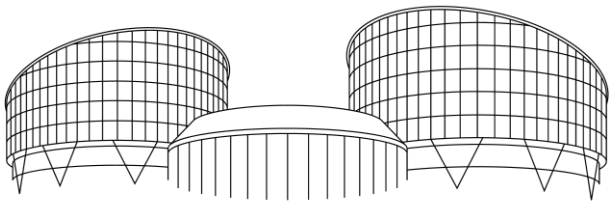

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MGN LIMITED v. THE UNITED KINGDOM

(Application no. 39401/04)

JUDGMENT
(merits)

STRASBOURG

18 January 2011

FINAL

18/04/2011

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

In the case of MGN Limited v. the United Kingdom,

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

Ljiljana Mijović, *President,*
Nicolas Bratza,
David Thór Björgvinsson,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić,
Vincent A. de Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 14 December 2010,

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

PROCEDURE

1. The case originated in an application (no. 39401/04) 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 company, MGN Limited ("the applicant"), on 18 October 2004.

2. The applicant was represented by Mr K. Bays of Davenport Lyons, a lawyer practising in London, assisted by Mr D. Pannick QC, Mr K. Starmer QC and Mr A. Hudson, Counsel. The United Kingdom Government ("the Government") were represented by their Agent, Ms H. Upton.

3. The applicant alleged two violations of its right to freedom of expression guaranteed by Article 10 of the Convention. In particular, it complained about a finding of breach of confidence against it and, further, about being required to pay the claimants' costs including success fees.

4. The Government filed written observations (Rule 59 § 1) on the merits and on the third parties' comments (Rule 44 § 6 and see immediately hereafter) and the applicant responded thereto making also its claims for just satisfaction, to which submissions the Government further responded. Combined third-party comments were received from the Open Society Justice Initiative, the Media Legal Defence Initiative, Index on Censorship, the English PEN, Global Witness and Human Rights Watch, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I THE CIRCUMSTANCES OF THE CASE

5. The applicant is the publisher of a national daily newspaper in the United Kingdom known as *The Daily Mirror* (formerly known as the *Mirror*). It is represented before the Court by Mr K. Bays of Davenport Lyons, a solicitor practising in London.

A. The relevant publications

6. On 1 February 2001 the "*Mirror*" newspaper carried on the front page an article headed "*Naomi: I am a drug addict*", placed between two colour photographs of Ms Naomi Campbell, a well-known model. The first photograph, slightly indistinct, showed her dressed in a baseball cap and had a caption: "*Therapy: Naomi outside meeting*". The second showed her glamorously partially covered by a string of beads.

7. The article read as follows:

> "Supermodel Naomi Campbell is attending Narcotics Anonymous meetings in a courageous bid to beat her addiction to drink and drugs.
>
> The 30-year old has been a regular at counselling sessions for three months, often attending twice a day.
>
> Dressed in jeans and baseball cap, she arrived at one of NA's lunchtime meetings this week. Hours later at a different venue she made a low-key entrance to a women-only gathering of recovered addicts.
>
> Despite her £14million fortune Naomi is treated as just another addict trying to put her life back together. A source close to her said last night: 'She wants to clean up her life for good. She went into modelling when she was very young and it is easy to be led astray. Drink and drugs are unfortunately widely available in the fashion world. But Naomi has realised she has a problem and has bravely vowed to do something about it. Everyone wishes her well.'
>
> Her spokeswoman at Elite Models declined to comment."

8. The story continued inside the newspaper with a longer article across two pages. This article was headed "*Naomi's finally trying to beat the demons that have been haunting her*" and the opening paragraphs read:

> "She's just another face in the crowd, but the gleaming smile is unmistakeably Naomi Campbell's. In our picture, the catwalk queen emerges from a gruelling two-hour session at Narcotics Anonymous and gives a friend a loving hug.
>
> This is one of the world's most beautiful women facing up to her drink and drugs addiction - and clearly winning.
>
> The London-born supermodel has been going to NA meetings for the past three months as she tries to change her wild lifestyle.
>
> Such is her commitment to conquering her problem that she regularly goes twice a day to group counselling ...
>
> To the rest of the group she is simply Naomi, the addict. Not the supermodel. Not the style icon."

9. The article made mention of Ms Campbell's efforts to rehabilitate herself and that one of her friends had said that she was still fragile but "getting healthy". The article gave a general description of Narcotics Anonymous ("NA") therapy and referred to some of Ms Campbell's recently publicised activities including an occasion when she had been rushed to hospital and had her stomach pumped: while she had claimed it was an allergic reaction to antibiotics and that she had never had a drug problem, the article noted that "those closest to her knew the truth".

10. In the middle of the double page spread, between several innocuous pictures of Ms Campbell, was a dominating picture with a caption "*Hugs: Naomi, dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week*". The picture showed her in the street on the doorstep of a building as the central figure in a small group. She was being embraced by two people whose faces had been masked on the photograph. Standing on the pavement was a board advertising a certain café. The photograph had been taken by a free-lance photographer contracted by the newspaper for that job. He took the photographs covertly while concealed some distance away in a parked car.

11. On 1 February 2001 Ms Campbell's solicitor wrote to the applicant stating that the article was a breach of confidentiality and an invasion of privacy and requesting an undertaking that it would not publish further confidential and/or private information.

12. The newspaper responded with further articles.

On 5 February 2001 the newspaper published an article headed, in large letters, "*Pathetic*". Below was a photograph of Ms Campbell over the caption "*Help: Naomi leaves Narcotics Anonymous meeting last week after receiving therapy in her battle against illegal drugs*". This photograph was similar to the street scene picture published on 1 February. The text of the article was headed "*After years of self-publicity and illegal drug abuse, Naomi Campbell whinges about privacy*". The article mentioned that "the Mirror revealed last week how she is attending daily meetings of Narcotics Anonymous". Elsewhere in the same edition, an editorial, with the heading "*No hiding Naomi*", concluded with the words: "If Naomi Campbell wants to live like a nun, let her join a nunnery. If she wants the excitement of a show business life, she must accept what comes with it".

On 7 February 2001, the *Mirror* published, under the heading "*Fame on you, Ms Campbell*", a further article mocking Ms Campbell's threatened proceedings, referring to the years during which she thrust "her failed projects like the nauseating book *Swan* and equally appalling record *Love and Tears* down our throats", stating that Ms Campbell was not an artist and that she was "about as effective as a chocolate soldier", implying that her prior campaign against racism in the fashion industry was self-serving publicity and that "the problem is that Naomi doesn't actually "stand" for anything. She can't sing, can't act, can't dance, and can't write."

B. The substantive proceedings

1. High Court ([2002] EWHC 499 (QB))

13. Ms Campbell claimed damages for breach of confidence and compensation under the Data Protection Act 1998. A claim for aggravated damages was made mainly as regards the article of 7 February 2001. On 27 March 2002 the High Court (Morland J.) upheld Ms Campbell's claim, following a hearing of 5 days.

14. He described Ms Campbell as an "internationally renowned fashion model and celebrity". The first issue was whether there had been a breach of confidence and, in that respect, Ms Campbell was required to prove three elements.

The first was that the details divulged by the article about her attendance at NA meetings had the necessary quality of confidence about them. Information to the effect that her treatment was regular attendance at NA meetings was clearly confidential: the details were obtained surreptitiously, assisted by covert photography when she was engaged (deliberately "low key and drably dressed") in the private activity of therapy to advance her recovery from drug addiction. Giving details of her therapy, including her regular attendance at NA, was easily identifiable as private and disclosure of that information would be highly offensive to a reasonable person of ordinary sensibilities. There existed a private interest worthy of protection.

Secondly, it was found that those details were imparted in circumstances importing an obligation of confidence given the sources of the information (either a fellow sufferer of drug addiction or one of her staff).

Thirdly, and having heard evidence on the subject, she had demonstrated that the publication was to her detriment and, notably, the publication of her treatment with NA specifically had caused her significant distress and was likely adversely to affect her attendance/participation in therapy meetings.

15. The High Court considered these findings to be in conformity with the judgment of the Court of Appeal in *Douglas v Hello! Ltd* ([2001] QB 967 §164-168) which had held that there was no watertight division between the concepts of privacy and confidentiality and that the approach to the tort had to be informed by the jurisprudence of Article 8 of the Convention. Citing *Dudgeon v. the United Kingdom* (22 October 1981, Series A no. 45) it noted that Convention jurisprudence acknowledged different degrees of privacy: the more intimate the aspect of private life which was being interfered with, the more serious the justification required.

16. The High Court adopted the approach of Lord Woolf CJ in *A v B plc* ([2003] QB 195, see paragraph 88 below) as regards, *inter alia*, the qualification of the right to freedom of expression by the right to respect for private life guaranteed by Article 8 of the Convention.

17. The High Court considered at some length the extent to which Ms Campbell had exposed herself and her private life to the media and, in light of this, how to reconcile the demands of Articles 8 and 10. The High Court considered that the applicant had been fully entitled to publish in the public interest the facts of her drug addiction and treatment as Ms Campbell had

previously misled the public by denying drug use. "She might have been thought of and indeed she herself seemed to be a self-appointed role model to young black women". However, the High Court had to protect a celebrity from publication of information about her private life which had "the mark and badge of confidentiality" and which she had chosen not to put in the public domain unless, despite that breach of confidentiality and the private nature of the information, publication was justifiable. The balance of Article 8 and 10 rights involved in the present case clearly called for a remedy for Ms Campbell as regards the publication of the private material.

18. The High Court heard evidence from, *inter alia*, Ms Campbell as to the impact on her of the publication. It concluded:

> "Although I am satisfied that Miss Naomi Campbell has established that she has suffered a significant amount of distress and injury to feelings caused specifically by the unjustified revelation of the details of her therapy with Narcotics Anonymous, apart from that distress and injury to feelings she also suffered a significant degree of distress and injury to feelings caused by the entirely legitimate publication by the defendants of her drug addiction and the fact of therapy about which she cannot complain. In determining the extent of distress and injury to feelings for which she is entitled to compensation, I must consider her evidence with caution. She has shown herself to be over the years lacking in frankness and veracity with the media and manipulative and selective in what she has chosen to reveal about herself. I am satisfied that she lied on oath [about certain facts]. Nevertheless I am satisfied that she genuinely suffered distress and injury to feelings caused by the unjustified publication and disclosure of details of her therapy in the two articles of the 1st and 5th February 2002 complained of. I assess damages or compensation in the sum of £2500."

19. As to her claim for aggravated damages (mainly the article of 7 February 2001), the High Court found that a newspaper faced with litigation was entitled to argue that a claim against it should never have been made and that any complaint should have been made to the Press Complaints Commission. Such assertions could even be written in strong and colourful language and it was not for the courts to censor bad taste. However, since the article also "trashed her as a person" in a highly offensive and hurtful manner, this entitled her to aggravated damages in the sum of GBP 1000.

2. Court of Appeal ([2002] EWCA Civ 1373

20. On 14 October 2002 the Court of Appeal (Lord Phillips of Worth Matravers MR, Chadwick and Keene LJJ) unanimously allowed the newspaper's appeal. The hearing had lasted two and a half days.

21. The Court of Appeal noted that Ms Campbell was an "internationally famous fashion model" who had courted, rather than shunned, publicity in part to promote other ventures in which she was involved. In interviews with the media she had volunteered information about some aspects of her private life and behaviour including limited details about her relationships. She had gone out of her way to aver that, in contrast to many models, she did not take drugs, stimulants or tranquillisers, but this was untrue.

22. As to the impact of the Human Rights Act 1998 ("HRA") on the law of confidentiality, the court observed that it had to balance the rights

guaranteed by Articles 8 and 10 of the Convention, noting that freedom of the media was a bastion of any democratic society.

23. As to whether the information disclosed was confidential, the Court of Appeal did not consider that the information that Ms Campbell was receiving therapy from NA was to be equated with disclosure of clinical details of medical treatment. Since it was legitimate to publish the fact that she was a drug addict receiving treatment, it was not particularly significant to add that the treatment consisted of NA meetings which disclosure would not be offensive to a reasonable reader of ordinary sensibilities. While a reader might have found it offensive that obviously covert photographs had been taken of her, that, of itself, had not been relied upon as a ground of complaint. In addition, it was not easy to separate the distress Ms Campbell must have felt at being identified as a drug addict in treatment accompanied by covert photographs from any additional distress resulting from disclosure of her attendance at NA meetings. In short, it was not obvious that the peripheral disclosure of Ms Campbell's attendance at NA meetings was of sufficient significance as to justify the intervention of the court.

24. Relying on *Fressoz and Roire v. France* ([GC], no. 29183/95, § 54, ECHR 1999-I), the Court of Appeal considered that the photographs were a legitimate, if not an essential, part of the journalistic package designed to demonstrate that Ms Campbell had been deceiving the public when she said that she did not take drugs and, provided that publication of particular confidential information was justifiable in the public interest, the journalist had to be given reasonable latitude as to the manner in which that information was conveyed to the public or his Article 10 right to freedom of expression would be unnecessarily inhibited. The publication of the photographs added little to Ms Campbell's case: they illustrated and drew attention to the information that she was receiving therapy from NA.

3. House of Lords ([2004] UKHL 22)

25. Following a hearing of 2 days, on 6 May 2004 the House of Lords allowed Ms Campbell's appeal (Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell formed the majority, Lords Nicholls of Birkenhead and Hoffman dissenting) and restored the orders made by the High Court. They delivered separate and extensive judgments.

(a) Lord Hope of Craighead

26. Lord Hope began by noting the powerful international reputation of Ms Campbell in the business of fashion modelling, which business was conducted under the constant gaze of the media. He also noted her "status as a celebrity". He considered that the issues were essentially questions of "fact and degree" which did not raise any "new issues of principle". In the present case, where the publication concerned a drug addict requiring treatment and, given the fact that disclosure of details concerning that treatment together with publication of a covertly taken photograph could endanger that treatment, the disclosure was of private information.

27. The case gave rise to a competition between the rights of free speech and privacy which were of equal value in a democratic society. In balancing these rights, Lord Hope noted that the right to privacy, which lay at the heart of an action for breach of confidence, had to be balanced against the right of the media to impart information to the public and that the latter right had, in turn, to be balanced against the respect that must be given to private life. There was nothing new about this in domestic law.

28. He examined in detail the latitude to be accorded to journalists in deciding whether or not to publish information to ensure credibility. He noted the principles set out in this respect in this Court's case law (*Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216; *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298 and *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I).

29. Having examined the balancing exercise in the *Jersild* and *Fressoz* cases, Lord Hope reiterated there was no doubt that the choices made about the presentation of material that was legitimate to convey to the public was pre-eminently an editorial matter with which the court would not interfere. However, choices to publish private material raised issues that were not simply about presentation and editing. Accordingly, the public interest in disclosure had to be balanced against the right of the individual to respect for their private life: those decisions were open to review by the court. The tests to be applied were familiar and were set down in Convention jurisprudence. The rights guaranteed by Articles 8 and 10 had to be balanced against each other, any restriction of those rights had to be subjected to very close scrutiny and neither Article 8 nor Article 10 had any pre-eminence over each other (as confirmed by Resolution 1165 of the Parliamentary Assembly of the Council of Europe ("PACE"), 1998).

30. As to the Article 10 rights involved, the essential question was whether the means chosen to limit Article 10 rights were "rational, fair and not arbitrary and impair the right as minimally as is reasonably possible". In this respect, the relevant factors were, on the one hand, the duty on the press to impart information and ideas of public interest which the public has a right to receive (*Jersild v. Denmark*, cited above) and the need to leave it to journalists to decide what material had to be reproduced to ensure credibility (*Fressoz and Roire v. France* cited above) and, on the other hand, the degree of privacy to which Ms Campbell was entitled as regards the details of her therapy under the law of confidence. However, the right of the public to receive information about the details of her treatment was of a much lower order than its undoubted right to know that she was misleading the public when she said that she did not take drugs since the former concerned an intimate aspect of her private life (*Dudgeon v. the United Kingdom*, 22 October 1981, § 52, Series A no. 45). While he acknowledged the great importance of political expression and, indeed, of freedom of expression (constituting one of the essential foundations of a democratic society and one of the basic conditions for its progress and the self-fulfilment of each individual, *Tammer v. Estonia*, no. 41205/98, § 59, ECHR 2001-I), he considered that no political or democratic values were at

stake and no pressing social had been identified (*a contrario*, *Goodwin v. the United Kingdom*, 27 March 1996, § 40, *Reports* 1996 II).

