Neutral Citation Number: [2006] EWHC 1235 (QB)

Case No: QB/2004/PTA/0686

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2006

Before :

THE HON. MR JUSTICE EADY
sitting with
COSTS JUDGE WRIGHT
MR MARTIN COCKX

- -

Between :

1. Sara Cox	**Claimants**
2. Jon Carter	
- and -	
1. MGN Ltd	**Defendants**
2. Jason Fraser	
3. Fraser Woodward Ltd	
4. Eliot Press	

Martin Farber (instructed by **Schillings**) for the Claimants
Jeremy Morgan QC (instructed by **Olswang)** for the First Defendant

Hearing dates: 5th and 6th April 2006

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

A summary of the issues

1. On 5 and 6 April of this year I heard appeals from various decisions of the Costs Judge, Master O'Hare, which he made in October 2004 by way of resolving certain preliminary issues arising in the detailed assessment. (Further relatively minor points were made in writing by the solicitors during the Easter Vacation.) I sat with assessors to whom I am greatly indebted for their assistance. I am grateful also to both counsel for their illuminating skeleton arguments and careful submissions. The time lag between the original decisions and the hearing of the appeal has been significantly longer than usual. I should explain that the reason for that was the need for the parties to abide the outcome of the House of Lords' decision in *Campbell v MGN (No 2)* [2005] 1 WLR 3394 which, it was anticipated, would narrow the scope of the arguments to be addressed on this appeal.

2. It is convenient at the outset to list the broad issues to which the appeal was related. First, there was a complaint by the paying party (i.e. MGN Ltd, the First Defendant) as to the Master's determination of the preliminary issue of proportionality, as contemplated by Lord Woolf in *Lownds v Home Office (Practice Note)* [2002] EWCA Civ 365. What was challenged was the Master's conclusion that the overall bill was not disproportionate.

3. Secondly, both parties wished to appeal the decision of Master O'Hare on the amount of the success fee he thought recoverable in accordance with the conditional fee agreement ("CFA"). He considered the right figure was 40%, whereas the Claimants' solicitor was contending for 95% and the First Defendant's advisers for a mere 5%.

4. Thirdly, there was a dispute as to the appropriate hourly rate for Mr Keith Schilling, the senior partner of the firm who had acted for the Claimants in the course of the original dispute. He sought to increase it from the range of £300-£315 up to £400-£450.

5. Fourthly, there was an issue as to increases in hourly rates after the date of the conditional fee agreement and the extent to which those should be recoverable.

The background to the litigation

6. Before I proceed further, it is necessary to summarise the circumstances which led to the Claimants' complaint and the history of the proceedings until it was resolved.

7. The Claimants, Ms Sara Cox and Mr Jon Carter, had married on 6 October 2001. They went to spend a honeymoon on a small private island in the Seychelles, where they took a private villa with private grounds at a resort known as "Fregate Island Private". As this description rather suggests, the Claimants were looking for privacy. Ms Cox was at the time a disc jockey and was well known to many people through radio and television. Mr Carter too was a disc jockey.

8. The First Defendant is the publisher of a Sunday tabloid newspaper, the *Sunday People*, with a large circulation in England and Wales. As it happened, the editor was Mr Neil Wallis, a member of the Press Complaints Commission ("PCC"). The Second

Defendant, Mr Jason Fraser, controlled the activities of the Third Defendant, Fraser-Woodward Ltd, which was a photographic agency based in London. They have a track record of obtaining and supplying photographs of "celebrities" for newspapers and magazines. The Fourth Defendant, Eliot Press, is a photographic agency based in France.

9. During the course of the honeymoon photographs of the Claimants came into the hands of the Second, Third and Fourth Defendants, some of which portrayed them naked or nearly naked in and around a hot tub in the grounds of their villa. It seems that the photographs were taken surreptitiously with a telephoto lens, and it was the Claimants' case this constituted an invasion of privacy and that the information contained within them was subject, in any event, to a duty of confidence in accordance with traditional principles of the common law. They complained, not only through the proceedings now before the court, but also by way of reference to the PCC which operates a Code including provisions, at Clause 3, aimed at the protection of private life and, in particular, the use of long distance photography to take images of people in private places without their consent. Given the location selected for their honeymoon, it was their case that they had "a reasonable expectation of privacy".

10. Accordingly, when the photographs, or the rights purportedly attaching to them, were sold to the First Defendant with a view to publication in one or more of its newspapers, it is said that this was an actionable infringement of the Claimants' rights. The complaint also related to the First Defendant's actual publication of colour photographs in the *Sunday People* on 14 October 2001.

11. There is no need to go into the detail of the photographs. The flavour can sufficiently be gleaned from some of the accompanying headlines, such as "DJ SARA COX IN THE NUDE! SEE PAGES 2 AND 3" and "HONEY-MOONING RADIO 1 BREAKFAST BABE'S AMAZING STRIP SHOW AS SHE REVEALS TWO OF HER GREATEST HITS" and "Barer Sara!".

