC 51

52. The applicant in this case was a trade union. It argued that the making of an Order requiring claimants to pay a fee in order to pursue proceedings before the Employment Tribunal and Employment Appeals Tribunal was not a lawful exercise of the Lord Chancellor's statutory powers, because, *inter alia*, the prescribed fees interfered unjustifiably with the right of access to justice under both the common law and EU law. The Supreme Court unanimously found the Order to be unlawful under both domestic and EU law because it had the effect of preventing access to justice. In reaching this conclusion, the court stressed that the constitutional right of access to the courts was inherent in the rule of law. In order for the national courts to apply and enforce the law, people in principle had to have unimpeded access to them:

“68. At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

53. The applicant complained that the recovery of the success fees and ATE premium under a CFA constituted a disproportionate interference with his rights under Article 6 of the Convention, in particular his right of access to a court and the principle of equality of arms.

54. In so far as relevant, Article 6 § 1 of the Convention reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

1. *Victim status*

(a) The Government's objection of lack of victim status

55. The Government submitted that the applicant was not a “victim” for the purposes of Article 34 of the Convention. While they accepted that in principle Article 6 could be engaged by the 1999 Act regime in a limited range of circumstances, for example, where a party was strong-armed into settling at an early stage despite having good prospects of a successful defence, there was no evidence that the applicant was himself placed at any such disadvantage. He participated actively in a full trial on the merits and in successive appeals. At all times, he had the benefit of solicitors and leading and junior counsel. He evidently did not feel strong-armed into settling, and there was no evidence to suggest that he was deterred from making an offer to settle by the existence of a CFA or an ATE policy. Finally, it would have been open to the applicant to himself enter into a CFA or ATE policy.

56. Referring to the ongoing proceedings against the insurance companies (see paragraphs 28 and 29 above), the Government argued that it would clearly be relevant to the balancing exercise under both Article 6 and Article 1 of Protocol No. 1 if the applicant had benefited from an insurance policy covering his costs in the proceedings, since that balancing exercise had to be undertaken with reference to the specific circumstances of the case. The extent of any interference with the applicant's Article 6 rights was necessarily diminished if he did not personally bear the risk of meeting a costs order. The High Court proceedings made clear that either the applicant in fact was covered by such a policy or at the very least would have been able to obtain one, since no arguable claim could be brought in the first instance if obtaining such coverage would not have been possible.

57. The applicant argued that the Government's objection was misconceived. First of all, if – as the Supreme Court held – the scheme was to be considered as a whole, it did not matter whether he was in fact able to present his case. In any event, he had explored the possibility of settling the case on various occasions but a significant factor which prevented settlement was the claimants' insistence that their rapidly escalating costs be paid in full.

58. Although the applicant's representatives were sceptical about his prospect of success in his claim against the insurers (see paragraphs 28 and 29 above), they submitted that even if he were to succeed the existence of insurance would have no impact on his contention that the legislative scheme and rules of court governing the recoverability of the success fee and ATE premium were in principle incompatible with his Convention rights.

