Neutral Citation Number: [2017] EWCA Civ 1767

Case No: A2/2016/3832

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
MASTER GORDON-SAKER (sitting as the Senior Costs Judge)
[2016] EWHC B13 (Costs)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2017

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LONGMORE
and
LORD JUSTICE IRWIN

- -

Between :

BNM	**Appellant**
- and -	
MGN LIMITED	**Respondent**

- -
- -

Simon Browne QC and **James Laughland** (instructed by **Atkins Thomson**) for the **Appellant**
Alexander Hutton QC and **Jamie Carpenter** (instructed by **Reynolds Porter Chamberlain**) for the **Respondent**

Hearing date : 11 October 2017

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Approved Judgment

Sir Terence Etherton MR :

1. The principal issue of law in this appeal is whether the former proportionality test in the old CPR 44.4(2) or the new proportionality test in the current CPR 44.3(2) and (5) applies on a standard basis of assessment to a pre-commencement funding arrangement as defined in the current CPR 48.

2. Expressed in less technical language and directed more specifically to the facts of the present proceedings, which are privacy proceedings, the issue is whether the success fee payable under conditional fee agreements between the claimant (who is the appellant) ("BNM") and her solicitors and between her solicitors and her barristers, and the premiums payable under an after the event ("ATE") insurance policy taken out by BNM, are subject to the old or the new proportionality rules under the Civil Procedure Rules on an assessment of her costs on the standard basis.

3. The appeal is from the final costs certificate dated 21 June 2016 of the Senior Costs Judge Gordon-Saker, in which BNM's costs payable by the defendant (the respondent on this appeal) MGN Limited ("MGN") were assessed in the sum of £83,964.80 plus interest in the sum of £5,375.59.

4. That certificate followed a detailed assessment on 23 to 24 November 2015 and 29 April 2016. The Senior Costs Judge gave two relevant judgments in the course of the assessment. In the first, which was delivered on 24 November 2015 ("the November 2015 judgment"), he rejected, among other things, MGN's objection that the issue of the proceedings was premature and unnecessary and, had prior notice been given to MGN, the proceedings would have been settled without the need for any proceedings. In the second, handed down on 3 June 2016 ("the June 2016 judgment"), he held that the new proportionality test applied to the success fees and the premiums under the ATE policy.

5. BNM appealed the Senior Costs Judge's decision that the new proportionality test in CPR 44.3(2) and (5) applies to the success fees and the ATE insurance premium. MGN has cross-appealed the Senior Costs Judge's rejection of its objection that the proceedings were issued prematurely.

The factual background

6. I gratefully take much of the following summary of the factual background from the November 2015 judgment and the June 2016 judgment.

7. BNM is a primary school teacher and has no public or media profile. Between 2008 and 2011 she had a relationship with a successful premiership footballer. That relationship was known only to a small circle of friends and family.

8. In March 2011 BNM lost her mobile phone, which contained private and personal information, including information linking her with the footballer.

9. MGN publishes a number of newspapers, including the Sunday People. An assistant editor of the Sunday People was approached by a source who was in contact with another person who claimed to have BNM's phone and who revealed the relationship between BNM and the footballer.

10. On 23 March 2011 Ms Tracey Kandolah, a freelance journalist who undertook work for MGN, was sent by the assistant editor to BNM's home to enquire about the relationship between BNM and the footballer.

11. This led to a complaint to MGN by BNM's father and, on 3 May 2011, to the return of the phone to BNM. BNM contended that all data, including text messages, personal photographs and videos, had been deleted from the phone before it was returned.

12. In March 2013 BNM instructed the solicitors Atkins Thomson in relation to a proposed claim against MGN. On 18 April 2013 BNM entered into a conditional fee agreement with Atkins Thomson, which provided for a success fee of 100 per cent of their normal fees but a discounted success fee if the claim concluded before trial. On 7 May 2013 Atkins Thomson entered into a conditional fee agreement with counsel, Mr David Sherborne, which provided for a success fee of 100 per cent but a discounted success fee if the claim concluded before exchange of witness statements. On 25 July 2013 BNM purchased an ATE insurance policy from Temple Legal Protection Limited. That provided indemnity of up to £165,000 against liability for MGN's costs and BNM's own disbursements. On 30 July 2013 Atkins Thomson entered into a conditional fee agreement with another counsel, Mr William Bennett, which similarly provided for a success fee of 100 per cent but a discounted success fee if the claim concluded before exchange of witness statements.