12. It was the Claimants' case that they suffered distress, embarrassment, humiliation and anxiety over the publication of this material, and especially in circumstances which gave readers the impression that they had been flaunting themselves publicly and were even co-operating with the photographer. In fact, it is not disputed that the first they knew of the photographs was upon publication in the newspaper. While they were still on the island, the Claimants instructed solicitors through their agent. Undertakings were obtained from the Third Defendant to prevent further supply of the photographs. In addition to this, one of their primary concerns was to obtain, if possible, delivery up or destruction of all copy photographs, negative and digital images. An apology was published by the First Defendant, but proceedings were commenced on 15 November 2001 when it became clear that appropriate undertakings and delivery up of the photographs were being resisted by some of the Defendants.

A brief history of the proceedings

13. When the proceedings were issued there was a claim for damages and/or an account of profits; compensation under s.13 of the Data Protection Act 1998; injunctions to restrain republication; delivery up or destruction on oath of all copies; and an order under s.14(4) of the Data Protection Act 1998.

14. The breadth of these remedies was emphasised before me on the Claimants' behalf in order to demonstrate that the mere obtaining of an apology from the First Defendant could not necessarily be regarded as a victory, in the sense that nothing was any longer in dispute and everything thereafter was plain sailing.

15. There were particular problems with regard to the Fourth Defendant, since it was outside the jurisdiction, and the solicitors instructed on behalf of the Second and Third Defendants were not in a position to accept instructions for the Fourth Defendant. The defence of the First Defendant was served on 31 January and that of the Second and Third Defendants on 5 February 2002. It appeared on the face of things that the Defendants were proposing to defend the claims with vigour. Arguments were raised to the effect that the taking of the photographs, and their subsequent publication, were not properly to be regarded as infringements of privacy or breaches of confidence. In themselves, these carried little conviction. Allegations were also made, however, to the effect that Ms Cox had put a considerable part of her personal and private life into the public domain already. That was a matter which would require to be investigated and, if appropriate, refuted.

16. The First, Second and Third Defendants made a Part 36 offer, together with a payment into court of £25,000, on 23 August 2002. A fresh Part 36 offer was made by the same Defendants on 20 December 2002, accompanied by notice of a payment into court of a further sum of £25,000.

17. Matters took their course, with an order for directions being made on 17 September 2002, lists being exchanged on 2 October and witness statements on 22 November of the same year. As to the Fourth Defendant, judgment was granted in default at a hearing before Gray J on 23 January 2003. On 11 April 2003 it was ordered that the trial should take place in a three month window from 1 November of that year, the time estimate being 4–5 days.

18. Correspondence was entered into and, eventually, it was confirmed that the Second and Third Defendants were in possession of everything previously held by the Fourth Defendant and that no copies remained in existence. This was clearly an important matter so far as the Claimants were concerned.

19. Ultimately, as long ago as 6 June 2003, a settlement was concluded through the means of a consent order. Subsequently, the relevant photographs were duly recovered from the Defendants in accordance with the terms of the order which provided for delivery up on oath within 14 days. The sums in court were paid out and the Claimants were to receive their costs, in respect of which a payment of £60,000 was made on account.

20. It is relevant for present purposes to note that the Claimants initially funded the proceedings themselves, privately, but later entered into a CFA on 10 January 2002 (i.e. prior to service of defences).

21. Having set out the background, I now turn to the arguments in connection with the issues arising on appeal.

The application of the *Lownds* test

22. First, there is the matter of proportionality. What fell to be considered was the test propounded in *Lownds v Home Office* at [31]:

> "In other words 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 CPR r.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".

There is no doubt that this two stage approach gives rise to certain difficulties, but nevertheless that is what Master O'Hare was invited to adopt in the present case. It is his preliminary view at stage one (the "global approach") that is under challenge. It is well known that what is required is a relatively brief and impressionistic appraisal of the costs having regard to the nature of the litigation. It has been said that such an appraisal should normally take no longer than about one hour, although in fact in the present case I am told by counsel that Master O'Hare reached his decision after a consideration of the matter which lasted for about two hours.

23. Given the nature of this exercise, inevitably to some extent "rough and ready", it will be unusual for such a preliminary finding to be overturned on appeal: see e.g. *Giambrone v JMC Holidays* [2003] 1 All ER 982 at [37]; *Ortwein v Rugby Mansions* [2004] 1 Costs LR 26 at [26]. It would be necessary to find that the relevant costs judge had erred in law or misdirected himself in the sense of taking into account irrelevant material or, on the other hand, excluding relevant factors. Another ground of attack, no doubt, could be formulated in accordance with cases such as *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652, on the basis that the costs judge in question had come to a conclusion outside the range of reasonable decisions open to him. It was recognised in the present case that this was the high hurdle which required to be overcome. The fact that permission has been granted for an appeal obviously cannot mean that the barrier has been lowered.

24. Mr Morgan QC for the First Defendant had submitted at the stage of seeking permission, notwithstanding the hurdle confronting his client, that it was important that an appellate tribunal should not be denied the opportunity of testing how costs

judges were approaching the issue of proportionality in media cases, which was giving rise to concerns about the "chilling effect" or "ransom factor" articulated by the Court of Appeal in *Musa King v Telegraph Group Ltd* [2004] 3 Costs LR 449 (and subsequently also addressed by their Lordships in *Campbell v MGN (No2)*, cited above).