(b) The Court's assessment*(i) As concerns the access to court complaint*

59. The Court recalls that it has interpreted the right of access to court as “the right to have a claim relating to ... civil rights and obligations brought before a court” (see, for example, *Zubac v. Croatia* [GC], no. 40160/12, § 76, 5 April 2018). It has acknowledged that the imposition of a considerable financial burden on a claimant after the conclusion of proceedings could act as a restriction on the right of access to a court (see *Stankov v. Bulgaria*, no. 68490/01, § 54, 12 July 2007, *Klauz v. Croatia*, no. 28963/10, § 77, 18 July 2013 and *Dragan Kovačević v. Croatia*, no. 49281/15, § 70, 12 May 2022). This is because such a financial burden could discourage potential litigants from bringing claims before the courts (see *Klauz*, cited above, 81; see also *Taratukhin v. Russia* (dec.), no. 74778/14, § 34, 15 September 2020). Unlike claimants, defendants generally have no choice regarding their initial involvement in litigation and thus the rationale for finding that an award of costs at the end of proceedings could act as a restriction on their right of access to court cannot apply to them with equal force (see, for example, *Stankiewicz v. Poland*, no. 46917/99, ECHR 2006 VI, in which the Court considered that while a prosecutor’s privileged position with respect to the costs of civil proceedings was relevant to its overall assessment of the fairness of those proceedings, the defendants’ right of access to court was not concerned). The Court would not exclude the possibility that a potentially significant award of costs at the end of the proceedings might, in certain circumstances, be capable of restricting even a defendant’s right of access to Court, particularly in the context of appellate proceedings. In *Benghezal v. France* (no. 48045/15, 24 March 2022) the Court held that an order that the applicant pay EUR 2,000 to a civil party for the costs incurred defending his unsuccessful appeal before the Court of Cassation disproportionately interfered with his right of access to court. However, the facts of that case were somewhat unusual; although the applicant had lost the appeal he nevertheless argued successfully that the lower court had violated the presumption of innocence. The Court noted that the appeal was his only available and effective means to obtain redress for the breach of the presumption of innocence and the Court of Cassation had not been obliged to make the order it did (*ibid*, § 47). In other cases, however, the Court has preferred to deal with complaints concerning the imposition of costs orders within the framework of its assessment as to whether the proceedings as a whole complied with the requirements of Article 6 § 1 of the Convention (see *Stankiewicz*, cited above, § 60 and *Karahasanoglu v. Turkey*, nos. 21392/08 and 2 others, § 135, 16 March 2021). In view of the fact that the applicant in the present case participated actively, with the benefit of legal representation, at every stage of the proceedings, the Court does not consider that any “access to court” issue arises. Rather, it considers the principal issue in the case at

hand to be the impact of the recoverability of the success fees and ATE premiums on the overall fairness of the proceedings, having particular regard to the principle of equality of arms.

60. Consequently, the Court considers that insofar as the applicant invokes the right of access to a court, he cannot claim to be a “victim” within the meaning of Article 34 of the Convention. This complaint must therefore be declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

(ii) As concerns the equality of arms complaint

61. In the Court’s view, in respect of the applicant’s complaint that the principle of equality of arms was violated in his case the Government’s objection of lack of victim status is so closely linked to the substance that it should be joined to the merits.

2. Other inadmissibility grounds

62. The Government further submitted that the applicant’s complaint was manifestly ill-founded. However, the Court is of the opinion that the complaint concerning the alleged infringement of the principle of equality of arms raises sufficiently complex issues of fact and law, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is further satisfied that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties submissions

(a) The applicant

63. The applicant argued that the orders requiring him to pay the success fees and ATE premiums were in principle incompatible with his rights under Article 6 of the Convention because the legislative scheme and rules of court pursuant to which the orders were made were an unfair, irrational and disproportionate means of pursuing the legitimate aim of widening access to justice; and that they had an individual and oppressive effect on him.

64. Regarding the operation of the legislative scheme, the applicant accepted that the recovery of base costs from a losing party was in principle a lawful interference with his rights under Article 6 § 1 of the Convention. He also accepted that the scheme pursued the legitimate aim of widening access to the courts for the “non-rich”. However, a restriction of the principle of equality of arms would not be compatible with Article 6 § 1 of the Convention unless there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.