13. The success fees and the ATE premiums increased substantially if proceedings were commenced. The solicitors' success fee increased from 0 per cent to 40 per cent. Counsel's success fees increased from 25 per cent to 50 per cent. The ATE premium was £3,710 if the claim settled within 62 days of the letter of claim and £7,155 if it settled subsequently but before proceedings were issued. Upon issuing proceedings, the premium immediately went up to £28,090.

14. Without any prior notice to MGN, BNM commenced proceedings against MGN on 31 July 2013, having obtained an anonymity order from Mann J on an ex parte application the previous day. The order was on terms that BNM would immediately issue a claim form. The order provided that no person should inspect or report the contents of the witness statements deployed in support of the application or the information contained in a confidential schedule to the order without the consent of both parties or the permission of the court. The order permitted BNM to bring these proceedings under initials rather than in her name.

15. In her claim form BNM claimed an injunction to restrain MGN from using or publishing confidential information taken from her phone, damages and an order for delivery up of any confidential information.

16. On 2 August 2013 Atkins Thomson wrote to MGN enclosing a copy of the application for the anonymity order, the order made by Mann J and what was described as a draft claim form. That was the first correspondence between the parties or their solicitors in relation to the proposed proceedings.

17. Particulars of Claim were served on 27 September 2013.

18. MGN filed and served a Defence on 22 November 2013, in which it admitted that it was liable to BNM to the extent particularised in the Defence. MGN admitted that towards the end of March 2011 an unidentified source had contacted the assistant editor of the Sunday People to say that the source had information about a relationship between the footballer and a girl which another source had obtained from a lost telephone. MGN admitted that, as a result of that contact, the assistant editor asked the freelance journalist Ms Kandolah to approach BNM to discuss her relationship with the footballer; and MGN asserted that, following BNM's father's complaint, there were communications between the assistant editor and the police in which the assistant editor explained that he had asked for the phone to be returned to the claimant.

19. MGN asserted that it had never handled or had possession of or saw BNM's phone and nor had any individual for whose acts MGN was vicariously liable; that no individual for whose acts MGN was vicariously liable had at any time been provided with or received copies of any materials or documents from the phone or had deleted data from the phone; that neither the assistant editor nor Ms Kandolah believed or understood that the phone had been stolen but rather they believed it had been lost; and that no information from the phone had been published by MGN. It admitted, however, that it had misused confidential information from the phone. MGN pleaded that it was prepared to provide an undertaking to the court not (save in relation to the proceedings) to read, access, communicate, use, disseminate, disclose or process the confidential information it had obtained. It also admitted that it was liable to pay BNM damages for misuse of private information. It also pleaded that it was prepared to deliver up to BNM all documents or copies of documents containing the confidential information, subject to redacting irrelevant matters.

20. MGN made an open offer to settle the claim by a letter dated 17 December 2013 on terms that it would undertake not to use the confidential information, that it would destroy any relevant documents or deliver them up, that it would pay a sum in damages to be agreed and that it would pay BNM's costs of the action on the standard basis, reserving the right to contend on assessment that the costs of the anonymity application were unreasonably incurred.

21. On 1 July 2014 MGN made two further offers. One was pursuant to CPR Part 36, in which it offered to pay £20,000 in damages and to give undertakings and to destroy or deliver up the information. A further open offer was made on the same day in similar terms but again, in relation to costs, expressly reserving the right to contend that the costs of the anonymity application were unreasonably incurred. MGN further offered to provide a letter of apology for having used the information contained on the claimant's mobile phone.

22. A consent order dated 18 July 2014 contained an order for delivery up of documents or copies of documents containing the information obtained from the source, staying all further proceedings, ordering MGN to pay BNM's costs of the action up to 3 July 2014 to be assessed on the standard basis subject to a detailed assessment if not agreed, and for an interim payment of £25,000 on account of costs.

23. The costs claimed were in the sum of £241,817. That included a success fee in respect of the solicitors' costs of 60 per cent, success fees in respect of the costs of both

counsel of 75 per cent and an ATE insurance premium of £58,000 plus insurance premium tax of £3,480.

The statutory background and the old and new costs rules and practice directions

24. The point of principle as to the applicable proportionality test on the detailed assessment of BNM's costs involves examination of two intertwining strands. One of them is the recoverability in an order for costs of the success fee under a conditional fee agreement and of ATE insurance premiums. The second is whether, on an assessment on the standard basis, the old or the new proportionality test applies where such a success fee and ATE insurance premiums are recoverable in a costs order.