31. As to the competing Article 8 rights, the potential for harm by the disclosure was an important factor in the assessment of the extent of the restriction that was needed to protect Ms Campbell's right to privacy. From the point of Article 8, publication of details of her treatment (that she was attending NA, for how long, how frequently and at what times of day, the nature of her therapy, the extent of her commitment to the process and the publication of covertly taken photographs) had the potential to cause harm to her and Lord Hope attached a good deal of weight to this factor. The fact that she was a "celebrity" was not enough to deprive her of her right to privacy. A margin of appreciation had be accorded to a journalist but viewing details of treatment for drug addiction merely "as background was to undervalue the importance that was to be attached to the need, if Ms Campbell was to be protected, to keep these details private". It was hard to see any compelling need for the public to know the name of the organisation that she was attending for therapy or the details of that therapy. The decision to publish these details suggested that greater weight was given to the wish to publish a story that would attract interest rather than any wish to maintain its credibility.

32. Lord Hope then considered the covert photographs. It was true that, had he to consider the text of the articles only, he would have been "inclined to regard the balance between these rights as about even", such was the effect of the margin of appreciation that had to be, in a doubtful case, given to a journalist. However, the text could not be separated from the photographs as the captions clearly linked what might otherwise have been anonymous and uninformative pictures to the main text. In addition, the reasonable person of ordinary sensibilities would regard publication of the covertly taken photographs, linked in that way to the text, as adding greatly to the overall intrusion into Ms Campbell's private life.

While photographs taken in a public place had to be considered, in normal circumstances, one of the "ordinary incidents of living in a free community", the real issue was whether publicising the photographs was offensive in the present circumstances. He reviewed the case-law of the Court (including *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 57, ECHR 2001 IX and *Peck v United Kingdom*, no. 44647/98, § 62, ECHR 2003 I) and applied the reasoning in the *Peck* case. Ms Campbell could not have complained if the photographs had been taken to show a scene in a street by a passer-by and later published simply as street scenes. However, the photographs invaded Ms Campbell's privacy because they were taken deliberately, in secret, with a view to their publication in conjunction with the article and they focussed on the doorway of the building of her NA meeting and they revealed clearly her face. The argument that the publication of the photograph added credibility to the story had little weight, since the reader only had the editor's word as to the truth of Ms Campbell's attendance at a NA meeting. He continued:

> "124. Any person in Miss Campbell's position, assuming her to be of ordinary sensibilities but assuming also that she had been photographed surreptitiously outside the place where she been receiving therapy for drug addiction, would have known what they were and would have been distressed on seeing the photographs. She would have seen their publication, in conjunction with the article which revealed what she had been doing when she was photographed and other details about her engagement in the therapy, as a gross interference with her right to respect for her private life. In my opinion this additional element in the publication is more than enough to outweigh the right to freedom of expression which the defendants are asserting in this case."

33. Lord Hope therefore concluded that, despite the weight that had to be given to the right to freedom of expression that the press needs if it is to play its role effectively, there was an infringement of Ms Campbell's privacy which could not be justified.

(b) Baroness Hale of Richmond

34. Baroness Hale observed that the examination of an action for breach of confidence began from the "reasonable expectation of privacy" test inquiring whether the person publishing the information knew or ought to have known that there was a reasonable expectation that the relevant information would be kept confidential. This was a threshold test which brought the balancing exercise between the rights guaranteed by Articles 8 and 10 of the Convention into play. Relying also on the PACE Resolution 1165 (1998), she noted that neither right took precedence over the other. The application of the proportionality test, included in the structure of Articles 8 and 10, was much less straightforward when two Convention rights were in play and, in this respect, she relied on the above-cited cases of *Jersild v Denmark*, *Fressoz and Roire v France* and *Tammer v Estonia*.

35. In striking the balance in this case, she noted:

> "143. ... Put crudely, it is a prima donna celebrity against a celebrity-exploiting tabloid newspaper. Each in their time has profited from the other. Both are assumed to be grown-ups who know the score. On the one hand is the interest of a woman who wants to give up her dependence on illegal and harmful drugs and wants the peace and space in which to pursue the help which she finds useful. On the other hand is a newspaper which wants to keep its readers informed of the activities of celebrity figures, and to expose their weaknesses, lies, evasions and hypocrisies. This sort of story, especially if it has photographs attached, is just the sort of thing that fills, sells and enhances the reputation of the newspaper which gets it first. One reason why press freedom is so important is that we need newspapers to sell in order to ensure that we still have newspapers at all. It may be said that newspapers should be allowed considerable latitude in their intrusions into private grief so that they can maintain circulation and the rest of us can then continue to enjoy the variety of newspapers and other mass media which are available in this country. It may also be said that newspaper editors often have to make their decisions at great speed and in difficult circumstances, so that to expect too minute an analysis of the position is in itself a restriction on their freedom of expression."

36. However, Baroness Hale considered it not to be a trivial case and defined the particularly private nature of the information the publication of which Ms Campbell contested. It concerned the important issue of drug abuse and, consequently, her physical and mental health. She underlined the importance of, as well as the sensitivities and difficulties surrounding,

treatment for addiction and, notably, of the vital therapy to address an underlying dependence on drugs. Moreover, the Court's jurisprudence had always accepted that information about a person's health and treatment for ill-health was both private and confidential (*Z v. Finland*, 25 February 1997, § 95, *Reports* 1997-I). While the disclosed information may not have been in the same category as clinical medical records, it amounted to the same information which would be recorded by a doctor in such records namely, the presenting problem of addiction to illegal drugs, the diagnosis and the prescription of therapy. Baroness Hale therefore began her analysis from the fact - which was common ground - that all information about Ms Campbell's addiction and attendance at NA disclosed in the article was both private and confidential because it related to an important aspect of her physical and mental health and the treatment she was receiving for it. It had also been received from an insider in breach of confidence.

37. As to the nature of the freedom of expression being asserted on the other side, Baroness Hale recalled the main forms of expression which she recorded in descending order of importance: political speech (which included revealing information about public figures, especially those in elective office, which would otherwise be private but was relevant to their participation in public life), intellectual and educational expression as well as artistic expression. However, Baroness Hale found it difficult to see the contribution made by "pouring over the intimate details of a fashion model's private life". It was true that the editor had chosen to run a sympathetic piece, listing Ms Campbell's faults and follies and setting them in the context of her addiction and her even more important efforts to overcome addiction and such publications might well have a beneficial educational effect. However, such pieces were normally run with the co-operation of those involved and Ms Campbell had refused to be involved with the story. The editor, nevertheless, considered that he was entitled to reveal this private information without her consent because Ms Campbell had presented herself to the public as someone who was not involved in drugs. Baroness Hale questioned why, if a role model presented a stance on drugs beneficial to society, it was so necessary to reveal that she had "feet of clay". However, she accepted that the possession and use of illegal drugs was a criminal offence and was a matter of serious public concern so that the press had to be free to expose the truth and put the record straight.

38. However, while Ms Campbell's previous public denial of drug use might have justified publication of the fact of her drug use and of her treatment for drug addiction, it was not necessary to publish any further information, especially if it might jeopardise her continued treatment. That further information amounted to the disclosure of details of her treatment with NA and Baroness Hale considered that the articles thereby "contributed to the sense of betrayal by someone close to her of which she spoke and which destroyed the value of [NA] as a safe haven for her".

39. Moreover, publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, the photographs were not objectionable. If the case concerned a photograph of Ms Campbell

going about her business in a public street, there could have been no complaint. However, the accompanying text made it plain that these photographs were different in that they showed Ms Campbell outside a NA meeting in the company of some persons undoubtedly part of the NA group and they showed the place where the meeting took place, which would have been entirely recognisable to anyone who knew the locality. Photographs by their very nature added to the impact of the words in the articles as well as to the information disclosed. The photographs also added to the potential harm "by making her think that she was being followed or betrayed, and deterring her from going back to the same place again".

40. Moreover, there was no need for the photographs to be included in the articles for the editor to achieve his objective. The editor had accepted that, even without the photographs, it would have been a front page story. He had his basic information and he had his quotes. He could have used other photographs of Ms Campbell to illustrate the articles. While the photographs would have been useful in proving the truth of the story had this been challenged, there was no need to publish them for this purpose as the credibility of the story with the public would stand or fall with the credibility of stories of the Daily Mirror generally. Baroness Hale added, in this context, that whether the articles were sympathetic or not was not relevant since the way an editor "chose to present the information he was entitled to reveal was entirely a matter for him".

41. Finally, it was true that the weight to attach to these various considerations was "a matter of fact and degree". Not every statement about a person's health would carry the badge of confidentiality: that a public figure had a cold would not cause any harm and private health information could be relevant to the capacity of a public figure to do the job. However, in the present case the health information was not harmless and, indeed, as the trial judge had found, there was a risk that publication would do harm:

> "... People trying to recover from drug addiction need considerable dedication and commitment, along with constant reinforcement from those around them. That is why organisations like [NA] were set up and why they can do so much good. Blundering in when matters are acknowledged to be at a 'fragile' stage may do great harm.
>
> 158. The trial judge was well placed to assess these matters. ... he was best placed to judge whether the additional information and the photographs had added significantly both to the distress and the potential harm. He accepted her evidence that it had done so. He could also tell how serious an interference with press freedom it would have been to publish the essential parts of the story without the additional material and how difficult a decision this would have been for an editor who had been told that it was a medical matter and that it would be morally wrong to publish it."

(c) Lord Carswell

42. Lord Carswell agreed with Lord Hope and Baroness Hale. It was not in dispute that the information was of a private nature and imparted in confidence to the applicant and that the applicant was justified in publishing the facts of Ms Campbell's drug addiction and that she was receiving treatment given her prior public lies about her drug use. He also agreed with Lord Hope as to the balancing of Articles 8 and 10 rights and, further, that

in order to justify limiting the Article 10 right to freedom of expression, the restrictions imposed had to be rational, fair and not arbitrary, and they must impair the right no more than necessary.

43. Having examined the weight to be attributed to different relevant factors, he concluded that the publication of the details of Ms Campbell's attendance at therapy by NA, highlighted by the photographs printed which revealed where the treatment had taken place, constituted a considerable intrusion into her private affairs which was capable of causing and, on her evidence, did in fact cause her, substantial distress. In her evidence, she said that she had not gone back to the particular NA centre and that she had only attended a few other NA meetings in the UK. It was thus clear, that the publication created a risk of causing a significant setback to her recovery.

44. He did not minimise the "the importance of allowing a proper degree of journalistic margin to the press to deal with a legitimate story in its own way, without imposing unnecessary shackles on its freedom to publish detail and photographs which add colour and conviction", which factors were "part of the legitimate function of a free press" and had to be given proper weight. However, the balance came down in favour of Ms Campbell.

(d) Lord Nicholls of Birkenhead

45. Lord Nicholls began by noting that Ms Campbell was "a celebrated fashion model", that she was a "household name, nationally and internationally" and that her face was "instantly recognisable". He noted that the development of the common law (tort of breach of confidence) had been in harmony with Articles 8 and 10 of the Convention so that the time had come to recognise that the values enshrined in Articles 8 and 10 were now part of the cause of action for breach of confidence (Lord Woolf CJ, *A v B plc* [2003] QB 195, 202, § 4).

46. He found that the reference to treatment at NA meetings was not private information as it did no more than spell out and apply to Ms Campbell common knowledge of how NA meetings were conducted.

47. However, even if Ms Campbell's attendance at meetings was considered private, her appeal was still ill-founded since:

> "On the one hand, publication of this information in the unusual circumstances of this case represents, at most, an intrusion into Miss Campbell's private life to a comparatively minor degree. On the other hand, non-publication of this information would have robbed a legitimate and sympathetic newspaper story of attendant detail which added colour and conviction. This information was published in order to demonstrate Miss Campbell's commitment to tackling her drug problem. The balance ought not to be held at a point which would preclude, in this case, a degree of journalistic latitude in respect of information published for this purpose.
>
> It is at this point I respectfully consider [that the High Court] fell into error. Having held that the details of Miss Campbell's attendance at [NA] had the necessary quality of confidentiality, the judge seems to have put nothing into the scales under article 10 when striking the balance between articles 8 and 10. This was a misdirection. The need to be free to disseminate information regarding Miss Campbell's drug addiction is of a lower order than the need for freedom to disseminate information on some other subjects such as political information. The degree of latitude reasonably to be accorded to journalists is correspondingly reduced, but it is not excluded altogether."

48. He observed that Ms Campbell's repeated public assertions denying her drug addiction rendered legitimate the publication of the facts that she was a drug addict and in treatment had been legitimate. The additional impugned element that she was attending NA meetings as a form of therapy was of such an unremarkable and consequential nature that its disclosure had also been legitimate. The same applied to information concerning how long Ms Campbell was receiving such treatment given that the frequency and nature of NA meetings was common knowledge. Hence, the intrusion into Ms Campbell's private life was comparatively minor.

49. Lastly, and as to the photographs, Lord Nicholls observed that she did not complain about the taking of the photographs nor assert that the taking of the photographs was itself an invasion of privacy, rather that the information conveyed by the photographs was private. However, the particular photographs added nothing of an essentially private nature: they conveyed no private information beyond that discussed in the article and there was nothing undignified about her appearance in them.

(e) Lord Hoffmann

50. Lord Hoffmann began his judgment by describing Ms Campbell as "a public figure" and, further, a famous fashion model who had lived by publicity. He noted that the judges of the House of Lords were "divided as to the outcome of this appeal" but the difference of opinion related to "a very narrow point" concerning the unusual facts of the case. While it was accepted that the publication of the facts of her addiction and of her treatment was justified as there was sufficient public interest given her previous public denials of drug use, the division of opinion concerned "whether in doing so the newspaper went too far in publishing associated facts about her private life". He continued:

> "But the importance of this case lies in the statements of general principle on the way in which the law should strike a balance between the right to privacy and the right to freedom of expression, on which the House is unanimous. The principles are expressed in varying language but speaking for myself I can see no significant differences."

51. There being no automatic priority between Articles 8 and 10, the question to be addressed was the extent to which it was necessary to qualify one right in order to protect the underlying value protected by the other and the extent of the qualification should be proportionate to the need. The only point of principle arising was, where the essential part of the publication was justified, should the newspaper be held liable whenever the judge considered that it was not necessary to have published some of the personal information or should the newspaper be allowed some margin of choice in the way it chose to present the story (referring to *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I).

52. In this respect, Lord Hoffman considered that it would be:

> "inconsistent with the approach which has been taken by the courts in a number of recent landmark cases for a newspaper to be held strictly liable for exceeding what a judge considers to have been necessary. The practical exigencies of journalism

> demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure. And if any margin is to be allowed, it seems to me strange to hold the Mirror liable in damages for a decision which three experienced judges in the Court of Appeal have held to be perfectly justified."

53. Given the relatively anodyne nature of the additional details, the *Mirror* was entitled to a degree of latitude in respect of the way it chose to present its legitimate story.

54. As to the publication of photographs in particular, Lord Hoffman observed that the fact that the pictures were taken without Ms Campbell's consent did not amount to a wrongful invasion of privacy. Moreover, the pictures did not reveal a situation of humiliation or severe embarrassment (as in *Peck v. the United Kingdom*, no. 44647/98, ECHR 2003-I) and had not been taken by intrusion into a private place. There was nothing demeaning or embarrassing about the photographs. They added nothing to what was said in the text and carried the message that the *Mirror*'s story was true. Accordingly, the decision to publish the pictures was within the margin of editorial judgment to which the *Mirror* was entitled. Although the trial judge found that the publication was likely to affect her therapy, this had neither been pleaded before nor fully explored by the trial judge.