65. In this regard, the applicant considered a number of features of the scheme to be noteworthy. First of all, the lower the claimant's prospect of success, the higher the success fees would be. As a result, the more justified a defendant was in resisting a claim, the greater the costs penalty would be if he lost. Secondly, the effect of the legislative scheme was that unsuccessful defendants sued by claimants with a CFA were subsidising unsuccessful litigation in unrelated cases. The scheme was therefore arbitrary as the cost of funding access to justice was not borne by unsuccessful defendants as a whole, but instead by a subset of unsuccessful defendants, namely those sued by a claimant with a CFA policy. Thirdly, although ATE insurance was in theory available to both parties, in practice it generally was not available to defendants facing claimants who had it. This was because insurers would require a 60-65% prospect of success in order to fund a claim. Fourthly, while it appeared from CPR 44.4 and 44.5 (see paragraphs 39-40 above) that proportionality underpinned the assessment of costs on the standard basis, following *Lownds v. Home Office (Practice Note)* [2002] 1 WLR 2450 (see paragraphs 43-45 above), costs were to be treated as "proportionate" if they were "necessary", even if the total necessary costs were disproportionate to the value of the claim. This applied to both base costs and additional liabilities, such as the success fees and the ATE premium. Moreover, the CPD (see paragraph 41 above) provided that there should be no reduction on the basis that the total costs, when the success fees and ATE premium were added to the base costs, were disproportionate. Fifthly, despite being intended to widen access to court for the non-rich, CFAs were available to any kind of claimant, including the very wealthy. Finally, the defendant had no way of knowing in advance what the CFA/ATE policies stipulated and therefore could not know in advance what the additional liabilities would be.

66. The applicant further argued that the available safeguards were inadequate. First of all, the assessment of costs took place at the end of the proceedings, by which time it was too late to control what was being spent, and proportionality was expressly excluded from the consideration of the recovery of the success fees and ATE premium. Further, the scope for challenging the reasonableness or otherwise of the success fees and ATE premium was very limited as it was judged exclusively from the *ex ante* perspective of CFA/ATE funded party and his insurers. Thirdly, the power of the court to impose a cost-capping order on a CFA-funded and/or ATE-protected party at an early stage did not address the significant disadvantage which the opposing party faced. It did not deal with the fundamental objection that a defendant was exposed to liability which was up to twice (or three times, if ATE insurance was in place) the amount which would be reasonable and proportionate for that case. Moreover, the court would only make a cost capping order in "exceptional circumstances" pursuant to paragraph 23A.1 of the CPD (see paragraph 42 above). Finally, an application for such an order

would involve satellite litigation which would be pointless in the event that the non-CFA/ATE party were to be successful.

67. According to the applicant, the operation of the scheme compromised defendants' freedom to settle, due to the claimants' rapidly escalating costs and the fact that there was no incentive for the claimants to limit those costs. Some defendants might wish to settle but could not afford to do so, while others might feel obliged to do so due to the risk of having to pay a fast-growing costs bill. Indeed, the fact that the success fees increased as the claimant's case became weaker meant that the pressure on defendants to settle would be greatest when they had a strong case.

68. The applicant placed particular reliance on the Court's finding in *MGN Limited v. the United Kingdom* (no. 39401/04, 18 January 2011). In that case, the Court had relied on four "flaws" identified in the Jackson review (see paragraph 48 above) and, in the applicant's opinion, all four of those flaws applied equally to an assessment of whether the scheme also violated Article 6 of the Convention. Moreover, in *MGN Limited* the Court had not applied the narrower margin of appreciation normally applied where freedom of the press was at stake. Rather, it accepted that the State's margin of appreciation was broad, as the scheme pursued social and economic interests, but nevertheless considered that that "broad margin" had been exceeded. The applicant therefore argued that there was no proper basis for distinguishing *MGN Limited* from the case at hand and, if this was correct, the Supreme Court had been wrong to rely on the approach to general measures taken by the Grand Chamber in *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08, ECHR 2013 (extracts)), since the Court had rejected a similar argument in *MGN Limited*.

69. With regard to the impact on himself, the applicant submitted that he was an uninsured defendant with no substantial savings or assets. Although the applicant and the third defendant were jointly and severally liable for the claimants' costs, the third defendant had gone into voluntary liquidation (see paragraph 27 above) and had no means to contribute to the costs order. The applicant therefore submitted that the knowledge that he faced the risk of an order to pay the claimants' costs, including the success fees and ATE premium, put him (and the other defendants) at a substantial disadvantage throughout the course of the litigation, especially with regard to their freedom, in practical terms, to enter into settlement negotiations with the other side. He contended that he and his fellow defendants had explored the possibility of settlement with the claimants on various occasions, including at a day-long mediation, but that a significant factor preventing a settlement being reached was the claimants' insistence that their rapidly escalating costs should be paid in full. Moreover, it was wholly unrealistic to suggest that he could have entered into a CFA or taken out an ATE policy himself as his prospects of success – 50% at best – were simply not strong enough.