Prior to 1 April 2013

Statutory provisions

(A) Success Fees

25. Sections 58 and 58A of the Courts and Legal Services Act 1990 ("the 1990 Act") made conditional fee agreements ("CFAs") enforceable, including CFAs that specified a success fee, and provided that success fees were recoverable on an award of costs against the other party.

26. Section 58A(6) provided as follows:

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

(B) ATE Premiums

27. Section 29 of the Access to Justice Act 1999 ("the 1999 Act") provided for the recovery by way of costs of premiums paid under policies taken out against the risk of incurring a costs liability.

The relevant old costs rules and practice direction

28. The old CPR 43.2(1)(a) defined costs for the purposes of CPR Parts 44 to 48 as follows:

> *"costs"* includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under *rule 48.6*, any additional liability incurred under a funding arrangement and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track;"

29. The expression "funding arrangement" was defined in 43.2(1) (k) as follows:

> "(k) *"funding arrangement"* means an arrangement where a person has—

> (i) entered into a conditional fee agreement or a collective conditional fee agreement which provides for a success fee within the meaning of *section 58(2) of the Courts and Legal Services Act 1990*;
>
> (ii) taken out an insurance policy to which *section 29 of the Access to Justice Act 1999* (recovery of insurance premiums by way of costs) applies; or
>
> (iii) made an agreement with a membership organisation to meet that person's legal costs;"

30. The expression "additional liability" was defined in 43.2(1)(o) as follows:

> "(o) *"additional liability"* means the percentage increase, the insurance premium, or the additional amount in respect of provision made by a membership organisation, as the case may be;"

31. It is clear that the success fees and the ATE insurance premium in the present case fall within those provisions and were "costs" to which the old CPR Parts 44 to 48 applied.

32. Accordingly, like all other costs, on an assessment on the standard basis the old proportionality test in CPR 44.4(2) applied to them. CPR 44.4(2) was as follows:

> "(2) Where the amount of costs is to be assessed on the standard basis, the court will—
>
> (a) only allow costs which are proportionate to the matters in issue; and
>
> (b) 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.
>
> (Factors which the court may take into account are set out in *rule 44.5*.)"

33. The old CPR 44.5(1) was as follows:

> "44.5—Factors to be taken into account in deciding the amount of costs
>
> (1) The court is to have regard to all the circumstances in deciding whether costs were—
>
> (a) if it is assessing costs on the standard basis—
>
> (i) proportionately and reasonably incurred; or
>
> (ii) were proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis—

(i) unreasonably incurred; or

(ii) unreasonable in amount."

34. The way proportionality was to be addressed on such an assessment on the standard basis was laid down by the Court of Appeal in *Lownds v Home Office* [2002] 1 WLR 2450. The Court of Appeal said (at [31]) that there had to be a two-stage approach: a global approach and an item by item approach. The global approach was to indicate whether the total sum claimed was or appeared to be disproportionate. If the costs as a whole were not disproportionate, then:

> "all that is normally required is that each item should have been reasonably incurred and the cost for that should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable."

35. The Court of Appeal elaborated further (at [37]) as follows.

> "Although we emphasise the need, when costs are disproportionate, to determine what was necessary, we also emphasise that a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent practitioner should be able to achieve without undue difficulty. When a practitioner incurs expenses which are reasonable but not necessary, he may be able to recover his fees and disbursements from his client, but extra expense which results from conducting litigation in a disproportionate manner cannot be recovered from the other party."

36. The critical issue under the old test, therefore, was necessity. As the Court of Appeal said (at [29]), "when an item is necessarily incurred then a reasonable amount for the item should normally be allowed", and "Any item that was not necessary should be disallowed". In order to avoid what it called (in [30]) "double jeopardy" the Court of Appeal said that it was not permissible for the costs judge, having determined a reasonable sum for each item of costs necessarily incurred, to make a global deduction having regard to the situation as a whole.

37. The old Costs Practice Direction supplementing CPR Part 44 contained the following provisions specifically relating to the reasonableness and proportionality of any additional liability under a funding arrangement:

> "11.5. In deciding whether the costs claimed are reasonable and (on a standard basis assessment) proportionate, the court will consider the amount of any additional liability separately from the base costs."
>
> "11.9 A percentage increase will not be reduced simply on the ground that, when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate."

On and from 1 April 2013

Statutory provisions

38. Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act") made important changes to the regime I have described.