25. Mr Morgan had in mind especially the observation of Brooke LJ in *Musa King* at [105] that detailed assessments would require to be conducted "toughly". This general point, however, would not necessarily entail any different criteria having to be applied in media cases at the "global approach" stage. It is more readily applicable at the item by item stage and this is probably what Brooke LJ was contemplating. At all events, that is the submission of Mr Farber for the Claimants. He submits that Brooke LJ was not intending to vary or modify the test applicable at *Lownds* stage one. He explained too that Master O'Hare was fully aware of what Brooke LJ had said in *Musa King* and that Mr Morgan had placed considerable emphasis on "toughly" when addressing him in the present case.

26. I have already noted that the "global" approach inevitably involves a matter of impression in the light of experience. One does not form impressions "toughly", but one can certainly apply the notion at the item by item stage. It seems to me that this is where it naturally belongs. Moreover, if a costs judge concludes that overall the costs do not appear disproportionate, as Master O'Hare did here, that would in no way preclude a "tough" approach when determining whether particular items are "reasonable". They are distinct functions serving rather different purposes.

27. One of the factors which would no doubt require careful scrutiny, on an item by item appraisal, is the cost incurred in relation to documents. A claim of this kind would not naturally give rise to document heavy litigation.

28. I believe that Mr Morgan's primary argument on proportionality is that the Master must have erred in carrying out stage one of the *Lownds* test because the total bill (base costs of £142,728) is obviously disproportionate to the total sum recovered by the Claimants by way of financial compensation (£50,000). This is a little simplistic in a case where the following factors, in particular, have to be borne in mind:

    i) The amount of financial compensation was not the Claimants' only or main concern; they were seeking undertakings from all four Defendants and, above all, delivery up and destruction of the photographic digital images to make further publication impossible. This took time.

    ii) The Defendants (including the First Defendant) prolonged the agony and dragged things out for an unnecessarily long time by pursuing what can be seen (especially with the benefit of hindsight) to have been bad points on liability in a case of what was manifestly a gross invasion of privacy.

    iii) Settlement was only reached finally in June 2003 (some 20 months after the cause of action arose). Correspondingly, it is obvious that the costs were building up over the intervening period.

iv) There was the complication here over the Fourth Defendant, which was outside the jurisdiction and had to be brought into line if the Claimants were to be given confidence that the images had been delivered up.

Accordingly, while the amount of financial compensation can provide a useful "starting point", as was acknowledged in *Musa King* at [105], there are cases in which the need to press for other remedies will assume greater significance. This was in my judgment a good example.

29. I have come to the conclusion that Master O'Hare's decision on proportionality in applying the *Lownds* stage one test was well within the range of reasonable options open to him. Nor did he misdirect himself in any aspect of law. It follows that the appeal in this respect will be dismissed. Indeed, if I may say so, I consider the decision entirely correct.

The success fee

30. I must now address the second issue which relates to the success fee. Here, the parties could hardly be further apart in their contentions. It is a question largely of assessing risk at or about the time the CFA was entered into in January 2002. It is fair to point out, and for me to have firmly in mind, that the exercise of assessing the risks in an infringement of privacy case might well be approached differently in 2006. There have been significant developments in this branch of the law since the Claimants' solicitor had to make his assessment: see e.g. *Von Hannover v Germany* (2005) 40 EHRR 1 and *Campbell v MGN Ltd* [2004] 2 AC 457.

31. At least through 2006 spectacles, it is possible with greater confidence to categorise the taking of these photographs as an invasion of privacy, and of the Claimants' Article 8 rights, for which a remedy is available under English law. It is nearly 14 years since Latham J (as he then was) refused a remedy in respect of similarly intrusive photographs taken of the Duchess of York on holiday with her children and Mr John Bryan, giving the reason that English law knew no right of privacy: see also *Kaye v Robertson* [1991] FSR 62. Things had certainly moved on by 2002, but there were still grounds for hesitation. It was later in that year that the Court of Appeal handed down its judgment in the Gary Flitcroft case: *A v B plc* [2003] QB 195. This introduced a new dimension of uncertainty over the concept of "role models" and one might reasonably have doubts about claims proposed on the part of celebrities who might, or might not, find themselves saddled with that dubious sobriquet. (Recently, in a lecture on 13 May 2006, Sir Stephen Sedley expressed the view that the Flitcroft case would probably be decided differently if the facts arose today because of *Von Hannover v Germany*.)

32. Be that as it may, Mr Schilling had obtained in early November 2001 an opinion on the merits of this claim from Mr Anthony White QC which may fairly be described as "bullish". One is reminded of Mr F.E. Smith's legendary opinion: "There is no answer to this action for libel, and the damages must be enormous". (As it happens, £50,000 was awarded in that case also – albeit worth nearer £5m today.) No one has criticised Mr White's opinion on this appeal, which would have been somewhat presumptuous in any event. Even at the end of 2001, it was entirely realistic to recognise that a court would find this, without difficulty, to have been a gross and actionable infringement. Master O'Hare clearly attached considerable weight to this assessment, and he was

entitled to do so. Indeed, it would be clear to any reasonable onlooker that the element of genuine public interest was non-existent (and that the circumstances fell within the narrowly defined exceptions contained in Article 10(2) of the European Convention on Human Rights).