(b) The Government

70. The Government argued, at the outset, that the rules allowing for the recoverability of success fees and/or ATE premiums were both prescribed by law and pursued a legitimate aim. This was accepted by the Court in unqualified terms in *MGN Limited* (cited above).

71. With regard to proportionality, the Government urged the Court to judge the Convention compatibility of the scheme under the 1999 Act “as a whole” and not by reference to a few unfortunate results (as it did, for example, in *James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98, and *Animal Defenders International*, cited above). The scheme was introduced following detailed consultation and gave effect to a perfectly rational social and economic policy, namely the need to ensure that litigants had access to justice notwithstanding the withdrawal of State funding for most civil actions. It had been open to Parliament to decide that such access could be secured by requiring unsuccessful defendants to fund the risks incurred by lawyers taking on cases on a “no win, no fee” basis. In this regard, the scheme had struck a fair balance between the rights of different litigants.

72. Furthermore, that balance had been considered in detail by the Supreme Court, which heard detailed evidence and submissions from the Government and legal professional bodies. It held, by a majority, that a proportionate balance had been struck and that the scheme was compatible with Article 6 of the Convention. In the Government’s view, the decisions of Parliament and the Supreme Court should be afforded a wide margin of appreciation as both were better placed to evaluate local needs and conditions. In fact, as the impugned legislative policy choice concerned economic and social issues, it should be respected unless it was “manifestly without reasonable foundation”. This threshold had not been crossed.

73. Insofar as the applicant relied on *MGN Limited*, the Government submitted that his reliance was misconceived. In that case the Court had been considering whether a fair balance was struck between the Article 10 rights of defendant publishers and the Article 6 rights of appellants alleging defamation or breach of privacy. The present case concerned the balancing of the Article 6 rights of those seeking access to justice and respondents faced with an additional costs burden. The balancing exercise was of a wholly different character as “most careful scrutiny” was required when measures taken by a national authority were capable of discouraging participation of the press in debates over matters of legitimate public concern. Furthermore, in *MGN Limited* the Court had relied on the detailed and lengthy public consultations in respect of the 1999 Act scheme, but, save for the Jackson review, all of these consultations had focused on defamation proceedings. Moreover, in considering the “four flaws” identified in the Jackson review (see paragraph 48 above), the Court in *MGN Limited* had focused on their effect in defamation and privacy cases.

74. In any event, the Government argued that only one of those flaws – the third flaw relating to the chilling effect of the system of recoverable success fees – could in principle have engaged the Article 6 rights of opposing parties. That flaw did not arise in this case, given the applicant’s participation in the trial and successive appeals.

75. With regard to safeguards, the Government pointed out that the scheme was overseen by district judges and costs judges, who played the role of watchdog. They regulated additional liabilities (including success fees and ATE premiums) against the criteria that they should be no more than reasonable. Moreover, in appropriate cases the courts had the ability to make a cost-capping order. Although not commonplace, this gave the court the power (prospectively) to regulate the overall liability for costs that a litigant should face. In addition, respondents could themselves enter into CFAs and take out ATE insurance. Finally, the existence of ATE insurance meant that successful defendants were often better off under the 1999 Act as it meant that they would not have to bear their own costs.

76. Finally, the Government submitted that any decision as to the validity of the 1999 Act scheme had to take account of the circumstances and competing interests as they stood at the time of the present proceedings. It was therefore relevant that in the twenty years since the 1999 Act came into force it had been analysed in detail by the Court of Appeal, House of Lords and Supreme Court with no finding that the impugned provisions were incompatible with Article 6 of the Convention. As a consequence, claimants with CFAs and/or ATE insurance would have had a legitimate expectation that the system would be enforced. Claimants and their lawyers had justifiably relied on the validity of the scheme and any decision which deprives a successful claimant of his right to recover the success fees or ATE premium would be likely to infringe his rights under Article 6 or Article 1 of Protocol No. 1.