55. The appeal was allowed, the High Court award was restored. Ms Campbell's costs (of the appeals to the Court of Appeal and to the House of Lords) were awarded against the applicant, the amount to "be certified by the Clerk of Parliaments, if not agreed between the parties ...".

C. The proceedings concerning legal costs

56. Ms Campbell's solicitors served three bills of costs on the applicant in the total sum of GBP 1,086, 295.47: GBP 377,070.07 for the High Court; GBP 114,755.40 for the Court of Appeal; and GBP 594,470.00 for the House of Lords. The latter figure comprised "base costs" of GBP 288,468, success fees of GBP 279,981.35 as well as GBP 26,020.65 disbursements. In the High Court and Court of Appeal, Ms Campbell's solicitors and counsel had acted under an ordinary retainer. But the appeal to the House of Lords was conducted pursuant to a Conditional Fee Agreement ("CFA") which provided that, if the appeal succeeded, solicitors and counsel should be entitled to base costs as well as success fees amounting to 95% and 100% of their base costs, respectively.

1. Campbell v. MGN Limited [2005] UKHL 61

57. On 21 February 2005 the applicant appealed to the House of Lords seeking a ruling that it should not be liable to pay the success fees as, in the circumstances, such a liability was so disproportionate as to infringe their right to freedom of expression under Article 10 of the Convention. The applicant did not seek thereby a declaration of incompatibility but argued that domestic law regulating the recoverability of success fees should be

read so as to safeguard its rights under Article 10. On 26 May 2005 this appeal was heard by the House of Lords.

58. On 2 August 2005 Ms Campbell's solicitors accepted the applicant's offers to pay GBP 290,000 (High Court costs) and GBP 95,000 (Court of Appeal costs), both amounts being exclusive of interest.

59. On 20 October 2005 the appeal was unanimously dismissed. The House of Lords found that the existing CFA regime with recoverable success fees was compatible with the Convention, but they expressed some reservations about the impact of disproportionate costs.

(a) Lord Hoffman

60. Lord Hoffmann observed that the deliberate policy of the Access to Justice Act 1999 ("the 1999 Act") was to impose the cost of all CFA litigation upon unsuccessful defendants as a class. Losing defendants were to be required to contribute to the funds which would enable lawyers to take on other cases, which might not be successful, but which would provide access to justice for people who could not otherwise have afforded to sue. Therefore, the policy shifted the burden of funding from the State to unsuccessful defendants, which was a rational social and economic policy.

61. While he was concerned about the indirect effect of the threat of a heavy costs liability on the newspapers' decisions to publish information which ought to be published but which carried a risk of legal action, he considered that a newspaper's right could be restricted to protect the right of litigants under Article 6 to access to a court.

62. The applicant maintained that recoverable success fees were disproportionate on the basis of two flawed arguments. The first was that the success fee was necessarily disproportionate as it was more than (and up to twice as much as) the amount which, under the ordinary assessment rules, would be considered reasonable and proportionate. This was a flawed point as it confused two different concepts of proportionality. The CPR on costs were concerned with whether expenditure on litigation was proportionate to the amount at stake, the interests of the parties, complexity of the issues and so forth. However, Article 10 was concerned with whether a rule, which required unsuccessful defendants, not only to pay the reasonable and proportionate costs of their adversary in the litigation, but also to contribute to the funding of other litigation through the payment of success fees, was a proportionate measure, having regard to the effect on Article 10 rights. The applicant did not "really deny that in principle it is open to the legislature to choose to fund access to justice in this way."

63. The second argument of the applicant was to the effect that it was unnecessary to give Ms Campbell access to a court because she could have afforded to fund her own costs. However, it was desirable to have a general rule to enable the scheme to work in a practical and effective way and that concentration on the individual case and the particularities of Ms Campbell's circumstances would undermine that scheme. It was for this reason that the Court in *James and Others v the United Kingdom* (21 February 1986, Series A no. 98) considered that Parliament was entitled

to pursue a social policy of allowing long leaseholders of low-rated houses to acquire their freeholds at concessionary rates, notwithstanding that the scheme also applied to some rich tenants who needed no such assistance. The success fee should not be disallowed simply on the ground that the applicant's liability would be inconsistent with its rights under Article 10. Thus, notwithstanding the need to examine the balance on the facts of the individual case, Lord Hoffman considered that the impracticality of requiring a means test and the small number of individuals who could be said to have sufficient resources to provide them with access to legal services entitled Parliament to lay down a general rule that CFAs were open to everyone. Success fees, as such, could not be disallowed simply on the ground that the present applicant's liability would be inconsistent with its rights under Article 10: the scheme was a choice open to the legislature and there was no need for any exclusion of cases such as the present one from the scope of CFAs or to disallow success fees because the existing scheme was compatible.

64. However, Lord Hoffman did not wish to leave the case without commenting on other problems which defamation litigation under CFAs was currently causing and which had given rise to concern that freedom of expression might be seriously inhibited. The judgment of Eady J in *Turcu v News Group Newspapers Ltd* ([2005] EWHC 799) highlighted the significant temptation for media defendants to settle cases early for purely commercial reasons, and without regard to the true merits of any pleaded defence. This 'chilling effect' or 'ransom factor' inherent in the CFA system was a situation which could not have arisen in the past and was very much a modern development.

65. Lord Hoffman considered that the "blackmailing effect" of such litigation arose from two factors: (a) the use of CFAs by impecunious claimants who did not take out insurance to protect themselves from having to pay the winning party's costs if they lost; and (b) the conduct of the case by the claimant's solicitors in a way which not only ran up substantial costs but required the defendants to do so as well. Referring to a recent case where this was particularly evident (*King v Telegraph Group Ltd [Practice Note]* [2005] 1 WLR 2282), he continued:

> "Faced with a free-spending claimant's solicitor and being at risk not only as to liability but also as to twice the claimant's costs, the defendant is faced with an arms race which makes it particularly unfair for the claimant afterwards to justify his conduct of the litigation on the ground that the defendant's own costs were equally high"

66. Lord Hoffman endorsed the solution offered by the Court of Appeal in the *King* case (a "cost-capping" order at an early stage of the action). However, that was only a palliative as it did not deal with the problem of a newspaper risking substantial and irrecoverable costs. Smaller publishers might not be able to afford to take a stand and neither capping costs at an early stage nor assessing them later dealt with the threat of having to pay the claimant's costs at a level which was, by definition, up to twice the amount which would be reasonable and proportionate. While the DCA Consultation

Paper (paragraph 101 below) discussed the problem, no legislative intervention had been proposed.

67. Lord Hoffman distinguished between personal injury litigation and defamation proceedings. Personal injury litigation comprised a large number of small claims and the liability insurers were able to pass these costs on to their road user customers with their own solvency not being threatened and the liability insurers had considerable negotiating strength to dispute assessments of costs and to hold up the cash flow of the claimants' solicitors so that both sides therefore had good reasons for seeking a compromise. On the other hand, in defamation cases the reasons for seeking a compromise were much weaker: there was a small number of claims and payment of relatively large sums of costs; some publishers might be strong enough to absorb or insure against this but it had a serious effect upon their financial position; and publishers did not have the same negotiating strength as the liability insurers because there were few assessments to be contested and disputing them involved considerable additional costs.

68. While the objective of enabling people of modest means to protect their reputations and privacy from powerful publishers was a good one, Lord Hoffman considered that it might be that a legislative solution would be needed for the scheme to comply with Article 10 of the Convention.

(b) Lord Hope of Craighead

69. Lord Hope agreed with Lord Hoffmann.

70. He underlined the protection to the losing party contained in the CPR and the Costs Practice Directions. Reasonableness and proportionality tests were applied separately to base costs and to the percentage uplift for success fees. However, the most relevant question for a court in assessing the reasonableness of the percentage uplift was "the risk that the client might or might not be successful" (paragraph 11.8(l)(a) of the Costs Practice Directions) and that "in evenly balanced cases a success fee of 100 per cent might well be thought not to be unreasonable".

71. There remained the question of proportionality. Other than providing that the proportionality of base costs and success fees were to be separately assessed, the Costs Practice Directions did not identify any factors that might be relevant. However, it would be wrong to conclude that this was an empty exercise as it was the "ultimate controlling factor" to ensure access to the court by a claimant to argue that her right to privacy under Article 8 was properly balanced against the losing party's rights to freedom of speech under Article 10. While the losing party would pay the success fee, any reduction in the percentage increase would have to borne by the successful party under the CFA: the interests of both sides had to be weighed up in deciding whether the amount was proportionate.

(c) Lord Carswell

72. Lord Carswell agreed with the opinions of Lord Hoffmann and Lord Hope. While "there are many who regard the imbalance in the system adopted in England and Wales as most unjust", the regimen of CFAs and

recoverable success fees was "legislative policy which the courts must accept". As to whether recoverable success fees, which undoubtedly constituted a "chill factor", were compatible with Article 10 and a proportionate way of dealing with the issue of the funding of such litigation, it was not really in dispute that the legislature could in principle adopt this method of funding access to justice.

73. The present case turned on whether it was still proportionate when the claimant was wealthy and not in need of the support of a CFA. While it was rough justice, the requirement on solicitors to means test clients before concluding a CFA was unworkable. With some regret, the conclusion was clear. While Lord Carswell was "far from convinced about the wisdom or justice of the CFA system" as it was then constituted, "it had to be accepted as legislative policy". It had not been shown to be incompatible with the Convention and the objections advanced by the applicant could not be sustained.

(d) Lord Nicholls of Birkenhead and Baroness Hale of Richmond

74. Lord Nicholls agreed with the preceding opinions. Baroness Hale also agreed with Lord Hoffman. It was, for her, a separate question whether a legislative solution might be needed to comply with Article 10: this was a complex issue involving a delicate balance between competing rights upon which she preferred to express no opinion.

75. From the date of rejection of this second appeal, the applicant was liable to pay 8% interest on the costs payable.

76. On 28 November 2005 an order for the costs of the second appeal to the House of Lords was made against the applicant. Ms Campbell therefore served an additional bill of costs of GBP 255,535.60. The bill included a success fee of 95% (GBP 85,095.78) in respect of the solicitors' base costs, her counsel having not entered into a CFA for this appeal.

2. Review by the Judicial Taxing Officers of the costs of the second appeal to the House of Lords

77. The applicant then sought to challenge the proportionality of the costs and success fees claimed in respect of both appeals to the House of Lords. An assessment hearing was fixed for 8 March 2006 before the Judicial Taxing Officers of the House of Lords.

78. On 3 March 2006 the applicant agreed with Ms Campbell's solicitors to pay the sum of GBP 350,000 in respect of the costs claimed in relation to the first appeal, excluding interest and including the success fee applicable to the first appeal. The applicant considered it was unlikely to do better before the Taxing Officers, it wished to avoid accruing interest (8% per day) and further litigation on costs would lead to further costs and success fees.

79. The hearing on 8 March 2006 (before two Judicial Taxing Officers) therefore concerned the costs of the second appeal only, the Taxing Officers noting that the applicant had settled the costs of the first appeal, it "no doubt recognising the inevitability of the position". A number of preliminary issues were decided by the Taxing Officers including the validity of the CFA, the applicable success fee rate and the proportionality of the base costs billed by Ms Campbell's representatives (and on which that success fee would be calculated).

80. By judgment dated 8 March 2006 the Judicial Taxing Officers found that, in these hard fought proceedings ultimately decided by a split decision of the House of Lords, there was "no doubt" that the success fees (95% and 100%) claimed in respect of the first appeal to the House of Lords were appropriate having regard to the first and second instance proceedings. Since the second appeal to the House of Lords was part and parcel of the first and was clearly contemplated by the parties when they entered into the CFA, the second appeal was covered by the CFA and thus the same success fee. The effect of this was, of course, that the applicant faced a greatly increased bill of costs: however, the applicant lost this issue in the second appeal to the House of Lords. A success fee of 95% for the second appeal to the House of Lords was therefore approved. Relying on Rules 44.4 and 44.5 of the CPR as well as paragraph 15.1 of the Costs Practice Directions as well as a necessity test, the Taxing Officers reduced the hourly rates chargeable by Ms Campbell's solicitors and counsel, thereby reducing the base costs and, consequently, the success fee payable by the applicant.

81. On 5 May 2006 the applicant appealed to the House of Lords arguing that the Taxing Officers judgment was incorrect in so far as those Officers considered that the success fee for the second appeal could not be varied. On 28 June 2006 the House of Lords refused leave to appeal.

82. On 5 July 2007 the applicant agreed to pay GBP 150,000 (inclusive of interest and assessment procedure costs) in settlement of Ms Campbell's costs of the second appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Breach of confidence/misuse of private information

1. The Human Rights Act 1998 ("the HRA")

83. Section 2(1) of the HRA provides that a court or tribunal determining a question which has arisen in connection with a Convention right must take into account, *inter alia*, any judgment, decision, declaration or advisory opinion of the European Court of Human Rights.

84. Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. A public authority includes a court (section 6(3)(a) of the HRA).

85. Section 12(4) provides that a court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to journalistic material, to (a) the extent to which the material has, or is about to, become available to the public, or it is, or would be, in the public interest for the material to be published as well as to (b) any relevant privacy code.

2. The Press Complaints Commission Code of Practice ("The PCC Code")

86. The PCC Code provided, at the relevant time, as follows:

> "3. Privacy
>
> i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent.
>
> ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable.
>
> Note - Private places are public or private property where there is a reasonable expectation of privacy
>
> ...
>
> 1. The public interest includes:
>
> i) Detecting or exposing crime or a serious misdemeanour.
>
> ii) Protecting public health and safety.
>
> iii) Preventing the public from being misled by some statement or action of an individual or organisation. . . ."

3. Breach of Confidence and Article 8 of the Convention

87. Originally the tort of breach of confidence was characterised by reference to an obligation of confidence which arose whenever a person received information he knew or ought to have known was fairly and reasonably confidential. More recently, the tort developed through the case-law so as to extend to situations where information, properly to be regarded as private information, has been misused. In principle, such a claim arises

where private information has been wrongfully published and it is now well-recognised that this form of the tort of breach of confidence encapsulates the values enshrined in both Articles 8 and 10 of the Convention. The guiding principle as to what comprises an individual's private information is whether the individual had a reasonable expectation of privacy as regards the information in issue.

88. Lord Woolf CJ held as follows, as regards the balancing of the interests protected by Articles 8 and 10, in his oft-cited judgment in the Court of Appeal in the case of *A v B plc* ([2003] QB 195):

> "4.....under section 6 of the 1998 [Human Rights] Act, the court, as a public authority, is required not to act "in a way which is incompatible with a Convention right". The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.
>
> 5. The court is assisted in achieving this because the equitable origins of the action for breach of confidence mean that historically the remedy for breach of confidence will only be granted when it is equitable for this to happen. ...
>
> 6. The manner in which the two articles operate is entirely different. Article 8 operates so as to extend the areas in which an action for breach of confidence can provide protection for privacy. It requires a generous approach to the situations in which privacy is to be protected. Article 10 operates in the opposite direction. This is because it protects freedom of expression and to achieve this it is necessary to restrict the area in which remedies are available for breaches of confidence. There is a tension between the two articles which requires the court to hold the balance between the conflicting interests they are designed to protect. This is not an easy task but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights both articles are designed to protect. Each article is qualified expressly in a way which allows the interests under the other article to be taken into account. ...
>
> 11(iv) ... Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it has to be justified. ...
>
> (x) If there is an intrusion in a situation where a person can reasonably expect his privacy to be respected then that intrusion will be capable of giving rise to a liability in action for breach of confidence unless the intrusion can be justified. ...
>
> (xii) Where an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his or her actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be

overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls. The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media. On the difficult issue of finding the right balance, useful guidance of a general nature is provided by the Council of Europe Resolution 1165 of 1998.

(xiii) In drawing up a balance sheet between the respective interests of the parties courts should not act as censors or arbiters of taste. This is the task of others."

B. Costs, conditional fee arrangements ("CFA") and success fees

1. General

89. A successful party to litigation may only recover costs if and to the extent that a Court so orders and such questions are to be determined in accordance with the Civil Procedure Rules 1988 ("CPR"). The CPR referred to below are applicable to proceedings before the House of Lords. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party (Rule 44.3(2) of the CPR).