33. On the other hand, Mr Schilling is entitled to make the point that things did not stand still after that opinion was written. It was two months later that he came to enter into the CFA, by which time it had become apparent to Mr Schilling, notwithstanding a published apology, that the Defendants were not simply going to lie down. There was considerable work yet to be done (as it happened, another 18 months elapsed). Moreover, he being familiar with the world of the media, and their lawyers, would be aware that this was a case in which a media organisation might wish to take a stand against a creeping law of privacy, especially in the context of supposed "celebrities", or at least give the appearance of doing so. After all, the "celebrity" culture and the feeding of readers' appetites for information about such persons, especially if it was of a salacious nature, provided the lifeblood of tabloid newspapers. He scented that a fight was brewing and that was not unreasonable. One could certainly assume that the merits of the Claimants' claim were very strong indeed, but that did not necessarily mean that the case was cut and dried.

34. Nevertheless, it is reasonable to suppose that Mr Schilling, with all his experience of the media, would probably have appreciated that there was a great deal of bluff in the MGN defence and that the Defendants were essentially playing for time – especially having regard to the published apology only a week after publication. It may be that it would not be possible to obtain delivery up and destruction, not least because much might depend on the position of the Fourth Defendant, but in entering into a CFA it was quite possible for him to define "success" in such a way that his firm need not necessarily be at risk in this respect. Cautious optimism was certainly justified, and it is probably not unfair to infer that if Mr Schilling had not been optimistic overall he would not have included within the CFA a provision whereby his firm undertook the risk as to disbursements.

35. I cannot ignore in this context the observations of Schillings in the Claimants' Replies to the Defendants' Points of Dispute dated 7 May 2004:

> "The Defendants' actions were self-evidently a gross invasion of the Claimants' privacy and the Claimants were fully justified in taking the matter seriously to prevent further publication of these or any other images taken of them whilst they were on honeymoon.
>
> The photographs were in their very nature private and confidential. This must have been apparent to the Defendants."

36. Over a year before, in a letter of 10 January 2003, Schillings had summarised the strength of the case, when seeking indemnity costs, in the following terms:

> "Such an award is appropriate in circumstances where there was never any reasonable prospect of defending liability in the action (as was the case here)".

I have no reason to think that this was other than a genuine appraisal.

37. Accordingly, it seems to me right that the merits of the case and the likelihood of obtaining a significant award of damages would justify setting the success fee at much less than 95%.

38. I am invited by Mr Morgan to bear in mind the observations of Lord Bingham in *Callery v Gray* [2002] 1 WLR 2000 at [5] and those of Lord Hoffmann at [32]-[34]. It is notorious that the levels of costs provided for in a CFA are not arrived at in free market conditions. They tend to be set at as high a level as possible by the solicitor in question – especially so with regard to any success fee, since the solicitor's client is unlikely to have to pay it and there is no incentive to negotiate it downwards. One must always therefore be alert to identify "a success uplift grossly disproportionate to any fair assessment of the risks of failure" (to adopt the words of Lord Bingham). The object is often to obtain as much as possible from the other side. This is a new phenomenon, which costs judges clearly need to have very much in consideration when attempting to achieve a fair outcome. Careful analysis accompanied by a healthy dose of scepticism is likely to be appropriate.

39. Mr Farber has submitted that the Master attached far too much significance to the optimistic opinion from Mr White and was thus seduced into ignoring, or giving too little weight to, other highly material factors. It is even said that he erred in principle by regarding it as virtually determinative on the size of the success fee. I do not believe this to be correct. It is plainly a relevant factor and the Master, as I have said, was entitled to attach significant weight to it in arriving at his own assessment. But he cannot have regarded the optimistic assessment on liability as determinative, or he would not have fixed upon such a high percentage as 40%. He plainly set other factors alongside Mr White's opinion and was right to do so.

40. I should identify some of the other considerations listed by Mr Farber as being, presumably, so powerful that they should effectively be regarded as outweighing Mr White's optimism and justifying a 95% success fee. The question is essentially whether the Master attached so little weight to them that he can be said to have erred in law or ventured outside the legitimate range of reasonable options.

41. Mr Farber relies on the following points, namely that:

    i) if contested, the case was likely to give rise to issues of complexity and novelty;

    ii) subsequently to leading counsel's opinion it had become apparent to Mr Schilling that the case was likely to be contested;

    iii) by January 2002 there was no sign of compensation, delivery up or destruction;

    iv) there was no participation or co-operation from the Fourth Defendant;

    v) the issues were far more complex and unpredictable than in standard road traffic accident litigation, as exemplified in *Callery v Gray* [2001] 1 WLR

2112 and *Halloran v Delaney* [2003] 1 WLR 28 (to which the Master had referred).

vi) Schillings had, unusually, incurred the cost of disbursements and ran the risk of not recovering them (a factor which clearly is capable of cutting both ways);

vii) whatever the risk on liability, there were inevitably uncertainties as to the scale of appropriate compensation in the new territory of privacy infringement (as Mr White had acknowledged) – but Schillings would be entitled to their fees if the Claimants received *anything* by way of compensation;

viii) there were, in any event, distinct risks attaching to the process of costs assessment;

ix) in order to honour Parliament's legislative intention, success fees should not be set at so low a level that solicitors are discouraged from acting on conditional fee terms;

x) MGN had deep pockets and access to lawyers with experience in this area of law (factors which Mr Farber suggests give rise in themselves to greater risk);

xi) the solicitors were entitled to form their own independent view of the merits and risks of the case (and to differ from counsel);

xii) no particular weight should be attached to Mr White's opinion because it was "directed at enabling the client to decide whether or not to embark on litigation" – rather than being "directed either at the solicitors or at the question of risk in the context of a CFA";

xiii) "the assessment of the CFA risk is not the same as reaching a view on the legal and factual merits of a case";

xiv) there was an analogy with defamation which "has always been a particularly risky area of litigation" (see e.g. the judgment of the Senior Costs Judge in *Musa King v Telegraph Group Ltd* , 2 December 2005, at [75] and [78]).