2. *The Court’s assessment*

77. The Court reiterates that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a “fair hearing” within the meaning of Article 6 § 1 of the Convention. They require a “fair balance” between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents (see *Regner v. the Czech Republic* [GC], no. 35289/11, § 146, 19 September 2017, and *Avotiņš v. Latvia* [GC], no. 17502/07, § 119, ECHR 2016).

78. The Court has accepted that such a disadvantage may arise where one party enjoys a privileged position with respect to the costs of civil litigation (see *Stankiewicz*, cited above, §§ 68-76). However, in the present case the Government have asked the Court to follow the approach adopted in

MGN Limited (cited above) and examine the scheme as a whole rather than judging it by a few unfortunate results (see paragraph 71 above). It is true that the merits of the applicant's case – that is, that he and the third defendant were individuals or small undertakings carrying on modest businesses without insurance and faced with one-off litigation which involved them in eye-catchingly large costs exposure – were largely “untested” before the domestic courts (see paragraph 18 above). Nonetheless, it would appear from the proceedings subsequently brought by the applicant against his insurers (see paragraphs 28 and 29 above) that he had been informed by the broker that the nuisance litigation was not covered by his insurance policy. The Government have not sought to challenge this assertion. Therefore, regardless of the outcome of the ongoing litigation, the Court would accept that the applicant – not unreasonably – believed himself to be an uninsured defendant throughout the course of the nuisance proceedings. Consequently, the Court will consider the operation of the scheme vis-à-vis uninsured defendants as a class.

79. In this respect, the Court recalls that according to its case-law, the rights deriving from the principle of equality of arms are not absolute and the Contracting States may enjoy a certain margin of appreciation in this area, although it is for the Court to determine in the last instance whether the requirements of the Convention have been complied with (see, for example, *Regner*, cited above, § 147). In *MGN Limited* the Court acknowledged that the introduction of the CFA with recoverable success fees sought to achieve the widest public access to legal services for civil litigation funded by the private sector (see *MGN Limited*, cited above, § 197). This is supported by the consultation paper (see paragraph 34 above); by the dictum of Lord Bingham in *Callery v. Gray* (see paragraph 38 above); and by the findings of the Supreme Court in the present case (see paragraph 16 above). The legislature was therefore implementing a social and economic policy, and in implementing such policies the Court has generally afforded it a wide margin of appreciation (see, *mutatis mutandis*, *James and Others*, cited above, § 46).

80. The scheme sought to achieve its aforementioned goal by rebalancing the means of access to justice: instead of placing the burden on the public purse, through the legal aid fund, it instead imposed the costs of CFA litigation on the unsuccessful party. In *MGN Limited*, the Court, in the context of Article 10 of the Convention, found the scheme 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 (see *MGN Limited*, cited above, § 217). In reaching this conclusion, it largely relied on the four flaws highlighted by the Jackson review (see paragraph 48 above): first, there was 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; secondly, there was no incentive on the part of a claimant to control the incurring of legal costs on his or her behalf and judges assessed those costs

only at the end of the case, when it was considered too late to control what had been spent; thirdly, there was 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 fourthly, the regime provided the opportunity for solicitors and barristers to “cherry pick” winning cases to conduct on CFAs with success fees (see *MGN Limited*, cited above, §§ 206-10).