90. Prior to 1995, the only means of funding litigation (apart from legal aid) was to agree an ordinary retainer with a lawyer. CFAs were introduced for a limited range of litigation by section 58 of the Courts and Legal Services Act 1990 ("the 1990 Act"). A CFA is an agreement between a client and a legal representative which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances (for example, if successful). Further secondary legislation was necessary to allow CFAs to be adopted. The Conditional Fee Agreements Order 1995 not only brought into force CFAs but it extended the range of proceedings for which CFAs could be concluded, that range being further extended to cover all litigation apart from criminal and family proceedings by the Conditional Fee Agreements Order 1998. This position was relatively unchanged by the Access to Justice Act ("the 1999 Act").

91. A CFA, even as initially introduced, could make provision for the payment of a percentage uplift in fees ("success fees"). A success fee provided that the amount of any fees to which it applied (base costs) could be increased by a percentage in specified circumstances (for example, if successful). Section 58(4) of the 1990 Act provides that a success fee must, *inter alia*, state the percentage by which the amount of the fees is to be increased and the Conditional Fee Agreements Order 2000 specified the maximum percentage uplift to be 100%.

92. The 1999 Act then inserted section 58A into the 1990 Act. This provided that an order for costs made by a court could include the success fees payable under a CFA, so that the base costs, as well as the success fees, could be recovered against an unsuccessful party. The 1999 Act also made ATE (after the event) Insurance premiums recoverable against a losing party.

93. The CPR regulate the making of costs orders and the assessment of such costs including success fees (Rule 43.2(1)(a) of the CPR).

Rule 44.3(1)-(9) sets out the general rules which govern the court's discretion to make an order for costs against a party.

Rule 44.3A of the CPR provides that, at the conclusion of the proceedings to which the CFA relates, the court may make a summary assessment or order a detailed assessment of all or part of the costs (including success fees).

Rule 44.4(2) provides that, where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue and that it will resolve any doubt which it may have, as to whether costs were reasonably incurred or reasonable and proportionate in amount, in favour of the paying party.

Rule 44.5 provides that the court must have regard to all circumstances in deciding whether costs, assessed on a standard basis, were proportionately and reasonably incurred or were proportionate and reasonable in amount. Such circumstances must include the conduct of all the parties, the amount or value of any money or property involved; the importance of the matter to all the parties; the particular complexity of the matter or the difficulty or novelty of the questions raised; the skill, effort, specialised knowledge and responsibility involved; the time spent on the case; and the place where and the circumstances in which work or any part of it was done.

94. Costs Practice Directions supplement the CPR.

Paragraph 11.5 of the Direction provides that in deciding, on a standard basis of assessment, whether the costs are reasonable and proportionate, the court will consider the amount of any additional liability (including success fees) separately from the base costs.

Paragraph 11.8 requires the Court to take into account, when deciding whether the percentage uplift by which the success fee is calculated is reasonable, all relevant factors and it provides examples of such factors: the circumstances in which the costs would be payable might or might not occur (including whether the case would win); the legal representative's liability for any disbursements; and any other methods of financing the costs available to the receiving party.

Paragraph 11.9 provides as follows:

> "A percentage increase will not be reduced simply on the ground that, when added to the base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate."

95. A party to litigation who instructs lawyers pursuant to a CFA may, but is under no obligation to, take out ATE Insurance.

2. Relevant domestic case law on CFAs and success fees

(a) *Designers Guild Ltd v. Russell Williams (Textiles) Ltd*. [2003] 2 Costs LR 204.

96. Paragraph 27 of the Practice Directions Applicable to Judicial Taxations in the House of Lords (adopted in March 2007) provides that

notification is to be given to the opposing parties and to the Judicial Office as soon as practicable after a CFA has been entered into, and that the Taxing Officers decide questions of percentage uplift in accordance with the principles set out in the above-cited case of *Designers' Guild Limited*.

97. This case was the first assessment of costs for an appeal to the House of Lords involving CFAs. The appellant had been successful at first instance, had lost (unanimously) in the Court of Appeal and its appeal was allowed (unanimously) in the House of Lords. On 31 March 2003 the Taxing Officers held:

> "14. With regard to the solicitors' claim a success fee of 100% is sought. [Counsel for the Appellant] produced to us the opinion of Leading Counsel prior to the CFA being entered into which put the chances of success at no more than evens. That opinion was given against a background in which the appellant company had been successful at first instance and lost in the Court of Appeal. It is quite clear that the issues were finely balanced. It is generally accepted that if the chances of success are no better than 50% the success fee should be 100%.
>
> The thinking behind this is that if a solicitor were to take two identical cases with a 60% chance of success in each it is likely that one would be lost and the other won. Accordingly the success fee (of 100%) in the winning case would enable the solicitor to bear the loss of running the other case and losing.
>
> 15. There is an argument for saying that in any case which reached trial a success fee of 100% is easily justified because both sides presumably believed that they had an arguable and winnable case. In this case we have no doubt at all that the matter was finely balanced and that the appropriate success fee is therefore 100%".

(b) *Turcu v News Group Newspapers Ltd* [2005] EWHC 799 (QB)

98. Eady J noted as follows:

> "6. The claimant ... seeks a large award of damages, including aggravated and exemplary damages, against the proprietors of The News of the World .... He is able to pursue his claim purely because [his legal representative] has been prepared to act on his behalf on the basis of a [CFA]. This means, of course, that significant costs can be run up for the defendant without any prospect of recovery if they are successful, since one of the matters on which [the legal representative] does apparently have instructions is that his client is without funds. On the other hand, if the defendant is unsuccessful it may be ordered to pay, quite apart from any damages, the costs of the claimant's solicitors including a substantial mark-up in respect of a success fee. The defendant's position is thus wholly unenviable.
>
> 7. Faced with these circumstances, there must be a significant temptation for media defendants to pay up something, to be rid of litigation for purely commercial reasons, and without regard to the true merits of any pleaded defence. This is the so-called "chilling effect" or "ransom factor" inherent in the conditional fee system, which was discussed by the Court of Appeal in [*King v Telegraph Group Ltd [Practice Note]* [2005] 1 WLR 2282]. This is a situation which could not have arisen in the past and is very much a modern development."

(c) *King v Telegraph Group Ltd [Practice Note]* [2005] 1 WLR 2282

99. This claimant was without financial means and had no ATE insurance. Brooke LJ noted the significant pre-action costs incurred by the claimant's solicitors which required, in turn, costs to be incurred by the

defendant who also risked paying double the claimants' already significant costs. He continued:

> "What is in issue in this case, however, is the appropriateness of arrangements whereby a defendant publisher will be required to pay up to twice the reasonable and proportionate costs of the claimant if he loses or concedes liability, and will almost certainly have to bear his own costs (estimated in this case to be about £400,000) if he wins. The obvious unfairness of such a system is bound to have the chilling effect on a newspaper exercising its right to freedom of expression ... and to lead to the danger of self-imposed restraints on publication which he so much feared ....
>
> It is not for this court to thwart the wish of Parliament that litigants should be able to bring actions to vindicate their reputations under a CFA, and that they should not be obliged to obtain ATE cover before they do so. ... On the other hand, we are obliged to read and give effect to relevant primary and secondary legislation so far as possible in a way that is compatible with a publisher's Article 10 Convention rights ....
>
> In my judgment the only way to square the circle is to say that when making any costs capping order the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. It cannot be just to submit defendants in these cases, where their right to freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win.
>
> If this means, ..., that it will not be open to a CFA-assisted claimant to receive the benefit of an advocate instructed at anything more than a modest fee or to receive the help of a litigation partner in a very expensive firm who is not willing to curtail his fees, then his/her fate will be no different from that of a conventional legally aided litigant in modern times. It is rare these days for such a litigant to be able to secure the services of leading counsel unless the size of the likely award of compensation justifies such an outlay, and defamation litigation does not open the door to awards on that scale today. Similarly, if the introduction of this novel cost-capping regime means that a claimant's lawyers may be reluctant to accept instructions on a CFA basis unless they assess the chances of success as significantly greater than evens (so that the size of the success fee will be to that extent reduced), this in my judgment will be a small price to pay in contrast to the price that is potentially to be paid if the present state of affairs is allowed to continue."

3. Public consultation process on CFAs and success fees including the "Review of Civil Litigation Costs: Final Report", of Jackson LJ, January 2010 ("the Jackson Review")

(a) Consultation prior to the Jackson Review

100. In 2003 a Consultation Paper entitled "Simplifying CFAs" was completed by the Department of Constitutional Affairs ("DCA", whose powers were transferred to the Ministry of Justice in May 2007). The use of CFAs in defamation proceedings emerged as a controversial issue during this consultation. Several national and regional media organisations took the opportunity to raise a number of concerns about the impact of the use of CFAs in defamation proceedings. Media organisations claimed that CFAs inhibited the right to freedom of expression and encouraged unmeritorious claims. Claimants' lawyers felt that the use of CFAs in defamation proceedings had greatly widened access to justice and placed claimants on an equal footing with their opponents.

101. In the 2004 Consultation Paper "Making Simple CFAs a reality" of the DCA, media organisations reiterated the view that CFAs needed to be controlled in defamation proceedings. They stressed that funding these cases by CFAs (particularly where the claimant had significant personal wealth) impinged on the media's right to freedom of expression because the success fee could effectively double a claimant lawyer's cost. This resulted in the "ransom" or "chilling effect" that forced the media to settle claims they might otherwise fight due to excessive costs. The media also expressed concerns there was no true ATE insurance market (because the very small number of cases did not ensure a competitive market), and about the failure of the costs judges to effectively control CFA costs in defamation proceedings. While the focus of the Consultation Paper had been defamation proceedings, the same problems applied in other publication cases.

The 2004 Paper also noted that claimants' lawyers, on the other hand, believed that CFAs provided access to justice for all in an area of law where many would otherwise not be able to afford to seek redress. They also made the point that CFAs played an important role in discouraging irresponsible journalism. The sharp decline in the number of claims issued in this area, after the introduction of CFAs in defamation proceedings, indicated that lawyers were being more cautious when advising clients who were considering litigation. They believed that CFAs should not be banned or restricted in this area of law, but that success fees should be staged – 100% for cases going to trial and less for cases that settled early.

The DCA concluded that legislation to restrict the use of success fees in this area (publication proceedings) was not planned. The DCA supported the initiative launched by the Civil Justice Council ("CJC") to mediate a general agreement on success fees in this area of law and considered that the existing powers of the courts were sufficient to control costs.

102. The above-cited judgment in *King* and the 2004 consultation prompted media organisations and claimants' lawyer groups to try to reach an agreement on the way forward. Following the CFA round table hosted by the DCA in July 2004, both sides approached the CJC to mediate.

103. In April 2005 a previous Lord Chancellor spoke about CFAs and costs at a media society event. He called for proper control and proportionality in the costs-risks attached to publication litigation and urged claimant and media lawyers to try to find a solution through discussion.

104. In March 2006 the House of Commons Constitutional Affairs Select Committee considered the role of CFAs in defamation and privacy proceedings as part of its inquiry on the "Compensation Culture". It felt that courts could address disproportionate costs through appropriate cost control measures such as cost-capping and that it might be appropriate for lawyers to re-assess risk (and therefore the amount of uplift) as the case progressed (staged success fees). No concrete action was taken.

105. From 2006 to 2007 the CJC hosted a number of forums including representatives from the media, legal profession and insurance. This mediation, having been suspended pending the second appeal in the present

case to the House of Lords, concluded with the production of a model agreement ("the Theobalds Park Plus Agreement") which set out a range of solutions including a range of staged success fees.

106. The Ministry of Justice agreed with the CJC's recommendations that the Theobalds Park Plus model agreement was workable and could help ensure that costs of litigation were proportionate and reasonable. The Ministry of Justice decided to consult on the issue. Through its Consultation Paper of August 2007 entitled "Conditional fee agreements in defamation proceedings: Success Fees and After the Event Insurance", the Ministry of Justice sought views on the implementation of the CJC's recommendations in publication proceedings and, notably, on a range of fixed staged recoverable success fees and on the recoverability of ATE insurance premiums. A slightly revised scheme was published with responses to the consultation in July 2008. Some responses to the consultation supported in principle the introduction of fixed recoverable staged success fees and ATE insurance premiums; however, there was no consensus on the details of the scheme. The media in particular did not support the scheme and strongly opposed its implementation and called for additional measures to address disproportionate and unreasonable costs in CFA cases. The scheme was not implemented.

107. On 24 February 2009 the Ministry of Justice published further a Consultation Paper on "Controlling costs in defamation proceedings". The high levels of legal costs in defamation and some other publication related proceedings had been the subject of criticism and debate in the courts and Parliament. "Excessive costs may force defendants to settle unmeritorious claims, which in turn threatens a more risk averse approach to reporting and some argue is a risk to freedom of expression". While the Government had previously consulted on proposals for a scheme of staged recoverable success fees and after the event insurance (ATE) premiums in publication proceedings to reduce unreasonable and disproportionate costs, a number of media organisations suggested additional measures that they considered necessary if costs in this area were to be maintained at reasonable levels. The Consultation Paper therefore sought views on measures to better control costs notably through limiting recoverable hourly rates; costs-capping; and requiring the proportionality of total costs to be considered on costs assessments conducted by the court.

108. As regards the question (no 6) of whether the courts should apply the proportionality test to total costs not just base costs, the Consultation Paper noted that the Government considered that "a requirement to consider the proportionality of total costs would be a helpful tool in controlling costs in defamation proceedings". They would request the CPR Committee to consider amendments to the CPR and to the related practice direction.

109. As to the scope of the proposals, the Consultation Paper assumed that as a minimum the provisions would be introduced for defamation disputes (libel and slander) because it was principally in these cases that the key problems were seen to arise. However, the Paper added that there were

other causes of action (such as breach of privacy) where "it may be considered they should also apply".

110. The Consultation Paper with the responses and proposals received was published on 24 September 2009. The CPR Committee, requested to consider a number of measures to control costs in publication proceedings, proposed draft rules concerning, *inter alia*, additional information and control of ATE insurance. The Civil Procedure (Amendment) Rules 2009 came into force on 1 October 2009. The Government preferred to leave other matters open pending the Jackson Review.

(b) The Jackson Review, January 2010

111. 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.

112. In January 2010 the Jackson Review was published, running to almost 600 pages plus appendices. 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.

113. 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:

> "4.7 The recoverability regime does not possess either of the two crucial features of the legal aid regime which it replaces. In my view these omissions are two of its flaws. The third flaw is that the burden placed upon opposing parties is simply too great. The fourth flaw is that it presents an opportunity for some lawyers to make excessive profits. The consequence of these four flaws is 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. I will give three examples in the next three paragraphs.
>
> 4.9 The tree root claims. It is, in my view, absurd that insurance companies can bring claims against local authorities using CFAs ... thereby doubling the costs burden upon council tax payers. The insurance companies can well afford to fund such litigation themselves and should do so.
>
> 4.10 Commercial claims. It is also, in my view, absurd that one party to commercial litigation can become a "super-claimant"... and thereby transfer most of the costs burden to the other party. Two arguments have been pressed upon me by defenders of recoverability in such cases: first, that recoverability enables [small and medium enterprises ("SMEs")] to take on larger companies; secondly that the opposing party can avoid the crushing costs burden by settling early. As to the first argument, the recoverability provisions are of universal application. They are just as likely to be

used by a large company against an SME as vice versa. As to the second argument ... some business disputes are evenly balanced. It is perfectly reasonable for the companies on both sides to decide to fight. It is quite wrong for one or other party to be pressurised into settling by a gross imbalance in the costs liabilities of the parties. If party A has a CFA... and party B does not, party A may be litigating at virtually no costs risk, whereas party B may face liability for quadruple costs if it loses.