42. Some of these points seem to me to have greater force than others and I need to decide whether any of those which are valid can be shown to have been wrongly ignored by the Master.

43. It is clear that the Master would have had in mind the points listed above as (i) to (iv), (vi), (vii), and (ix)-(xi), and must have given them the weight he thought appropriate. I shall need to say something about the remainder.

44. I return to point (v). One of the few issues on which counsel were agreed on this appeal was that the Master should not have used the 20% fee in *Callery v Gray* as a starting point and that, if he did so, there would be a misdirection. I am not sure that he intended to do so, although I can understand that his references to the case could easily give that impression. He acknowledged that plainly the case was of a different kind and that, therefore, the success fee in the present case was bound to be greater. That seems obvious and unobjectionable if merely taken as a passing observation. Counsel are right, in my view, to submit that the cases were so different that *Callery v*

Gray should not have been used as a point of reference at all. It is unfortunate that the Master referred to it as though somehow the two situations appeared on the same scale. Yet I am not persuaded that this reference in the judgment actually tainted the final assessment. The very fact that the Master drew a distinction between a road traffic case and a privacy case shows that he was aware that the two were wholly distinct – so much is glaringly obvious even to a layman. I cannot believe that the Master thought them truly comparable. He was simply trying to convey the message that they were "in a different league".

45. As to (viii), Mr Morgan says that there is no risk at the costs stage which it is legitimate to take into account in arriving at a success fee. It is now clear that one does not apply different success fees to different stages of the litigation; it should be an overall figure: See *U v Liverpool City Council* [2005] 1 WLR 2657. That is not to say, however, that all risks arising in the course of litigation may not be taken into account in arriving at the overall single success fee. As has become only too apparent, not only on this appeal but in the various forays in other recent cases to the Court of Appeal and the House of Lords, there are risks and uncertainties on the principles to be applied under the new regime. These issues can be dragged out for years after the principal dispute has been concluded. That was to an extent foreseeable in January 2002. I see no reason why this factor should be ignored in deciding whether, and on what terms, to enter into a CFA. At the same time, I do not lose sight of the fact that delay, as such, can be mitigated to an extent by payments on account and the award of interest.

46. I can deal shortly with items (xii) and (xiii). It seems to me that "the legal and factual merits of a case", even though there may be difficulties in assessing them, do not shift according to the purpose for which they are currently being addressed. When one is advising the client on the likelihood of overall success or failure, one should be applying the same criteria to exactly the same information as when one is assessing the same risks for the purposes of deciding on the terms of a CFA. The chances of success do not suddenly diminish because one turns to the calculation of a success fee. A solicitor may wish to take other factors into account when deciding whether to proceed on a CFA basis, or when defining "success", but the overall merits remain the same and do not expand or shrink like Alice.

47. Finally, as to (xiv), I certainly recognise that the law of privacy is a developing area and, as I have noted already, that its development was significantly less advanced in January 2002. There is no point in drawing an analogy with the law of defamation for that purpose, since much of the difficulty in assessing outcomes in the libel context stems from ambiguity in the words complained of, the need to establish the true facts and then having to cope with a variety of substantive defences. That has no application in the present case.

48. No doubt there is room for differing personal assessments, according to judgment and experience, since the exercise is not one of precise scientific determination. But I am not persuaded that the Master strayed outside the range of reasonable assessments when he arrived at 40%. I would not accept that 40% is so high as to conflict with the public policy considerations addressed by Lord Bingham in *Callery v Gray* at [10] or that the figure "would have solicitors scrabbling for the right to conduct such cases". I might well have arrived at a somewhat lower percentage myself, but that is neither

here nor there. I am satisfied that each of the extremes espoused by the parties is untenable. Thus, the appeal fails on the second ground also.

Mr Schilling's hourly rates

49. That brings me to Mr Schilling's hourly rates. The first point to make is that the "rough and ready" approach which the courts tend to adopt on summary assessments, as encouraged by the modern approach to case management under the CPR, is unlikely to provide a sure guide for the more detailed exercise which is the subject of the present appeal. There are clearly risks if summary assessments are elevated to the status of precedents. Not surprisingly, the figures I was shown vary considerably. Also, there is a danger of selectivity if some figures approved by individual judges on particular occasions are plucked from memory and placed before the court, rather than producing the full range.

50. The rates claimed in the bill are undoubtedly high, ranging from £400 to £450 per hour. In support of these, reliance was placed on certain newspaper cuttings, purporting to show the unique qualities of the service offered by Mr Schilling.