81. In the present case, Lord Neuberger and Lord Dyson considered that only the third flaw could have affected the Article 6 and Article 1 of Protocol No. 1 rights of opposing parties adversely (see paragraph 14 above). The Court would agree that the risk of a party with good prospects of a successful defence being driven to settle early by the possibility of an excessive costs burden was one of the principal objections to the scheme, especially when viewed through the prism of the principle of equality of arms. This risk would be particularly acute when the defendant was uninsured. Although insurers would not be oblivious to an opposing parties’ rapidly escalating costs, and would dictate the course of the proceedings accordingly, it is clear that defendants who did not have insurance to cover their opponents’ costs would be at a particular disadvantage. While the obvious risk is that they could be pressurised into an early settlement, the Court would not define the potential prejudice so narrowly (for example, in *Stankiewicz*, cited above, the Court did not expressly link the imbalance in the parties’ liability for costs to any particular outcome in the civil proceedings). On the contrary, the very different financial risks being faced by the opposing parties would be likely to impact every decision concerning the conduct of the proceedings. As the applicant in the present case suggests, it could also preclude a settlement, even in the early stages, if a party was simply not in a position to pay the opposing party’s costs (see paragraph 69 above). For Lord Clarke (with whom Baroness Hale agreed), it was discriminatory and disproportionate to burden uninsured defendants with costs which vastly exceeded the fair and reasonable costs incurred by the claimant in order to encourage solicitors to act for other claimants in cases where the claim might fail (see paragraph 21 above).

82. The risk of a party with good prospects of a successful defence being driven to settle early was exacerbated by the fact that as Lord Neuberger himself pointed out in the second Supreme Court judgment of 23 July 2014, a curious feature of the scheme was that the stronger the defendants’ case, the greater their liability for costs would be if they lost, as the size of the success fee and the ATE premium reflected the claimants’ prospects of success. Consequently, a defendant with a good prospect of a successful defence who ultimately lost the case could find himself paying, in addition to the whole of his own costs, three times the claimants’ base costs (see paragraph 11 above). An uninsured defendant would be personally liable for the entirety of this sum.

83. However, the Court does not consider only the third flaw to be relevant to the case at hand. In the context of Article 6 of the Convention, its task is to assess whether the scheme struck a fair balance between the litigants in CFA litigation, and in particular whether defendants in such cases were placed at a substantial disadvantage vis-à-vis their opponents (see paragraph 77 above). It is therefore relevant that, unlike an uninsured defendant, who would personally be facing rapidly escalating costs, a claimant with both a CFA and ATE insurance would not normally be liable for his own costs or those of the defendant if his claim was unsuccessful. This was also recognised by Lord Neuberger in the second Supreme Court judgment, where he identified as one of the “unique and regrettable features of the scheme” the fact that claimants had no interest whatever in the level of base costs, success fees or ATE premiums which they agreed with their lawyers, since if they lost they had to pay nothing, and if they won the costs would all be paid by the defendants (see paragraph 11 above).

84. The Government have not been able to point to any safeguards built into the scheme which would be capable of redressing the imbalance. While it is true that in principle defendants could also take out ATE insurance, in view of the fact that a claimant could usually only obtain ATE insurance if his chances were “better than evens”, a defendant in the same proceedings would have little or no prospect of obtaining such insurance (see paragraph 22 above). In addition, while costs were subject to assessment at the end of the proceedings, where the principle source of prejudice to the defendant is the chilling effect occasioned by the prospect of rapidly escalating costs, this assessment would come too late to correct the imbalance between the parties during the course of the proceedings (see paragraph 23 above). In any event, while proportionality had a part (albeit a limited part) to play when assessing the recoverability of base costs, it had no part to play when assessing the recoverability of success fees or ATE premiums, which only had to be reasonable (see the relevant provisions of the CPD set out at paragraph 41 above). As the Court observed in *MGN Limited* (citing the dictum of Lord Hope in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd.* (2003] 2 Costs LR 204), the reasonableness of success fees essentially concerned the review of the percentage uplift on the basis of the risk undertaken in the case (see *MGN Limited*, cited above, § 216).

85. The Court considers two further factors to be relevant. First of all, as Lord Clarke, with whom Baroness Hale agreed, stated in the third and final judgment of the Supreme Court in this case, the scheme did not place the burden of widening public access to legal services on unsuccessful litigants; rather, it singled out unsuccessful litigants who happened to be opposed by CFA/ATE funded litigants and imposed on them the burden of funding other unsuccessful cases which did not involve them at all (see paragraph 23 above). While some litigants might themselves have had insurance, uninsured litigants would have been burdened with costs which vastly exceeded the fair

and reasonable costs incurred by their opponents in order to encourage solicitors to act for litigants in other cases (see paragraph 21 above).