4.11 Consumer dispute. County court litigation sometimes involves disputes between suppliers of goods and customers or consumers. Where such litigation is above the level of the small claims track, it is not unknown for the supplier to have a CFA and for the individual on the other side not to have a CFA. It all depends upon the terms which each party manages to agree with its own solicitors. In some cases the recoverability regime will give the consumer a "free ride" against the supplier. In other cases it will have precisely the opposite effect. It is perfectly possible for the recoverability regime to give the supplier a free ride and to expose the consumer to a massively increased costs liability.

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."

114. Specifically in relation to defamation and related claims, Jackson LJ considered that the present system was "the most bizarre and expensive system that it is possible to devise" for the following three reasons:

"(i) Defendants pay a heavy price in order to ensure (a) that claimants within the CFA regime are protected against adverse costs liability and (b) that defendants can still recover costs if they win.

(ii) Despite paying out large ATE insurance premiums in cases which they lose, the defendants' costs recovery in cases which they win may be only partial. This is because the defendants' costs recovery will be subject to the policy limits agreed by claimants in those cases.

(iii) The present regime of recoverable ATE insurance premiums is indiscriminating. A wealthy celebrity suing a hard pressed regional newspaper publisher is fully entitled to take out ATE insurance, effectively at the expense of the defendant. The present regime provides protection against adverse costs, but it is in no way targeted upon those claimants who need such protection."

115. As to defamation and related proceedings, Jackson LJ noted that a principal concern that had been expressed in relation to the costs of defamation proceedings and privacy cases was the widespread use of CFAs with ATE insurance, which could impose a disproportionate costs burden on defendants. He had recommended, for all civil litigation, a return to CFAs whose success fees and ATE premiums were not recoverable from the losing party (the pre-1999 Act position): those arrangements had not suffered from the above flaws but opened up access to justice for many individuals who formerly had no such access.

If that recommendation were to be adopted, Jackson LJ considered that it should go a substantial distance to ensuring that unsuccessful defendants in such proceedings were not faced with a disproportionate costs liability. However, such a measure could also reduce access to justice for claimants of slender means. To overcome this latter potential problem, he recommended complementary measures for defamation and related proceedings including increasing the general level of damages in defamation and breach of privacy proceedings by 10% and introducing a regime of qualified one way costs shifting, under which the amount of costs that an unsuccessful claimant may be ordered to pay was a reasonable amount, reflective of the means of the parties and their conduct in the proceedings.

(c) Consultation subsequent to the "Jackson Review"

(i) Report of the House of Commons Culture, Media and Sport Committee entitled "Press standards, privacy and libel", 24 February 2010

116. In its introduction, the Report noted:

"Throughout our inquiry we have been mindful of the over-arching concerns about the costs of mounting and defending libel actions, and the 'chilling effect' this may have on press freedom. The evidence we have heard leaves us in no doubt that there are problems which urgently need to be addressed in order to enable defamation litigation costs to be controlled more effectively. We find the suggestion that the problem confronting defendants, including media defendants, who wish to control their costs can be solved by settling cases more promptly to be an extraordinary one. If a defendant is in the right, he should not be forced into a settlement which entails him sacrificing justice on the grounds of cost.

All the evidence which we have received points to the fact that the vast majority of cases brought under a Conditional Fee Agreement (CFA) are won. We therefore see no justification for lawyers to continue to demand 100% success fees which are chargeable to the losing party. We recommend that the recovery of success fees from the losing party should be limited to no more than 10%, leaving the balance to be agreed between solicitor and client. We further recommend that the Government should make After the Event Insurance premiums irrecoverable."

117. As regards, in particular, costs in defamation litigation, it commented:

"263. We are aware that machinery exists for defendants to protect their position as to costs by making a payment into court. It does not appear to us that this machinery effectively protects a defendant, who genuinely attempts to settle a claim at an early stage, against a determined and deep-pocketed litigant. This is another issue which needs to be addressed by the Ministry of Justice. ...

292. Although some have suggested that CFAs should be means-tested, in practice, given the high costs involved, this would be likely to result in access to justice being limited to the extremely poor and the super rich. The complexities involved also do not lend themselves to a simple or proportionate solution. We therefore do not support the introduction of means-testing CFAs. ...

294. In the matter of success fees, the argument is made that they need to be high to compensate for the risks run by lawyers .... This view is not, however, supported by the data available on the outcomes of cases of this kind. This data suggests that CFA-funded parties win the vast majority of their cases. ...

295. This high success rate is no doubt in part the fruit of careful selection. Indeed common sense and the economic incentives would point to the inevitability of cherry-picking. ...

307. All the evidence we have heard leads us to conclude that costs in CFA cases are too high. We also believe that CFA cases are rarely lost, thereby undermining the reasons for the introduction of the present scheme. However it is vital to the maintenance of press standards that access to justice for those who have been defamed is preserved. We do not agree with the Ministry of Justice that the maximum level of success fees should be capped at 10%, nor do we believe that success fees should become wholly irrecoverable from the losing party. However we would support the recoverability of such fees from the losing party being limited to 10% of costs leaving the balance to be agreed between solicitor and client. This would address the key issue and seems to us to provide a reasonable balance, protecting access to justice, adequately compensating solicitors for the risks taken, giving claimants and their

lawyers, in particular, a strong incentive to control costs and ensuring that costs to a losing party are proportionate. ...

309. ... Just as the press must be accountable for what it writes, lawyers must be accountable for the way in which cases are run, and that includes costs. The current costs system, especially the operation of CFAs, offers little incentive for either lawyers or their clients to control costs, rather the contrary. It also leads to claims being settled where they lack merit. We hope that the combined effect of our recommendations, the Ministry of Justice consultations and the conclusions of Lord Justice Jackson, will provide the impetus for a fairer and more balanced approach to costs in publication proceedings."

(ii) "Controlling Costs in Defamation Proceedings – Reducing Conditional Fee Agreement Success Fees" ("The 2010 Consultation Paper"): CP1/2010

118. In January 2010 the Ministry of Justice launched a further public consultation with the above-noted Paper. It considered only the option of reducing the maximum uplift in defamation cases to 10% pending consideration of the other recommendations of the Jackson Review (the reference here to defamation including other publication cases). The executive summary of the Consultation Paper reads as follows:

"The Government has for some time been concerned about the impact of high legal costs in defamation proceedings, particularly the impact of 100% success fees, which can double the costs to unsuccessful defendants in cases funded under conditional fee agreements (CFAs).

CFAs have increased access to justice for claimants in making it more possible to bring cases. However, the experience over the past decade suggests that - in defamation proceedings in particular - the balance has swung too far in favour of the interests of claimants, and against the interests of defendants. The current arrangements appear to permit lawyers acting under a CFA to charge a success fee that is out of proportion to the risks involved. Aside from the cost burden this places on the opposing side, this could encourage weaker and more speculative claims to be pursued.

The Government does not believe that the present maximum success fee in defamation proceedings is justifiable in the public interest. This is particularly the case because the evidence shows that many more defamation claims win than would substantiate such a generous success fee. This view is supported by Sir Rupert Jackson's report ...

This consultation paper seeks views on a proposal to reduce the maximum success fee which lawyers can currently charge from 100% to 10% of the base costs. This is an interim measure for dealing with disproportionate costs while the Government considers Sir Rupert's wider proposals which seek to radically change the existing arrangements for all cases where CFAs are used. The proposal in this consultation paper would help reduce the costs for media defendants further and limit the potential harmful effect very high legal costs appear to have on the publication decisions of the media and others.

This proposed change is intended to complement changes already introduced on 1 October 2009 in respect of defamation proceedings which were designed to control the costs of individual cases."

119. The Ministry of Justice Consultation Paper of 3 March 2010 included the responses and its conclusions. It concluded as follows:

"2. The Government has had particular concerns about the high costs in defamation cases. Defamation is a discrete area where we have already taken a number of steps to help control costs. Defamation proceedings are now part of a mandatory costs budgeting pilot, with Judges scrutinising costs as cases progress.

3. Lord Justice Jackson in his report ... recommends the abolition of recoverability of success fees and after the event (ATE) insurance premiums across civil litigation. Sir Rupert's report is substantial with recommendations that are far reaching with potentially widespread impact on many areas. However, it sets out a clear case for CFA reform. Even those respondents who did not support our proposal of reducing defamation success fees to 10% agree that the status quo cannot be permitted to continue. The main flaw identified by Sir Rupert of the current regime is the costs burden placed upon the opposing side. He also points out that the CFA regime was working satisfactorily before recoverability of success fees and ATE was introduced – an assertion that is made by a large number of respondents to the consultation.

4. Previous attempts to control the success fees have proved unfruitful. For example during 2007 the Department published a consultation paper, Conditional fee agreements in defamation proceedings: Success Fees and After the Event Insurance, on a scheme of fixed recoverable staged success fees and ATE insurance premiums. However, there was no consensus on the details of the scheme and it could not be implemented. No new evidence was provided to Sir Rupert against his recommendation on abolishing recoverability of success fees and ATE.

5. We carefully considered all the responses. More than half (53%) of those who responded agreed with our proposal to reduce the defamation success fees to 10%. The Government also considered the report from the Culture Media and Sport Committee on press freedom libel and privacy published on 25 February 2010. Although the Committee did not agree with our proposal it recommends that the recoverability of success fees should be capped to 10%.

6. The Government is actively assessing the implications of Sir Rupert's proposals and will also consider the Committee's report and recommendations including those on costs. However, in the meantime we are minded to implement the proposal to reduce the maximum success fee in defamation cases to 10% immediately as an interim measure.

7. We have therefore today laid the Conditional Fee Agreements (Amendment) Order before Parliament with a view to having the maximum success fee of Controlling Costs in Defamation Proceedings Summary of responses 10% in defamation cases in force as soon as possible subject to Parliamentary approval.

8. In light of the comments received, the Order has been amended to make clear that the new requirements will only apply to CFAs entered into after the date on which the Order comes into force. Defamation proceedings for the purpose of the Order means publication proceedings (within the meaning of rule 44.12B of the [CPR]) which includes defamation, malicious falsehood or breach of confidence involving publication to the public at large."

120. The Conditional Fee Agreements (Amendment) Order was therefore laid before Parliament. However, that proposal was not maintained during the run-up to the general election in May 2010.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION CONCERNING BREACH OF CONFIDENCE

121. The applicant complained under Article 10 of the Convention about the finding of breach of confidence against it as regards its publication of the relevant articles. Article 10 reads, insofar as relevant, as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence,..."

A. Admissibility of the complaint

122. The Court finds that the present complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other ground. It must therefore be declared admissible.

B. The applicant's observations on the merits

123. The applicant noted that Ms Campbell accepted that she could not complain about the publication of the facts of her drug addiction and treatment because she had chosen to put into the public domain an assertion that she did not take drugs. Every domestic judge therefore considered that it was therefore in the public interest to publish those matters.

124. The core question in the domestic courts was whether the publication of three items of additional information ("the additional material") was justified or not. The addition material impugned by the majority of the House of Lords comprised the fact that Ms Campbell was attending NA meetings, information about those NA meetings and two photographs of her outside her NA meetings.

125. The applicant preferred and relied extensively upon the dissenting judgments of Lord Nicholls and Lord Hoffman.

126. It mainly argued that the majority of the House of Lords failed to accord sufficient weight to the editor's assessment made in good faith as to how much detail to publish in order to ensure the credibility of the story, particularly in light of Ms Campbell's previous false denials of addiction and treatment, even if those details related to a medical condition. The difference between the majority and minority in the House of Lords was not a narrow point, as the Government suggested, but rather a fundamental dispute as to the circumstances warranting an interference with editorial judgment.

127. If there was no objection to publishing the fact of her addiction and treatment, there could be no objection to the publication of the details of that treatment since treatment by attendance at NA meetings was well known treatment, widely used and much respected. The treatment details and photographs were anodyne once it was accepted that it was permissible to publish the fact of her addiction and the fact that she was receiving treatment for it. These details therefore constituted a limited intrusion into her private life which could not take priority over the newspapers entitlement to assess in good faith which details to publish to support the credibility of the matters it was reporting in the public interest. Equally, the photographs were taken to illustrate articles on a matter of agreed legitimate public interest and, in any event, contained no private information beyond that already legitimately contained in the article. Moreover, given that Ms Campbell lived by publicity, she could not insist upon too great a nicety of judgment as to the circumstantial detail with which the story was presented.

128. Finally, it was impossible to see that Ms Campbell suffered any significant additional distress because of the publication of the additional material concerning her treatment. As Lord Hoffman pointed out, the impact of the publication on her continuing therapy was not pleaded domestically.

129. It was for the Court to decide if the domestic courts made errors of principle and the applicant considered that they made the above-described errors. The applicant was not suggesting that a public figure who put aspects of her private life into the public domain forfeited the protection of Article 8: rather it maintained that its publication rights and rights of editorial discretion derived from Article 10 were weightier than the private life rights of the applicant on the facts of the present case.

C. Observations of the Government

130. The Government submitted that the law of England and Wales was Convention compliant as was the application of that law to the present facts.

131. A claim for breach of confidence would only succeed if the court concluded that the publication of the private information was wrongful. The notion of wrongful publication was interpreted as importing the values contained in Articles 8 and 10 of the Convention. In practice, a court was required to weigh the public interest in maintaining the confidentiality of the information in question against the countervailing public interest in publication. The context for this exercise was provided by Articles 8 and 10 of the Convention, as explained by Lord Hope (paragraph 27 above).

132. On matters of fine assessment of conflicting Convention rights and the application of settled principles to the facts of a particular case, Contracting States were entitled to a certain margin of appreciation.

133. The domestic assessments demonstrated that the balance of the Articles 8 and 10 rights in the present case was correct and indeed a narrow point. The House of Lords relied on the correct Convention principles as to how to balance Articles 8 and 10 rights: indeed, there was no difference of principle between the majority and minority of the House of Lords. The

narrow point at issue between them and, consequently, in the present case was the application of those principles to the facts of the case. The majority considered, for relevant and sufficient reasons given, that details of Ms Campbell's treatment went beyond justified publication. The Government underlined that there was a clear qualitative distinction to be made between the facts that Ms Campbell was a drug addict and in treatment and the publication of details of the treatment she was receiving. The non-medical therapy clearly constituted treatment close to the core of Article 8 of the Convention: the treatment was continuing, publication of those details risked affecting her willingness or ability to continue and the publication of these additional details had no public interest. Moreover, the same reasoning applied as regards the decision by the majority of the House of Lords as regards the photographs: the decision on photographs flowed from their decision that information about the treatment details of Ms Campbell was private and that there was no public interest in its publication.

134. Accordingly, since the correct principles were identified and relevant and sufficient reasons given for their application, the House of Lords' conclusion fell within its permitted margin. The applicant simply requested this Court to ignore this margin of appreciation and to exercise a further appeal jurisdiction and to prefer the minority factual analysis over that of the majority.

135. As to the applicant's suggestion that the House of Lords accorded insufficient respect to a journalist's right to decide how much to publish to ensure credibility, the majority of the House of Lords clearly recognised the need to afford the applicant a proper margin in that respect. Having regard also to the "duties and responsibilities" of journalists, the margin to be accorded was not an unlimited one, was not out-with the supervision of the national court and was appropriate on the facts.

D. The Court's assessment

136. The Court must determine whether the finding by the majority of the House of Lords of breach of confidence against the applicant constituted an interference with its right to freedom of expression. Any such interference will breach the Convention if it fails to satisfy the criteria set out in the second paragraph of Article 10 and, in that respect, the Court must determine whether an interference was "prescribed by law", pursued one or more of the legitimate aims listed in that paragraph and was "necessary in a democratic society" in order to achieve that aim or aims.

1. Was there an interference prescribed by law for a legitimate aim?

137. The Court considers, and it was not disputed by the Government, that the finding of a breach of confidence against the applicant amounted to an interference with its right to freedom of expression.

138. In addition, the applicant did not contest the lawfulness of the interference, which derived from the common law tort of breach of confidentiality, nor that its aim, protecting the rights of others, was

legitimate. The Court accepts that the interference was prescribed by law (paragraphs 83-88 above) and pursued the legitimate aim of protecting "the ... rights of others" namely, Ms Campbell's right to respect for her private life.