51. There was an extract from *GQ* magazine, for example, in which Mr Schilling is listed as one of the 100 most powerful men in Britain (albeit only at No. 68, just behind Sir Andrew Turnbull, the then head of the civil service and Cabinet Secretary). The magazine's verdict on him was that he was rich, powerful, ruthless and successful. There is also a full page photograph in *The Guardian* for 17 March 2003 with a caption including the description that he is "… probably the most feared lawyer in Britain". Inside, there is a two-page feature about him headed "The silencer" and stating that he is "… one of the highest paid lawyers in Britain, a regular at film premieres and the first port of call for any celebrity having a spot of bother with the press … the injunction king". He is said to have "… world-weary features and what appears to be expensively coloured hair". There is another article from *The Independent*, headed "No gentlemanly fencing for Keith Schilling. Make way for the media lawyer at the sharp end", in which he is quoted as saying "Libel is the sharp end of PR" and also given (by himself) the title "Prince of Darkness".

52. This coverage was described by Mr Morgan, a little unkindly perhaps, as "self-serving media hype" which the Master was entitled to put aside when determining hourly rates. I agree, on the other hand, with the substance of his point. It is difficult to see what a costs judge is supposed to do with such material.

53. I am naturally conscious that since the fundamental culture change some years ago, whereby advertising for lawyers was not only permitted but positively encouraged, there is a danger that some people will begin to believe their own publicity. Those of a naturally modest and retiring character are likely to lose out to those more inclined to self-proclamation. Nonetheless, it is necessary to recognise the realities of the market place, however they have come about. On the other hand, as Master Hurst pointed out in *Campbell v MGN Ltd*, 8 March 2006, at [52], a costs judge is not concerned with "charges", only with "costs"; nor is he concerned with any market, except indirectly, and is certainly not concerned to influence any market. Master O'Hare here acknowledged the fact that clients are prepared, for whatever reason, to remunerate Mr Schilling highly for the service he provides. The essential question remained, however, to what extent it was reasonable to reflect this when the other side

comes to pick up the tab. (See the similar observations of Master Hurst in *Campbell v MGN Ltd*, cited above, at [51].)

54. In matters of this kind an appellate tribunal is likely to be slow to interfere with the judgment of an experienced costs judge. I remind myself again of the nature of an appeal in these circumstances. In particular, I need to ask whether the figure selected for hourly rates falls outside the generous ambit within which reasonable disagreement is possible. Master O'Hare assessed the appropriate rate at between £300 and £315.

55. The court is required to take into account all the circumstances including, in particular, the factors listed at CPR Part 44.5(3), which are sometimes referred to as the "seven pillars of wisdom". It is necessary to have regard to the solicitor's particular skill, effort, specialised knowledge and responsibility. Obviously, also, the case in hand must be assessed for importance, complexity, difficulty or novelty. All the while the court will apply the test of proportionality. It is not appropriate, in that context, to leave out of account the relatively low level of damages now available in defamation (and privacy) cases: see e.g. *Musa King* at [92].

56. More generally, for further guidance on the approach to hourly rates, my attention was drawn to *Higgs v Camden and Islington Health Authority* [2003] 2 Costs LR 211, a decision of Fulford J, and to *Cook on Costs*, 2006, at paragraphs 22.19-22.23.

57. This case had an element of novelty both with regard to the nature of the cause of action and quantification of damages. As litigation goes, however, it can hardly be described as "a weighty and complex matter" (as was submitted). Nor should it have been especially document heavy.

58. I am wary of the argument that because of Mr Schilling's exceptional or unique standing "defendants more readily respond to his requests/points". It is, first, questionable whether a solicitor confronted by Mr Schilling on the other side is going to give his client's case better or closer attention than would otherwise be the case. Secondly, even if correct, the point would seem to be neutral. If Mr Schilling's "requests/points" are on the facts of a particular case not especially powerful, giving them closer attention will not necessarily work to his client's advantage. As with any other lawyer, much will depend on the strength of his client's case. I do not see why answering Mr Schilling's points requires the losing side to pay more than for answering anyone else's.

59. It was argued for Schillings that its specialist expertise can only be developed, provided and retained "at an overhead cost that is likely to be much higher than for 'average' firms in the same geographical area and in areas traditionally considered to involve high overheads". This is a presumption I am invited to make *a priori* and it is said that there should be no need for evidence of actual overheads. I do not see why I should assume, without specific evidence to that effect, that media work generally, or in the field of privacy in particular, should involve greater overhead costs than commercial or private client work. It could be so, but it can hardly be a matter which I should take for granted.

60. My attention was drawn to *Jones v Secretary of State for Wales* [1997] 1 WLR 1008, 1012, Buckley J. Mr Morgan argues in the light of this decision that evidence should

be produced to demonstrate why the particular firm's expenses are in fact higher than those of the average firms in the same geographical area from which it is sought to draw a distinction. Mr Farber submits that *Jones* is rather a special case which "went against the norm in stipulating for evidence". I do not find that submission easy to reconcile with the observations by Master Hurst in *Various Claimants v TUI UK Ltd*, 11 August 2005, at [59] and [61]. He twice referred to the absence of evidence; once as to the direct cost of doing the work in question, and once as to London salary rates. I have in mind also his observations in *Campbell v MGN Ltd*, 8 March 2006, at [45], where reference was made to the evidence adduced in that case (also from Schillings) as to "differentials between City rents and salaries and West End rents and salaries".