86. Secondly, while the fourth flaw identified in the Jackson review may not have interfered with the Article 6 rights of the opposing parties, in *MGN Limited* the Court considered that the fact the 1999 Act scheme permitted lawyers to “cherry pick” implied that it did not in fact achieve the intended objective of extending access to justice to the broadest range of persons (an objective rightly recognised by the Supreme Court to be inherent in the rule of law: see *R (on the application of UNISON) v. Lord Chancellor* at paragraph 52 above). On the contrary, lawyers had the opportunity to pursue only meritorious cases with CFAs/success fees and to avoid claimants whose claims were less meritorious but which were still deserving of being heard (see *MGN Limited*, cited above, §§ 210 and 215).

87. The Court acknowledges the findings of the Supreme Court in *Flood v. Times Newspapers Ltd (No. 2)*, *Miller v. Associated Newspapers Ltd and Frost and Others v. MGN Ltd (No. 2)* to the effect that depriving claimants of the ability to recover the success fees and ATE premiums for which they were liable to their legal advisors and ATE insurers respectively could potentially infringe their rights under Article 1 of Protocol No. 1 to the Convention (see paragraph 51 above). It also acknowledges that ATE insurance afforded protection to successful defendants by providing them with the opportunity to recover their costs. Therefore, in contrast to the position in respect of success fees, which aimed to compensate lawyers for their unsuccessful cases, in paying the ATE premiums unsuccessful defendants were not being required to contribute to the funding of other litigation and general access to justice. Nonetheless, having regard to the depth and nature of the aforementioned flaws in the scheme, which were highlighted by the public consultation process, which were accepted in important respects by the Ministry of Justice and which have resulted in the abolition of the recoverability of success fees and ATE premiums from the losing party (see paragraph 49 above), the Court considers that in respect of uninsured defendants, who bore an excessive and arbitrary burden in CFA litigation, the impugned scheme, when viewed as a whole, infringed the very essence of the principle of equality of arms as guaranteed by Article 6 § 1 of the Convention.

88. This conclusion would appear to be borne out by the facts of the present case. The Court has accepted that the applicant – not unreasonably – believed himself to be an uninsured defendant throughout the course of the nuisance proceedings (see paragraph 78 above). Moreover, the Government have not sought to challenge his assertion that the third defendant, with whom he was jointly and severally liable, went into liquidation without making any contribution to the claimants’ costs (see paragraph 27 above). If these claims are true, he personally stands to pay a total sum of GBP 846,838.27 in respect of the claimants’ costs before the High Court and the Court of Appeal, with the claimants’ costs before the Supreme Court still to be assessed. Of this

figure, GBP 320,658.56 represents the claimants' base-costs; GBP 236,113.41 represents the success fees owed to the claimants' solicitor and counsel; and GBP 290,066.30 represents the claimants' ATE premiums (see paragraph 25 above). To put it into context, even excluding the costs before the Supreme Court, the order for costs made against the applicant is more than eighty times the award of damages made against him (see paragraph 4 above).

89. Accordingly, the Court would accept that the applicant can claim to be a "victim" of the alleged violation of his right to a fair trial within the meaning of Article 34 of the Convention and therefore dismisses the Government's preliminary objection of lack of victim status (see paragraphs 55, 57 and 61 above). It further finds that there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

90. The applicant considered that the facts of the case also disclosed a violation of Article 1 of Protocol No. 1 to the Convention.

91. This provision provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

92. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

93. The applicant argued that the 1999 Act scheme failed to give effect to the stated objective of imposing the cost of funding access to justice on unsuccessful defendants as a class, and instead imposed that burden on an arbitrarily selected sub-class of unsuccessful defendants: namely, those who happened to be sued by a claimant with the benefit of a CFA and an ATE insurance policy. As he had already submitted in respect of his Article 6

complaint, there was no reasonable relationship of proportionality between the means employed and the legitimate aim pursued.