2. Was the interference "necessary in a democratic society"?

139. The fundamental principles relating to this question are well established in the case-law and have been summarised by the Grand Chamber as follows (see, for example, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-XI):

> "45. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.
>
> The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.
>
> The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether it was "proportionate to the legitimate aim pursued". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ... ."

140. A number of additional factors are particularly relevant to the Court's supervisory role in the present case.

141. In the first place, regard must be had to the pre-eminent role of the press in a State governed by the rule of law (for example, *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports* 1996-II). Whilst it is true that the methods of objective and balanced reporting may vary considerably and that it is therefore not for this Court, nor for the national courts, to substitute its own views for those of the press as to what technique of reporting should be adopted (*Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298), editorial discretion is not unbounded. The press must not overstep the bounds set for, among other things, "the protection of the reputation of ... others", including the requirements of acting in good faith and on an accurate factual basis and of providing "reliable and precise"

information in accordance with the ethics of journalism (*Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI with further references contained therein). Nevertheless it is incumbent on it to impart information and ideas on matters of public interest (*De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I). Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (Observer and Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239 *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III; and, more recently, *Gutiérrez Suárez v. Spain*, no. 16023/07, § 25, 1 June 2010).

142. In addition, when verifying whether the authorities struck a fair balance between two protected values guaranteed by the Convention which may come into conflict with each other in this type of case, freedom of expression protected by Article 10 and the right to respect for private life enshrined in Article 8, the Court must balance the public interest in the publication of a photograph and the need to protect private life (*Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, ECHR 2007-VII. The balancing of individual interests, which may well be contradictory, is a difficult matter and Contracting States must have a broad margin of appreciation in this respect since the national authorities are in principle better placed than this Court to assess whether or not there is a "pressing social need" capable of justifying an interference with one of the rights guaranteed by the Convention (*Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III).

143. Finally, the Court considers that the publication of the photographs and articles, the sole purpose of which is to satisfy the curiosity of a particular readership regarding the details of a public figure's private life, cannot be deemed to contribute to any debate of general interest to society despite the person being known to the public. In such conditions freedom of expression calls for a narrower interpretation (see, *mutatis mutandis*, *Campmany y Diez de Revenga and Lopez Galiacho Perona v. Spain* (dec.), no. 54224/00, ECHR 2000-XII; *Julio Bou Gibert and El Hogar Y La Moda J.A. v. Spain* (dec.), no. 14929/02, 13 May 2003; and *Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003; as cited in *Von Hannover v. Germany*, no. 59320/00, § 65-66, ECHR 2004-VI). Moreover, although freedom of expression also extends to the publication of photographs, this is an area in which the protection of the rights and reputation of others takes on particular importance. Photographs appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution (*Von Hannover v. Germany*, cited above, at § 59. See also *Hachette Filipacchi Associés v. France*, cited above, § 42).

144. The Court has therefore examined whether the finding of a breach of confidence by the majority of the House of Lords disclosed relevant and

sufficient reasons through an examination of whether the standards applied to the assessed facts were in conformity with the principles embodied in Article 10 of the Convention (*Lindon, Otchakovsky-Laurens and July v. France*, cited above).

145. The Court has set out the domestic judgments in some detail and, notably, those of the majority of the House of Lords impugned by the applicant (paragraphs 25-54 above). It observes that the majority members of the House of Lords recorded the core Convention principles and case-law relevant to the case. In particular, they underlined in some detail the particular role of the press in a democratic society and, more especially, the importance of publishing matters of public interest. In addition, and contrary to the applicant's submission, each member of the majority specifically underlined the protection to be accorded to journalists as regards the techniques of reporting they adopt and as regards decisions taken about the content of published material to ensure credibility, as well as journalists' duties and responsibilities to act in good faith and on an accurate factual basis to provide "reliable and precise" information in accordance with the ethics of journalism (citing, in particular, *Jersild v. Denmark*, cited above, § 31 and *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I, see paragraphs 28-29, 35, 40 and 47 above). Moreover, the majority recorded the need to balance the protection accorded under Articles 8 and 10 so that any infringement of the applicant's Article 10 rights with the aim of protecting Ms Campbell's privacy rights had to be no more than was necessary, neither Article having a pre-eminence over the other (citing, *inter alia*, Resolution 1165/98 entitled "Right to Privacy" of the Parliamentary Assembly of the Council of Europe and *A v B plc* [2003] QB 195). Finally, the majority explained the particularly private nature of information concerning a person's treatment for drug addiction and the potential detriment resulting from its disclosure.

146. The Court further observes that all members of the House of Lords, both minority and majority, were in agreement as to these relevant principles. Lord Hope noted that the case did not raise any new issues of principle but was rather concerned with questions of "fact and degree" and Lord Hoffman emphasised that all members of the House of Lords were unanimous as to the applicable principles but were divided in their application to the narrow point related to the facts of the case (paragraphs 26 and 50 above).

147. Indeed, there was agreement at all three instances (and among all members of the House of Lords) as to the application of those principles to the main part of the published articles. They considered Ms Campbell to be an internationally known model and celebrity. Given her prior public denials of drug use, the core facts of her drug addiction and the fact that she was in treatment were legitimately a matter of public interest and capable of being published. Ms Campbell accepted this before the domestic courts, as did the parties before this Court. In making this undisputed qualitative distinction between, on the one hand, private information which Ms Campbell had already made public and which was therefore legitimately the

subject of a public debate and, on the other, the additional information which she had not made public, the Court considers that all three domestic courts which examined the case reflected the same distinction underlined by this Court in the above-cited *Von Hannover* case decided some days after the present judgment of the House of Lords.

148. Accordingly, the difference of opinion between the judges in the national courts on which the present complaint turns, concerned only the application of relevant Convention principles to the question whether an interference with the editorial decision to publish the additional material (the fact that she was attending NA, details about the nature of her NA treatment and covertly taken photographs outside her NA meetings) was justified under Article 10.

149. The High Court examined this issue over 5 days and, in a detailed and lengthy judgment, found the publication of the additional material unjustified. The Court of Appeal, following a hearing of 2 days and by another detailed judgment, allowed the applicant's appeal finding the publication of the additional material to be justified. Having heard the appeal over 2 days and, each of the five members giving detailed judgments, the House of Lords found by a majority (3 to 2) that the publication of the additional material exceeded the latitude accorded to editorial assessment and was not justified.

150. Against this background, the Court considers that, having regard to the margin of appreciation accorded to decisions of national courts in this context, the Court would require strong reasons to substitute its view for that of the final decision of the House of Lords or, indeed, to prefer the decision of the minority to that of the majority of that court, as the applicant urged the Court to do.

151. Indeed, the Court considers convincing the reasons for the decision of the majority of the House of Lords. The majority underlined, *inter alia*, the intimate and private nature of the additional information about Ms Campbell's physical and mental health and treatment and concluded that the publication of the additional material about that treatment had been harmful to Ms Campbell's continued treatment with NA in the United Kingdom and risked causing a significant setback to her recovery as well as being considerably distressing for her. The photographs had been taken covertly with a long range lens outside her place of treatment for drug addiction and would have been clearly distressing for a person of ordinary sensitivity in her position and faced with the same publicity; the photographs had been taken deliberately with a view to inclusion in the article and were accompanied with captions which made it clear she was coming from her NA meeting thereby connecting those photographs to the private information in the articles; and those photographs allowed the location of her NA meetings to be identified. On the other hand, the publication of the additional material was found not necessary to ensure the credibility of the story, the applicant itself accepting that it had sufficient information without the additional material to publish the articles on the front page of its newspaper. Nor was it considered that there was any compelling need for

the public to have this additional material, the public interest being already satisfied by the publication of the core facts of her addiction and treatment.

152. The applicant maintained that it was impossible to find that Ms Campbell suffered significant additional distress because of the publication of the additional material. However, that was precisely what the majority of the House of Lords considered to be established: whether or not the publication of that additional material prejudiced her continued treatment with NA (and see Lord Hoffman at paragraph 54 above), the majority of the House of Lords found that it had caused her some distress, Baroness Hale specifically relying on the evidence taken and findings of fact in this respect of the first instance court (paragraph 41 above). The relatively low award of damages of the first instance court (restored by the majority of the House of Lords) reflected the former court's assessment of the level of prejudice suffered.

153. Finally, it was pointed out by the applicant that the Court of Appeal found that the photographs had not been, of themselves, relied upon by Ms Campbell as a ground of complaint. However, Lord Nicholls (paragraph 49 above) clarified that the applicant complained that the information conveyed in the photographs was private and, further, the majority members of the House of Lords (paragraphs 32, 39 and 43 above) found that the captions and context in which the photographs were presented, which made it clear that Ms Campbell was coming from her NA meeting at an identifiable place, inextricably linked the photographs to the impugned private additional material. Accordingly, as the Government expressed it, the decision of the House of Lords on the photographs flowed from their decision that the additional material about Ms Campbell's treatment details was private and without public interest.

154. It is indeed true that the minority of the House of Lords found that the additional material was anodyne and inconsequential, noting that it was unremarkable to add the details of Ms Campbell's treatment with NA and, further, that the photographs, of themselves, added little and were not demeaning or embarrassing, so that the publication of all of this additional material fell within the latitude to be accorded to journalists. The applicant urged the Court to prefer the opinion of the minority.

155. However, the relevancy and sufficiency of the reasons of the majority as regards the limits on the latitude given to the editor's decision to publish the additional material is such that the Court does not find any reason, let alone a strong reason, to substitute its view for that of the final decision of the House of Lords or to prefer the decision of the minority over that of the majority of the House of Lords, as the applicant urged the Court to do.

156. In such circumstances, the Court considers that the finding by the House of Lords that the applicant had acted in breach of confidence did not violate Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION CONCERNING RECOVERABLE SUCCESS FEES

157. The parties devoted extensive submissions to the precise nature of this complaint. The Court considers that the applicant's core complaint concerned the recoverability against it, over and above the base costs, of success fees which had been agreed between Ms Campbell and her legal representatives as part of a CFA.

A. Admissibility of the complaint

158. The Government relied on the fact that the applicant did not challenge the level of the base costs of the first appeal to the House of Lords and that it had, in the end, settled all of Ms Campbell's costs' claims against it. The only ground of inadmissibility invoked by the Government in these respects was that the case was manifestly ill-founded. The Court considers it appropriate to examine these submissions on the merits of the complaint.

159. The Court therefore finds that the present complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other ground. It must therefore be declared admissible**.**

B. The applicant's observations

160. The applicant did not contest the base costs before the first instance court, the Court of Appeal or the House of Lords. It did not contest the use of CFAs in publication cases or in the present case.

161. The applicant's core complaint concerned, rather, the recoverability of success fees included in CFAs. In particular, it complained that the total costs order against it was excessive because it included success fees in both appeals to the House of Lords which amounted to double the amount of the base costs of those appeals in a situation where domestic courts were expressly precluded by the Costs Practice Directions (paragraph 11.9) from controlling and reducing the total costs payable.

162. The requirement to pay the success fees of Ms Campbell's lawyers was an interference with the applicant's freedom of expression. While it was prescribed by law, it did not pursue a legitimate aim and was not necessary in a democratic society.

163. In the first place, the costs were excessive, amounting to disproportionate and punitive awards against media organisations.

They were excessive by definition, being a multiple of already high base costs. Base costs in defamation and privacy cases were noticeably higher (GBP 400-500 per hour) when compared to other equally complex civil and criminal cases before the House of Lords (GBP 140 per hour in a serious rape case). In addition, a success fee was applied which could double those already high base costs. In the present case, uplifts of 95% and 100% were accepted as appropriate and a 100% success fee in a CFA was regularly

charged. Moreover, a second success fee of 95% was charged as regards the second appeal to the House of Lords challenging the first success fee, which left the applicant in an impossible position. It was, moreover, perverse that the greater the prospects of success of a defence (for example, if it was assessed at 50/50), the higher the success fee.

In addition, the total costs, including success fees, were also excessive in that they bore no relationship of proportionality to the damages recovered by Ms Campbell (GBP 3,500), it being inconceivable that even wealthy claimants would pay that sum in costs for the small damages obtained.

Moreover, they were excessive because the CFAs and success fee system meant that there was no incentive for a claimant's legal representatives to keep costs low.

164. Secondly, the principle was no different from the requirement of proportionality between damages for defamation and the injury suffered which was set out in *Tolstoy Miloslavsky v. the United Kingdom* (13 July 1995, Series A no. 316-B, § 49). The costs award to which it was subjected was excessive and, even though domestic law required base costs and the percentage success fee rate to be reasonable, the control of the level of costs awards was deficient, a matter recognised by the domestic consultation process.

165. Thirdly, this excessive burden constituted a chilling effect on the applicant as a media organisation. The financial impact of CFAs inevitably inhibited media organisations from defending claims that should be fought and put pressure on them to settle early valid claims and, further, deterred such organisations from publishing material, including material which it would be proper to publish. The applicant relied on, *inter alia*, statements made to the House of Commons Constitutional Affairs Select Committee (paragraph 104 above) by numerous well-known press and media organisations, which statements set out those organisations' experience of, and concerns about, success fees in publications cases.

166. Fourthly, success fees did not achieve the aim of giving impecunious but deserving claimants access to justice because there were no obligations concerning, or mechanism controlling, a lawyer's use of success fees earned in one case to take on other poor claimants with deserving cases. The domestic consultation process confirmed that access to justice for impecunious clients had not increased. The impression of many media groups was that certain solicitors conducted weak cases on an ordinary retainer and strong cases on CFAs. Since, in addition, the media rarely win publication cases, a success fee was therefore a windfall profit for lawyers and a punitive award against the media. Indeed, since there was no means of ensuring that impecunious litigants benefited, the only result of the scheme was to shift the burden of funding civil litigation from the public purse to the private sector.

167. Fifthly, allowing success fees to claimants such as Ms Campbell who could afford legal fees and were at no risk whatsoever of being denied access to justice was entirely unnecessary for the above-noted legitimate aim. Indeed, the House of Lords simply deferred to what it assumed was

parliament's intention. The House of Lords failed to determine whether success fees (including for wealthy claimants) were necessary to contribute to access to litigation by impecunious litigants and, indeed, these were not factors which a judge assessing costs could take into account. The CFA system should therefore be amended to exclude wealthy claimants and means testing was possible to achieve this since the same financial eligibility for legal representation in criminal cases had been usefully employed in Magistrates Courts, which courts tried approximately 95% of criminal cases.

168. Sixthly, publication cases were sufficiently distinguishable from other civil litigation, for the CFA scheme to exclude such cases. The applicant reiterated the reasons, also outlined by Lord Hoffman at paragraph 67 above, as to why the CFA/success fee system had a heavier impact in publication cases compared to other cases, such as traffic cases.

C. The Government's observations

169. The Government noted that the applicant did not contest the costs in the High Court and the Court of Appeal or the base costs in the House of Lords. Moreover, it did not object in the domestic courts to the use of CFAs, to costs following the event or to a costs order including a lower level success fee. The applicant's core case before this Court had become a complaint that the domestic courts were precluded from reducing the total costs payable by an unsuccessful defendant, even when they were disproportionate and excessive as a result of the success fees, given paragraph 11.9 of the Costs Practice Directions.

170. The Government considered that the Court should examine only the underlying legislative provisions (sections 58 and 58A of the 1990 Act) namely, the overall scheme which permitted a person to enter into a CFA in practically all types of litigation with a success fee which could be recovered against an unsuccessful defendant in order to fund litigation by other persons.

171. As to whether those legislative provisions constituted an interference with the applicant's freedom of expression, the Government pointed out that the relevant provisions were permissive as to whether a CFA with success fee was concluded; as to the amount of that fee (subject to a statutory maximum of 100%); and, indeed, as to the making by a court of any specific form of costs order against an unsuccessful party. In any event, even if the interference of which the applicant appeared to complain may have been capable of amounting to an interference with its right to freedom of expression, it was one of a low order and was minimal.

172. The applicant had not disputed that the interference was prescribed by law and the Government clarified that the impugned costs order with success fees was based on sections 58 and 58A of the 1990 Act (inserted by the 1999 Act) and on Rule 44 of the CPR and the Costs Practice Directions.