61. Mr Morgan argued as follows:

> "If you wish to take yourself out of the norm you have to provide the court with evidence to enable you to do so. You may have a niche practice, and you may be able to persuade celebrities that you are the solicitor to go to at whatever rate you choose to charge them, but without evidence that your overheads are out of the ordinary there is no basis for holding that a *Jones* increase should apply".

I find his reasoning persuasive.

62. In the alternative, Mr Farber sought rather late in the day to introduce evidence from Mr Benaim (a Schillings partner) to plug the gap. The reason for the lateness was explained on the basis that it was a response to the decision of the Senior Costs Judge, Master Hurst, in *Musa King* on 2 December 2005. Mr Farber's primary point on that case, however, is that the decision should be confined to its own facts and should not be applied more generally. I am not sure why that should be so. It seems to me to be valuable guidance. The hourly rates assessed in that case were relatively modest (at £325 for a grade A fee earner) compared to those claimed by Mr Schilling. Moreover, I need to bear in mind that *Musa King* was a more complex case than the present and that the period in question was a little later than that in issue here (2002-2003).

63. A comparison was made also with the recent assessment of Master Hurst in relation to the costs in the House of Lords hearing in *Campbell v MGN*, 8 March 2006. Master Hurst went so far as to accept that Mr Schilling "had attained a pre-eminent position in the field of defamation" and that he was "able to command from his clients rates significantly higher than other solicitors". Even so, applying his own knowledge and experience, he was only prepared to sanction £375 per hour as "the appropriate rate": see [51]-[53]. Again, however, it is necessary to remember that this related to work carried out two to three years later. I was invited to apply a discount of 11% (corresponding to the Retail Price Index) in order to make a valid comparison with 2002. This would yield a figure around £338 – certainly higher than allowed by Master O'Hare. On the other hand, that is a far cry from concluding that the difference is such as to satisfy the criteria for overturning his exercise of discretion on the facts of this case.

64. In any event, Master Hurst's assessment was based in part upon evidence from Mr Benaim which would not be admissible in the present case.

65. The introduction of Mr Benaim's fresh evidence for this appeal was opposed by Mr Morgan, essentially because he submits that it would not have fulfilled the criteria traditionally applied under *Ladd v Marshall* [1954] 1 WLR 1489. The evidence could have been adduced before the Master but would probably not have had any significant impact on the outcome. A number of arguments were deployed in support of this latter proposition.

66. First, it was submitted that the process of determining the guideline rates published by the SCCO is complex and involves the gathering of data from various sources and the application of judicial experience to that data. On the other hand, as Master Hurst himself pointed out in *Various Claimants v TUI UK Ltd* at [58]-[59], those guideline hourly rates are published to assist judges and court users in connection with summary assessment and are, in any event, "guidelines only". The court has a discretion to allow rates which are reasonable in all the circumstances. This will include allowing from time to time costs and fees in excess of the guidelines in appropriate cases. The guidelines cannot be taken to have supplanted the experience and knowledge of those who discharge these responsibilities – either as to geographical areas or specialist fields of practice. Accordingly, neither a costs judge at first instance nor an appellate tribunal should follow the guidelines slavishly. Yet there will always be a need for transparency as to how the discretion has been exercised.

67. It must be acknowledged that the guideline rates have already built into them an element for care and conduct, although the precise percentage of that element is not ascertainable. Thus, they do not correspond to the old "A" element in the "A+B" formula which was supposedly discarded in 1998. Nevertheless, it is important to have in mind the observation in *Cook* at para. 22.23:

> "Whether or not the A and B factors are identified or concealed in a charging rate, they will still be there. Any commercial enterprise must base its prices and charges on costs plus profit and it is naïve to think that the legal profession could operate in some other way".

68. The evidence of Mr Benaim, which I read *de bene esse*, provided comparator rates charged, but inevitably it was suggested that the court could not be satisfied without further investigation as to how selective the information was or as to the objectivity of its presentation. He did not claim to give exhaustive evidence of charging rates. These submissions were buttressed by reference to an Office of Fair Trading report of February 2006. This declared that the practice of a solicitor "ringing round" to find what other firms were charging was inherently anti-competitive and that, in so far as it was appropriate to gather information of this kind, it should be gathered by an independent third party.

69. Mr Morgan submitted that Mr Benaim was "inviting the court to disregard reality" in so far as the object of his exercise was to justify, for a firm based in Soho, charging rates comparable to the large city firms. It was especially unsatisfactory since he did not provide data for comparison relating to rents and salaries.

70. Furthermore, in the increasingly competitive market place, Mr Morgan argued that it would be necessary to have information as to the extent to which firms are prepared to

negotiate down from a headline charging rate, or write off costs if not recoverable from the other side. There is a distinction between what solicitors would like to charge their clients and what they are actually asked to pay.

71. Although I did consider Mr Benaim's evidence, and heard submissions from both sides about it, I feel that it raises more questions than it answers. It would require further investigation to evaluate properly. Rather than exclude it, which would be somewhat artificial in the circumstances, I have concluded that I cannot attach any weight to it in reviewing Master O'Hare's decision.

72. All in all, I am not persuaded that there is any solid basis, whether in relation to the circumstances of the particular case, the overheads of Schillings or the specific skills and experience of Mr Schilling, which would justify my interfering with Master O'Hare's assessment of the hourly rates. I find no error of principle; nor is there anything about his decision which falls outside the reasonable range of options open to an experienced costs judge. It reflects the necessary elements of proportionality, consistency and scepticism.