94. Furthermore, he did not accept the Government's contention that claimants who had entered into CFAs and ATE insurance policies had a legitimate expectation that they would be enforced (see paragraph 96 below), as there could not be a legitimate expectation that someone else's Convention rights would be infringed. In any event, a claimant's rights under Article 1 of Protocol No. 1 could only be enforced against the State.

95. The Government accepted that an unsuccessful defendant's rights under Article 1 of Protocol No. 1 would be engaged at the moment a success fee was found to be due to be paid. However, it was not in dispute that the 1999 Act scheme was in accordance with the law and in pursuit of a legitimate aim; and for the reasons given in response to the applicant's Article 6 complaint, the Government contended that the scheme was not disproportionate.

96. The Government further submitted that litigants who had entered into CFAs and ATE policies had a legitimate expectation that they would be enforced and that legitimate expectation was itself a possession under Article 1 of Protocol No. 1.

2. *The Court's assessment*

97. Although the Court has, in the context of costs in civil proceedings, acknowledged the legitimate aim behind the "loser pays" rule, it has found that the imposition of a disproportionate costs burden on a losing party may violate Article 1 of Protocol No. 1 to the Convention (see *Cindrić and Bešlić v. Croatia*, no. 72152/13, §§ 94-111, 6 September 2016).

98. While the aim of the "loser pays" rule (namely, the avoidance of unwarranted litigation and unreasonably high litigation costs by dissuading potential plaintiffs from bringing unfounded actions without bearing the consequences) was quite different from that of the 1999 Act scheme (see paragraph 38 above), the Court would nevertheless accept that that scheme had both a basis in domestic law and pursued a legitimate aim. However, in light of its conclusions at paragraphs 77-89 above, in particular, its finding that the scheme placed an excessive burden on uninsured defendants, in CFA litigation, in the context of Article 1 of Protocol No. 1 the Court considers that in respect of that class of defendant the scheme exceeded even the wide margin of appreciation accorded to the State in matters of social and economic policy (see *James and Others*, cited above, § 46, and, *mutatis mutandis*, *MGN Limited*, cited above, § 200). While it acknowledges that litigants who entered into CFAs may, at the time the arrangement was entered into, have had a legitimate expectation that it would be enforced, that can be no answer to the question posed in the present case, namely, whether the scheme was itself compatible with the Convention.

99. Accordingly, the Court finds that there has also been a violation of Article 1 of Protocol No. 1 to the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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.”

101. The applicant invited the Government to indemnify him in a sum equivalent to his liability for success fees and ATE premiums. He also sought an indemnity in respect of his liability for base costs incurred by the claimants in relation to the Convention issues before the Supreme Court. Before the High Court and Court of Appeal, his liability for success fees and ATE premiums could be quantified as 526,199.71 British pounds (GBP). The costs before the Supreme Court have yet to be determined.

102. Finally, the applicant claimed his own legal costs and expenses incurred before the Supreme Court and before this Court. Those costs and expenses amounted to GBP 55,096.06.

103. The Government argued first, that the applicant had failed to engage in the assessment of costs, resulting in default costs certificates being issued. He had not, therefore, taken reasonable steps to mitigate the loss that he might suffer. Secondly, he had not provided any evidence that he had in fact paid any sum in respect of the success fees or ATE premiums.

104. In light of the foregoing, and, indeed, in light of the ongoing domestic proceedings, the Court considers that the question of the application of Article 41 is not ready for decision. The question must accordingly be reserved in whole and the further procedure fixed with due regard to the possibility of agreement being reached between the Government and the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits, the Government’s preliminary objection of lack of victim status concerning the applicant’s complaint of infringement of the principle of “equality of arms” under Article 6 § 1 of the Convention, and *rejects* it;
2. *Declares*, the complaints concerning the principle of “equality of arms” under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention admissible and the remainder of the application inadmissible;

3. *Holds*, that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds*, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
5. *Holds*, that the question of the application of Article 41 is not ready for decision; accordingly,
 - (a) *reserves* the said question in whole;
 - (b) *invites* the Government and the applicant 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.

Done in English, and notified in writing on 11 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth
Deputy Registrar

Gabriele Kucsko-Stadlmayer
President