173. The Government recalled that the purpose of allowing CFAs to be concluded was to achieve the widest public access to legal services funded

by the private sector. In particular, CFAs provided a greater range of funding options to allow the widest possible range of people, including but not limited to claimants and defendants just above the means test for legal aid but not sufficiently wealthy to incur litigation costs, to have a real opportunity to have effective access to legal services and to the courts in relation to as many forms of litigation as possible. This was achieved through a fundamental re-balancing of the means of access to justice by resort to private sector funding (and hence funded indirectly by the public as a whole) rather than by the use of public (legal-aid) funds. It was intended to balance the rights of all litigants (claimants, defendants and successful or not), as well as the interests of lawyers who were expected to provide their services to the widest range of persons possible on a CFA. This allowed the State to re-allocate legal-aid resources by removing, for example, through the 1999 Act personal injuries claims from the legal-aid system, given the effectiveness of CFAs.

174. Success fees enhanced the effectiveness of the CFA and were thus an integral part of the CFA scheme. It would ensure that lawyers would provide legal services on a CFA to the widest range of persons and not just to those whose claims were the strongest. Success fees were designed to broadly reflect the overall risk undertaken by a legal representative across his range of work and thus serve a purpose beyond a single piece of litigation. "Excessive" costs in a single case were justified by the general objective. In addition, the level of the success fee had to be high enough to provide a clear incentive to legal representatives to provide services under a CFA to those whose cases were less meritorious. The level also had to be sufficiently limited so as "to afford the client with the practical opportunity to pursue or defend legal proceedings". The maximum uplift was therefore 100%. Moreover, it was also necessary for success fees to be recoverable from the unsuccessful party. Without this possibility, the CFA would not have been useful for claimants, unless the potential value of their cases would cover the success fee and other costs leaving sufficient damages to make the claim worthwhile, or for those seeking non-monetary remedies or for defendants.

175. Promoting thereby access to justice, guaranteed by Article 6 of the Convention, was plainly a legitimate aim for the purposes of Article 10 § 2 of the Convention.

176. The Government went on to argue in some detail that recoverable success fees did not amount to a disproportionate interference with the applicant's right to freedom of expression. Contracting States were entitled to adopt rules and schemes of general application in support of social policy objectives and, in conceiving of such schemes, were required to carry out a delicate balance of a range of relevant and competing social and public interests including, as in the present case, issues under Articles 6 and 10 of the Convention. Indeed, "excessive" costs in a single case would be justified by the general objective. In these respects, they were to be afforded a significant margin of appreciation for this exercise (*Blečić v. Croatia*, no.

59532/00, § 64, 29 July 2004; and *Evans v. the United Kingdom* [GC], no. 6339/05, § 68, ECHR 2007-IV).

177. The Government made lengthy submissions to the effect that the recovery of success fees was subject to a number of safeguards, the argument being that those safeguards struck a proper balance between the interests of unsuccessful litigants and the objective of expanding access to justice consonant with Article 6 of the Convention.

178. The first safeguard was the fixing of the maximum uplift at 100%.

179. The second safeguard was the requirement that the base costs and the success fees contained in a CFA were to be regulated by a court separately and on a case by case basis against the criterion that such amount should be no more than was reasonable and proportionate, any doubt to be resolved in favour of the paying party (Rule 44.4 of the CPR and paragraph 11 of the Costs Practice Directions). In particular, the base costs had to be reasonable and proportionate (paragraph 11.6 of the Costs Practice Directions) and thus were subject to assessment under Rule 44 of the CPR. A court was also required to consider whether there should be a success fee and, if so, whether the percentage uplift was reasonable (paragraph 11.7 of the Costs Practice Directions) and paragraph 11.8 contained a non-exhaustive list of factors to which a court could have regard in so deciding. All the impugned paragraph 11.9 of the Costs Practice Directions did therefore was to acknowledge the above-described control which had already been applied to the base and success fee elements of the costs order so that a further reduction of the total costs was unnecessary. Indeed, it would be illogical to allow a double reduction of the total costs as it would imply that a court would, in the end, award base costs that were less than what was initially considered reasonable.

180. As to the applicant's suggestion that "publication cases" be excluded from the system, there was no reason to suggest that those involved in publication cases should have less access to legal services; cases against newspapers concerned important and sensitive rights' issues for which CFAs should be available; and since legal aid was never available for defamation cases, those on modest incomes could not consider bringing or defending such actions without CFAs.

181. The applicant's submission that persons such as Ms Campbell should not have access to CFAs was rejected by the House of Lords. It did not matter if her solicitors had indicated that they did little CFA work: when pursuing broad social policy objectives, a State was entitled to adopt provisions of general application so that the justification of the general scheme was not undermined by one example. As to whether entitlement to the CFA system should be means tested, the Government relied on Lord Hoffman's judgment in the second appeal and maintained that this was precisely the type of social and economic decision to which the margin of appreciation applied. There were no clear objective criteria by which one could regulate access to the CFA/recoverable success fee scheme according to the financial status of a claimant and, indeed, any attempt to draw such a line would undermine the objective of promoting wide access to legal

services and would risk those falling just the wrong side of the line being significantly disadvantaged. It would also be unrealistic to expect the private sector to control financial qualifications.

182. As to the consistency between the Government's submissions to the Court and those during the consultation process concerning paragraph 11.9 of the Costs Practice Directions in particular, the Government noted that the fact that it was considering reform of that specific provision did not mean that it was contrary to Article 10. If the Consultation Paper suggested that amending it might be an improvement (paragraph 108 above), that did not amount to a statement that it was "necessary" under Article 10, the Convention requiring minimum standards and States being free to provide further protection (*Brecknell v. the United Kingdom*, no. 32457/04, § 70, 27 November 2007). The maintenance of the current CFA/recoverable success fee system fell within its margin of appreciation and, indeed, the ongoing domestic consultation process underlined why, in such a complex area of social and economic policy, that margin should be respected.

183. Nor was the application of these domestic provisions to the applicant's case a disproportionate interference. The only complaint made by the applicant before the domestic courts and this Court was the principle of recoverable success fees as regards both appeals to the House of Lords. However, it did not seek a determination by a court as to whether the level of those success fees was reasonable and proportionate. Equally, the applicant did not request a court to review the level of costs having regard to the low damages award made. Indeed, when the applicant did challenge the base costs in respect of Ms Campbell's lawyers in the second appeal, these were found to be disproportionate and reduced.

D. The third parties' submissions and the Government's response

184. Joint submissions were made by Open Society Justice Initiative, Media Legal Defence Initiative, Index on Censorship, the English PEN, Global Witness and by Human Rights Watch.

185. They considered that the case raised an important issue as to the chilling effect of high costs in defamation proceedings on NGOs and small media organisations with small budgets, which organisations were often involved in investigative reporting and dissemination of information on issues of significant public interest.

186. As to those high costs, they relied on a "*Comparative Study of Costs in Defamation Proceedings across Europe*", as part of the "Programme in Comparative Media Law and Policy" of the Centre for Socio-Legal Studies at Oxford University, which had compared costs of defamation proceedings in 11 countries (Belgium, Bulgaria, Cyprus, France, Germany, Ireland, Italy, Malta, Romania, Spain and Sweden) as well as in England and Wales. Claimants with CFAs incurred substantially higher legal costs than defendants who had no CFA because of the lack of incentive of a client with a CFA to control the costs of legal work done on its behalf. In addition, the study estimated that, even in non-CFA cases,

costs in the UK were 4 times higher than in the next most costly jurisdiction, Ireland. Ireland was, in turn, almost ten times more expensive than Italy, the third most expensive jurisdiction. If the figure for average costs across the jurisdictions is calculated without including the figures from England and Wales and Ireland, England and Wales is seen to be around 140 times more costly than the average. None of the comparator countries had CFA schemes, let alone success fees, a factor of itself demonstrative of its disproportion.

187. While CFAs had an important role to play in supporting public interest litigation, the system had to be designed so as not to infringe those organisations' Article 10 rights. The availability of CFAs had made it more difficult for non-governmental organisations ("NGOs") and small publications to publish information on matters of public interest.

188. NGOs that investigated and exposed serious wrongdoing, which included many of the interveners, were increasingly assuming the traditional watchdog function of the media and, in seeking to expose unpopular truths, NGOs were particularly vulnerable to defamation actions. This was particularly so given libel tourism, the laws of England and Wales allowing organisations to be sued in that jurisdiction even if only a small proportion of the readership (print or internet) was located there. This was compounded by the difficulty in obtaining libel costs' insurance, given their risk profile, and by the CFA scheme.

189. The chilling effect of the excessive costs caused by CFA schemes in England and Wales amounted to a restriction on the Article 10 rights of these publishers which bore no relationship of proportionality to the injury suffered by a claimant and the Government had fashioned no doctrine to prevent this.

190. In response, the Government contended that these submissions were not directed to the costs matter at issue in the present case namely, recoverable success fees. As to the chilling effect of increased costs pursuant to CFAs, this was answered by the availability of defences to defamation actions under substantive law and by the role of the courts in controlling costs.

191. As to the comparative research, the Government contended that insufficient information was known about the study so as to ensure that like was being compared with like. It was inaccurate, for example, in stating that domestic law in England and Wales did not control the reasonableness and proportionality of the costs awarded. The extent to which the differing costs were reflective of the differing legal procedures was not known. Any lack of incentive on the part of a client with a CFA to control costs incurred on its behalf was again answered by the control exercised by the courts over the reasonableness and proportionality of costs' awards. In any event, the applicant's complaints did not concern the general level of base costs in defamation proceedings.

E. The Court's assessment

1. Was there an interference?

192. The applicant's complaint, as noted at paragraph 157 above, concerns the impact on it of a costs award which, under domestic law, included success fees calculated at almost twice most of the base costs of two appeals to the House of Lords. The Court considers, and it was not seriously disputed by the Government, that the requirement to pay these success fees, as an unsuccessful defendant in breach of confidence proceedings, constituted an interference with the applicant's right to freedom of expression guaranteed by Article 10 of the Convention.

193. The fact, as emphasised by the Government, that the underlying legal regime was "permissive", in that it permitted a CFA including success fees to be concluded rather than requiring it, does not change the fact that the applicant was required, pursuant to a court order for costs, to pay costs including the impugned success fees to the claimant.

2. Was the interference "prescribed by law"?

194. The provisions relating to CFAs, the calculation of success fees by a percentage uplift and their recoverability from an unsuccessful defendant are regulated by the 1990 and 1999 Acts, the Conditional Fees Arrangement Orders 1995 and 2000 as well as the CPR and the relevant Costs Practice Directions, as outlined at paragraphs 89-98 above. It is clear, and the parties did not dispute, that the interference was prescribed by law within the meaning of Article 10 of the Convention.

3. Did the interference have a "legitimate aim"?

195. The essential objective of CFAs, of which success fees recoverable from an unsuccessful defendant were an integral part, were broader than the individual case and were described by the Government at paragraphs 173-175 above. This system was designed to provide a greater range of funding options to allow the widest possible range of people to have a real opportunity to have effective access to legal services and to the courts in relation to as many forms of civil litigation as possible, and to do so *via* a fundamental re-balancing of the means of access to justice by resorting to private sector funding rather than use of public funds.

196. The Court recalls that the right of effective access to a court is a right inherent in Article 6 of the Convention (*Golder v. the United Kingdom*, 21 February 1975, Series A no. 18). While it does not require state assistance in all matters of civil litigation, it may compel the State to provide, for example, the assistance of a lawyer when such assistance proves indispensable for effective access to court, depending on the particular facts and circumstances, including the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself (*Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32*;* and *Steel and Morris v.*

the United Kingdom, no. 68416/01, § 61, ECHR 2005-II and references contained therein).

197. The Court therefore accepts that the CFA with recoverable success fees sought to achieve the legitimate aim of the widest public access to legal services for civil litigation funded by the private sector and thus the protection of the rights of others within the meaning of Article 10 § 2 of the Convention.

4. Was the interference "necessary in a democratic society"?

198. The Court will examine whether success fees recoverable against unsuccessful defendants are "necessary in a democratic society" to achieve that aim. In particular, it must consider the proportionality of requiring an unsuccessful defendant not only to pay the reasonable and proportionate costs of the claimant, but also to contribute to the funding of other litigation and general access to justice, by paying up to double those costs in the form of recoverable success fees. The applicant did not complain about having had to pay any ATE premiums of the claimant.

199. This complaint also concerns the question of whether the authorities struck a fair balance between two values guaranteed by the Convention which may come into conflict with each other, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, an individual's right of access to court protected by Article 6 of the Convention. As noted at paragraph 142 above, this balancing of individual Convention interests attracts a broad margin of appreciation.

200. Moreover, a wide margin of appreciation is available to a legislature in implementing social and economic policies and the Court will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (*James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98). The Court later described this margin of appreciation as the "special weight" to be accorded to the role of the domestic policy-maker in matters of general policy on which opinions within a democratic society may reasonably differ widely (*Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII). However, if such general measures produce an individual and excessive burden, the requisite balance will not be found (*James and Others v. the United Kingdom*, at § 50): put otherwise, the Court may not regard as disproportionate every imbalance between the public interest and its effects on a particular individual but will do so in exceptional circumstances, when a certain "threshold of hardship" on the individual has been crossed (*Velikovi and Others v. Bulgaria*, nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01 and 194/02, § 192, 15 March 2007).

201. However, the Court has found the most careful scrutiny on the part of the Court is called for when measures taken by a national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (*Jersild v. Denmark*, cited above, § 35; and *Bladet Tromsø and Stensaas v. Norway* [GC], cited above, § 64. It is,

moreover, not necessary to consider, in any particular case, whether a damages award has a chilling effect on the press as a matter of fact so that, for example, unpredictably large damages awards in defamation cases are considered capable of having such an effect (*Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, no. 55120/00, § 114, ECHR 2005-V (extracts)).

202. The Court notes at the outset that the essential position of the Government was that any disproportionality visited on an individual case by the CFA/recoverable success fee regime was justified by the need to adopt provisions of general application when pursuing broad social and economic policy objectives. They referred to the reasoning of Lord Hoffman who had similarly responded to the applicant's argument based on the facts of its case namely, that Ms Campbell was wealthy so that a CFA/recoverable success fee was not necessary to ensure her access to court. Lord Hoffman found that the general policy objectives underlying the CFA/recoverable success fees scheme meant that the scheme could not be disallowed solely on the ground that liability of an individual applicant would be inconsistent with its rights under Article 10 of the Convention (relying on the above-cited *James v. the United Kingdom* case). He considered the scheme to be a rational legislative policy which the Government could adopt as a general scheme compatibly with Article 10 and which the courts had to accept (Lord Hoffman at paragraph 63 above. See also Lord Carswell, paragraphs 72-73 above).

203. However, one of the particularities of the present case is that this general scheme and its objectives have themselves been the subject of detailed and lengthy public consultation notably by the Ministry of Justice since 2003. While most of this process transpired after the House of Lords judgment in the second appeal in the present case (2005), it highlighted fundamental flaws underlying the recoverable success fee scheme, particularly in cases such as the present. The Court has therefore set out this public consultation process in some detail above (paragraphs 100-120 above) and has highlighted key elements below.

204. By March 2006 the House of Commons Constitutional Affairs Select Committee considered that the courts should address the question of disproportionate costs in defamation and privacy proceedings and it made certain proposals including cost-capping. No legislative action was taken. The proposal of staged success fees (re-assessing the risk and the percentage of the success fee as the action progressed) was then included in the "Theobalds Park Plus Agreement" drafted by the CJC following mediation between media organisations and claimants' representatives. The Ministry of Justice agreed with the CJC's recommendations that the Theobalds Park Plus Agreement could help ensure that costs of litigation were proportionate and reasonable. As a result, in 2007 it sought views on the implementation of the CJC's recommendations including on a range of fixed staged recoverable success fees. A slightly revised scheme was published with responses to the consultation in July 2008. The media, in particular, did not support the proposals and the scheme was not implemented.