The increases in hourly rates following review

73. Finally, I must consider whether Schillings are entitled to claim for the periodic increases in hourly rates. This is essentially a matter of construing the contractual obligations as between Schillings and their clients. Was there a right under the original retainer, or under some subsequent contractual arrangement, to impose liability to pay increased hourly rates?

74. In the letter notifying the clients, it was described as "a procedural formality for your records". This is a curious, if disarming, form of words. The relevant clause in the CFA states:

> "[Basic charges] are calculated for each hour engaged on your matter from now until the review date of which we shall notify you".

75. That might appear to contemplate one increase (only) on an unspecified date in the future. It could be more informative, but there is no reason to suppose that it is wholly unenforceable. It was argued before Master O'Hare that it was too open-ended and, since it failed to specify the method of calculation (e.g. by reference to the Retail Price Index), was not in compliance with the CFA Regulations 2000 (which applied at the material time). This argument did not succeed. The Master was of the view that the clients would be sufficiently protected by an implied term that any rate increase should be fair and reasonable. His decision in this respect has not been appealed by the Defendants.

76. Strictly speaking, there was non-compliance with Regulation 2(1)(d). This provided that a conditional fee agreement must specify:

> "(d) the amounts which are payable in all the circumstances and cases specified or the method to be used to calculate them and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client".

77. The Master was prepared to allow for a degree of flexibility in Schillings' favour. For this reason, it is argued, they are not on strong ground in seeking to overturn the Master's ruling so as to claim the right to more than one increase in hourly rates (and indeed percentages said to range from 11% to 23%). It would be necessary to show that such significant, unheralded and retrospective changes were consistent with the relevant Regulation.

78. The "procedural formality" formulation rather suggests that it is permissible in a CFA case effectively to by-pass the contractual process of agreeing fees between solicitor and client for the reason that the other side is likely to be paying. On the present law, however, that would clearly not be correct. The fees are required to be agreed with the client in the conventional way. What that involves is a need for the client's informed approval: see e.g. *MacDougall v Boote Edgar Esterkin* [2001] 1 Costs LR 118.

79. What was said on Schillings' behalf was broadly as follows. The contract conferred on them an express right to review their charges. Moreover, that right extends to multiple reviews and the revised rates, following each and every such review, would be binding on the client even when notified after the event. The words "review date" should not be construed as signifying only one date, but are sufficiently broad to embrace periodic reviews. It would be up to the solicitor to decide how many reviews there should be and at what intervals. The natural reading of the words (it is said) would be that notification to the clients "must inevitably be retrospective because the solicitor has to make the decision before there is anything to tell the client". There would be no need for a "discursive exchange between solicitor and client", and it would not be unusual for a solicitor to be entitled to make a unilateral decision about rates.

80. In other words, the clients must pay what they are told without any chance to be consulted or to object. It thus appears to be the Schillings stance that the unilateral decision by the solicitor to charge the clients what he likes, and to keep them in the dark for months about what they are being charged, should be regarded as a "procedural formality". So much for transparency. I do not see how this could be consistent with the wording of the regulation cited above.

81. It is conceded, on the other hand, that there would be, by implication in the contract, a term that frequency of reviews and any increases should be subject to a "reasonableness" test. The absence of an express "reasonableness" test would only be critical if the clients were materially prejudiced by its omission: *Hollins v Russell* [2003] 1 WLR 2487. In the case of a CFA, it is said, there would be no detriment because the clients would not have to pay.

82. This argument again brings into play the public policy concerns expressed by Lord Bingham in the House of Lords in *Callery v Gray* at [5]:

> "One possible abuse was that lawyers would be willing to act for claimants on a conditional fee basis but would charge excessive fees for their basic costs, knowing that their own client would not have to pay them and that the burden would in all probability fall on the defendant or his liability insurers. With this expectation the claimant's lawyers would have no incentive to moderate their charges".

83. It can thus be seen that Schillings' line of reasoning is to an extent flawed. Much of their argument, which I have attempted to summarise above, is predicated upon the proposition that charges in a CFA case are arrived at on a contractual basis like in any other case, but this is shown to be something of a fiction at the final hurdle because the analogy breaks down. An extraneous element is introduced in judging "prejudice" or "detriment" to the client; namely, that some third party is going to pay – not the client.

84. As a matter of fact, as Mr Morgan points out, it would not in any event be right to assume that the clients would in no circumstances have to pay. For example, it was provided in Condition 7 that the clients would be liable to pay all the base charges in the event of early termination of the retainer. Also, there was a provision in Condition 4 as follows:

> "You will not be entitled to recover from your opponent the part of the success fee that relates to the cost of us of postponing (*sic*) receipt of our charges and our disbursements. This remains payable by you".

It had, correspondingly, been stipulated in Schedule 1 that 5% of the increase on basic charges was attributable to two factors; namely, delayed receipt of basic charges and the special arrangement about paying disbursements. To that extent, therefore, it could not be said that the contractual arrangements were wholly free of potential prejudice or detriment to the clients.

85. Since Schillings are unable to demonstrate that their more ambitious construction of the contractual arrangements would be consistent with the regulation, I cannot uphold this ground of appeal either.

The final outcome

86. In the event, each of the appeals is dismissed.