205. The Ministry of Justice then published a further Consultation Paper in February 2009. It noted that the high levels of legal costs incurred in publication proceedings had been the subject of criticism and debate in the courts and in Parliament; that excessive costs might force defendants to settle unmeritorious claims which in turn threatened a risk to reporting; and that some had argued that it was a risk to freedom of expression. It sought views on measures to better control costs. While certain minor proposals concerning, *inter alia*, additional information and control of ATE insurance were proposed and introduced (The Civil Procedure (Amendment) Rules 2009), other matters were left open pending the Jackson Review. Amending the prohibition on reviewing the proportionality of the total costs (paragraph 11.9 of the Costs Practice Directions) was principally considered with respect to defamation disputes because it was mainly in those cases that the key problems addressed in the Paper were seen to arise.

206. The Jackson Review, commissioned by the Ministry of Justice and published January 2010, was an extensive review of costs in civil litigation and it highlighted four flaws inherent in the recoverability of success fees in civil litigation.

207. The first flaw of the recoverable success fee regime 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. He highlighted certain anomalies flowing from this.

208. Secondly, Jackson LJ considered flawed the fact that there was no incentive on the part of a claimant to control the incurring of legal costs on his or her behalf and that judges assessed those costs only at the end of the case, when it was considered too late to control what had been spent.

This concern was highlighted by the third party submissions to this Court by media organisations (paragraph 186 above). The consequent "costs race" and resulting rise in costs were particularly underlined by the judiciary (the *King* case at paragraph 99 above and by Lord Hoffman in the costs' appeal in the present case at paragraph 65 above).

209. The third flaw was the "blackmail" or "chilling" effect of the system of recoverable success fees. 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.

This "ransom" effect of the scheme was highlighted during the earlier public consultation processes (see paragraphs 101 and 107 above), by the judiciary in other cases (the *Turcu* and *King* cases, at paragraphs 98 and 99 above), in the judgments of the House of Lords in the second appeal in the present case (Lords Hoffman and Carswell, paragraphs 64 and 72 above) and by the third parties (paragraphs 185 and 189 above).

210. The fourth flaw was the fact that the regime provided, at the very least, the opportunity, it not being possible to verify the confidential financial records of solicitors and barristers, to "cherry pick" winning cases to conduct on CFAs with success fees. The Court considers it significant that this criticism by Jackson LJ would imply that recoverable success fees did not achieve the intended objective of extending access to justice to the

broadest range of persons: instead of lawyers relying on success fees gained in successful cases to fund their representation of clients with arguably less clearly meritorious cases, lawyers had the opportunity to pursue meritorious cases only with CFAs/success fees and to avoid claimants whose claims were less meritorious but which were still deserving of being heard.

211. Jackson LJ went on to point out that these flaws produced in defamation and privacy cases the "most bizarre and expensive system that it is possible to devise" for reasons which essentially concerned the excessive costs' burden imposed on defendants in such cases.

212. Jackson LJ therefore recommended to the Ministry of Justice far-reaching reform. He recommended, for all civil litigation including privacy cases, a return to CFAs whose success fees and ATE premiums were not recoverable from the losing party (the pre-1999 Act position), pointing out that the pre-1999 Act arrangements had not suffered from the above flaws and still extended access to justice for many individuals who formerly had none. If that recommendation were to be adopted, a further two recommendations (specifically concerning defamation and privacy actions) were made to ensure the objective of ensuring access to justice for claimants of slender means: increasing the general level of damages in defamation and breach of privacy cases by 10% and introducing a regime of qualified one-way costs shifting, so that the amount of costs an unsuccessful claimant might be ordered to pay was a reasonable amount, reflective of the means of the parties and their conduct in the proceedings.

213. The subsequent report of the House of Commons of 2010 again recognised similar flaws of recoverable success fees (the "blackmail" effect on the press; "cherry picking" by lawyers so that CFA cases were rarely lost; and the lack of incentive on lawyers or their clients to control costs). It considered that those problems had to be addressed urgently and it proposed to limit the recoverability of success fees to 10% of the base costs with the balance to be agreed between the solicitor and client.

214. The further Consultation Paper in January 2010 recorded the particular concern of the Ministry of Justice about the impact of 100% success fees in publication cases. It considered that experience over the past decade had shown that, in defamation proceedings in particular, "the balance had swung too far in favour of the interests of claimants and against the interests of defendants" and it noted that the Government did not believe that the "present maximum success fee in defamation proceedings is justifiable in the public interest". Pending fuller consideration of Jackson LJ's proposals, the Ministry sought views on a proposal to reduce the maximum uplift from 100% to 10% of the base costs in defamation and privacy cases. In March 2010 the Ministry of Justice confirmed that legislation had been put to Parliament to reduce success fees. Pending a fuller assessment of the Jackson Review which set out a "clear case for CFA reform", this was only an interim proposal. However, this interim solution was not maintained given the intervening general election in April 2010.

215. In summary, within four years of the introduction by the 1999 Act of recoverable success fees to the existing CFA scheme, concerns expressed

in the industry about consequent excessive costs orders, notably, in defamation and other publication including privacy cases, led to detailed public consultations by the Ministry of Justice and inquiries by Committees of the House of Commons, as well as a far-reaching review of costs in civil litigation commissioned by the Ministry.

The Ministry of Justice acknowledged in that process that, as a result of recoverable success fees, the costs burden in civil litigation was excessive and, in particular, that the balance had swung too far in favour of claimants and against the interests of defendants. This was particularly so in defamation and privacy cases. Not only was the burden on defendants in publication cases recognised as excessive but one of the acknowledged flaws of the scheme - the opportunity for solicitors to "cherry pick" cases evidenced by the success of publication cases run on a CFA/success fee basis - would appear to indicate that the scheme has not achieved the espoused aim of ensuring access to justice of the broadest range of persons.

Of equal importance, Jackson LJ considered that the pre-1999 Act position achieved that aim without overburdening defendants, a point with which a large number of respondents to the 2010 consultation of the Ministry had agreed (paragraph 119 above). Moreover, pending fuller consideration of the broader recommendations of Jackson LJ, the Ministry of Justice introduced legislation as a first step towards solving the acknowledged problems by drastically reducing the maximum success fee to 10%, precisely the core point impugned by the present applicant. However, the Government were unable to ensure the adoption of the legislation and have not indicated whether this or any other legislation has since been proposed for adoption.

216. The Government relied on the domestic courts' ability to control costs in publication proceedings through the provisions of the CPR and the Costs Practice Directions. However, the second flaw highlighted in the Jackson Review indicates that those safeguards were undermined by a combination of an uncontrolled "costs race" provoked by the impugned scheme during an action and the difficulty of a court in effectively assessing those costs after the action. In addition, while those provisions addressed the reasonableness of base costs given matters such as the amount at stake, the interests of the parties and the complexity of the issues, Lord Hope underlined that the separate control of the reasonableness of success fees essentially concerned the review of the percentage uplift on the basis of the risk undertaken in the case and that, in an evenly balanced case such as the present, success fees were inevitably 100% (see also *Designer's Guild Limited*, cited at paragraph 97 above). Such safeguard provisions could not, therefore, as Lord Hoffman confirmed, address the applicant's rejection in principle of recoverable success fees calculated as a percentage of reasonable base costs. Moreover, these safeguards relied on by the Government were available throughout the period of public consultation at the end of which the Ministry of Justice accepted that costs were disproportionate, especially in publication cases, so that a drastic reduction in the maximum success fee was required.

217. The Government did not address in detail the public consultation process, much of which had taken place after their observations were submitted in March 2009. It is also true that attempts by a State to improve a scheme does not mean, of itself, that the existing scheme is in violation of the Convention (*Brecknell v. the United Kingdom*, cited above, at § 70).

However, the Court considers that the depth and nature of the flaws in the system, highlighted in convincing detail by the public consultation process, and accepted in important respects by the Ministry of Justice, are such that the Court can 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 (the above-cited case of *Tolstoy Miloslavsky v. the United Kingdom*, at § 50).

218. This conclusion is indeed borne out by the facts of the present case.

On the one hand, the claimant was wealthy and not in the category of persons considered excluded from access to justice for financial reasons. Her representatives accepted in the domestic proceedings (paragraph 181 above) that they did not do much CFA work, which limited their potential to act for impecunious claimants with access to justice problems. The applicant's case was not without merit, in that the Court of Appeal and a minority of the House of Lords considered that the impugned articles did not violate Ms Campbell's right to private life.

On the other hand, and while accepting that the proceedings were lengthy and somewhat complex, the total costs billed by the claimant, as regards the two appeals to the House of Lords alone, amounted to GBP 850,000.00, of which GBP 365,077.13 represented success fees. It is true that the applicant, in the end, reached a settlement of the costs of both appeals paying the total sum of GBP 500,000.00 (base costs and success fees). However, given the findings of the House of Lords and of the Judicial Taxing Officers in the second appeal (paragraphs 70 and 80, respectively) as well as in the similar above-cited case of *Designer's Guild Limited*, success fees were clearly recoverable against the applicant and, further, at the rates of 95% and 100% in the first appeal and 95% for the solicitors' costs in the second appeal. Accordingly, even if it is not possible to quantify with certainty the precise amounts paid by the applicant which can be attributed to success fees, it is evident that the negotiated costs settlements reflected the obligation on the applicant to discharge substantial success fees.

219. In such circumstances, the Court considers that the requirement that the applicant pay success fees to the claimant was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to the Government in such matters.

220. Accordingly, the Court finds that there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

221. 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."

222. The applicant claimed reimbursement of the success fees paid to the claimant following both appeals to the House of Lords. Since the success fees claimed by her as regards the first appeal amounted to 47% of the total appeal costs billed, the applicant claimed reimbursement of GBP 164,500, being 47% of the total appeal costs actually paid in settlement by it. By the same reasoning, it claimed GBP 50,000 for the success fee for the second appeal, that being 33% of the total costs paid by it (the lower percentage reflecting the fact that only the solicitors' fees were subject to a CFA in the second appeal). This amounted to a total claim of GBP 214,000 in pecuniary damages.

223. The applicant also claimed GBP 100,000 (inclusive of interest and taxation costs) being the costs paid by it, using the above means of calculation, in settlement of the base costs claimed pursuant to the costs order against it as in the second appeal to the House of Lords.

224. The applicant further claimed GBP 41,258.00 in respect of its costs in preparing a separate application on the costs issue for this Court. A further GBP 52,349.00 was claimed for work done on both the breach of confidence and costs issues since the communication of the cases. Vouchers were submitted for all costs claimed.

225. The Government did not dispute the applicant's analysis as regards the success fees but disputed the amounts claimed. The costs' settlements between the applicant and the claimant did not specify an amount paid in respect of the success fees and, as a matter of principle, it should be assumed that the bulk of the costs paid were base costs, which would be consistent with the applicant's stance of opposition to payment of the success fees. The pecuniary loss for the first appeal should be GBP 35,511.00, the amount by which the sum paid in respect of the first appeal exceeded the base costs billed. The pecuniary loss as regards the second appeal should be zero since the sum paid by the applicant (GBP 150,000) was less than the claimed base costs (GBP 170,499.82). The Government did not address the applicant's request for reimbursement of the base costs of the second appeal to the House of Lords.

226. The Government also made detailed submissions to the effect that the costs claimed in respect of the application to this Court were plainly excessive.

227. The Court considers that the question of the application of Article 41 is not ready for decision. The question must accordingly be reserved and the further procedure fixed with due regard to the possibility of agreement being reached between the Government and the applicants.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by six votes to one that there has been no violation of Article 10 of the Convention as regards the finding of a breach of confidence against the applicant;

3. *Holds* unanimously that there has been a violation of Article 10 of the Convention as regards the success fees payable by the applicant;

4. *Holds* unanimously that the question of the application of Article 41 is not ready for decision;
   accordingly,
   (a) *reserves* the said question;
   (b) *invites* the Government and the applicants to submit, within the three 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;
   (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 18 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Ljiljana Mijović
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge David Thór Björgvinsson is annexed to this judgment.

F.A.
L.M.

PARTLY DISSENTING OPINION OF JUDGE DAVID THÓR BJÖRGVINSSON

1. I agree with the majority that there has been a violation of Article 10 of the Convention as regards the costs payable by the applicant. However, I disagree that there has been no violation of that provision on account of the domestic court's finding of a breach of privacy ("confidence") against the applicant.

2. It is not disputed that the basic facts of Ms C's drug addiction and treatment were publishable in the public interest. This is so not only because she had earlier pronounced publicly that she did not take illegal drugs but also because she herself is a public figure who, as an international fashion model and celebrity, has a direct interest in projecting a certain image of herself in the mind of the general public in order to exploit that image to promote her professional ventures and interests. In this light, Ms C's earlier statements that she did not take drugs can be seen as an intentional projection of an inaccurate image. The applicant was therefore justified in alerting the public to the truth about her drug problem.

3. The main issue in dispute before the domestic courts was whether the publication of the additional information was justified. This additional information consisted of a report that Ms C was attending NA meetings, information about those meetings as well as two photographs of her outside the NA centre. The majority of the Chamber agreed with the domestic courts that the publication of this additional information was not justified. It would seem that the main reason for its stance is that the relevance and sufficiency of the reasoning of the House of Lords concerning the limits of the latitude given to an editor's decision to publish the additional material "is such that the Court does not find any reason, let alone a strong reason, to substitute its view for that of the final decision of the House of Lords or to prefer the decision of the minority over that of the majority of the House of Lords..." (paragraph 155). I find the approach of the Chamber to be unacceptable for a number of reasons.

4. Firstly, at least some of the principles applied by the House of Lords are not relevant in the balancing exercise. I refer in this regard to Baroness Hale's opinion that it was "not necessary to publish any further information ..." (paragraph 152 of the judgment of the House of Lords and paragraph 38 above). The test implied in that opinion is the wrong one. From the point of view of journalistic discretion in the presentation of a legitimate story, it is the restriction on freedom of expression that must be justified by reference to 'necessity' and not the publication as such. Secondly, insofar as the relevant principles are concerned, they have not been correctly applied on all counts. I agree that the "public interest" test was correctly applied when the majority found that the publication of the original story was in the public

interest. However, its finding that the publication of the additional material was not is difficult to justify. I find this distinction in principle between the original story and the supplementary material to be unconvincing.

5. However, in the final analysis, the majority simply defers to the assessment made by the domestic courts. This approach is inconsistent with the 'strict scrutiny' that is usually found in this Court's case law in balancing Article 8 and Article 10 rights where the Court regularly makes its own independent assessment of the facts involved and of the application of the relevant principles to those facts and it frequently substitutes its own views for those of the domestic courts. It has been the consistent approach of this Court that it is not enough, in itself, that the domestic courts consider the relevant principles; they must also be applied correctly (in this regard, see, for example, *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I; *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI; *Biriuk v. Lithuania*, no. 23373/03, 25 November 2008; *Petrenco v. Moldova*, no. 20928/05, 30 March 2010; *Flinkkilä and Others v. Finland*, no. 25576/04, 6 April 2010; and *Mariapori v. Finland*, no. 37751/07, 6 July 2010). In these and many other cases, the Court has made its own assessment and reversed the findings of the domestic courts without suggesting that the domestic courts had considered irrelevant principles or applied improper criteria in the overall assessment made. I do not see why a different approach should be adopted in this case.

6. Annoying as Ms C may have found the publication of the story in question, the applicant newspaper was justified in alerting the public about her drug addiction. The additional information and the photographs were no more than a continuation of the original legitimate story. I agree with the unanimous decision of the Court of Appeal and the views of Lord Nicholls and Lord Hoffman JJ of the House of Lords that this addition did not reveal anything fundamentally significant to the story but served mostly “to add colour and conviction” to it. In my view, the publication of the supplementary materials fell well within the journalistic margin of the press in deciding the way in which a legitimate story is presented (see, for example, *Fressoz and Roire v. France*, cited above, at § 54). Thus, even accepting that the publication of the additional information and pictures was a further incursion into Ms C's private life, it was only to a relatively minor degree in the overall context of the story as a whole. It cannot be considered as sufficient and serious enough to justify the restriction on freedom of expression under Article 10.