39. Recoverable success fees and ATE premiums were abolished but subject to certain saving and transitional provisions.

(A) Success fees

40. Section 44 of the 2012 Act made substantial amendments to sections 58 and 58A of the 1990 Act. As amended by section 44, s.58A(6) of the 1990 Act now reads as follows:

> "A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement."

41. By transitional provisions in section 44(6) the amendment does not prevent a costs order including provision in relation to a success fee payable by a person ("P") under a CFA entered into before the commencement day (1 April 2013) if (a) the agreement was entered into specifically for the purposes of the provision to P of advocacy or litigation services in connection with the matter that is the subject of proceedings in which the costs or order is made, or (b) advocacy or litigation services were provided to P under the agreement in connection with the matter before the commencement day.

42. The relevant commentary in the 2017 White Book (48.0.2.2) states as follows:

> "The effect of this is that the provisions in the pre-April 1, 2013, Costs Rules, insofar as they apply, directly or indirectly, to the recovery of success fees will continue to apply where they are recoverable by a person who entered into a CFA before April 1, 2013. It has to be anticipated that, for these reasons, the relevant provision in the pre-April 1, 2013, Costs Rules will remain effective for many years after the commencement date.

(B) ATE premiums

43. By section 46(2) of the 2012 Act section 29 of the 1999 Act is omitted.

44. Section 46(1) of the 2012 Act inserted in the 1990 Act a new section 58C (recovery of insurance premiums by way of costs), enabling the Lord Chancellor to provide by regulations for the recovery of insurance premiums in clinical negligence proceedings where a costs insurance policy is taken out by a party on or after 1 April 2013 against the risk of incurring a liability to pay for one or more expert reports.

45. By transitional provisions in section 46(3) of the 2012 Act the amendments do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which the section came into force (1 April 2013).

46. The relevant commentary in the 2017 White Book (48.0.2.3) states as follows:

> "The necessary implication is that the law relating to the recovery of insurance premiums by way of costs, including provision in the pre-April 1, 2013, Costs Rules and the Costs Practice Direction relevant to that matter, will continue to apply in those cases. Again, it has to be anticipated that those provisions will remain effective for a considerable period, possibly a number of years, after the commencement date.

(C) Saving provisions in the 2012 Act for both success fees and ATE premiums

47. There are saving provisions in section 48 of the 2012 Act. Article 3 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 (SI 2013/77) brought sections 44 and 46 into force on 1 April 2013, subject to the saving in Article 4. In addition to excluding proceedings relating to a claim for damages in respect of diffuse mesothelioma and proceedings relating to insolvency, Article 4 excludes from the commencement of sections 44 and 46 on 1 April 2013 "publication and privacy proceedings" (as defined in Article 1(1)).

48. The commentary in the White Book (48.0.2.4) states as follows:

> "… until [s.44 and s.46 are brought into force in relation to proceedings of the types which remain covered by the saving provisions] the rules in the pre-April 1, 2013, Costs Rules and provisions in the Costs Practice Direction relating to the recovery of success fees and of insurance premiums by way of costs will continue to apply where funding arrangements are entered into in those proceedings (whether entered into before or after April 1, 2013)."

The relevant new costs rules and practice direction

49. The new CPR Part 48 has the following heading:

> "Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 relating to Civil Litigation Funding and Costs: transitional provision in relation to pre-commencement funding arrangements".

50. CPR 48.1(1) provides as follows:

> "The provisions of *CPR Parts 43 to 48* relating to funding arrangements, and the attendant provisions of the Costs Practice Direction, will apply in relation to a pre-commencement funding arrangement as they were in force immediately before 1 April 2013, with such modifications (if any) as may be made by a practice direction on or after that date."

51. A "pre-commencement funding arrangement" is defined in CPR 48.2, which distinguishes between "insolvency–related proceedings, publication and privacy proceedings or a mesothelioma claim" and other proceedings. CPR 48.2(1)(b) defines a pre-commencement funding arrangement for insolvency–related proceedings, publication and privacy proceedings or a mesothelioma claim as being:

> "(i) a funding arrangement as defined by *rule 43.2(1)(k)(i)* where—
>
> (aa) the agreement was entered into before the relevant date specifically for the purposes of the provision to the person by whom the success fee is payable of advocacy or litigation services in relation to the matter that is the subject of the proceedings in which the costs order is to be made; or
>
> (bb) the agreement was entered into before the relevant date and advocacy or litigation services were provided to that person under the agreement in connection with that matter before the relevant date;
>
> (ii) a funding arrangement as defined by *rule 43.2(1)(k)(ii)* where the party seeking to recover the insurance premium took out the insurance policy in relation to the proceedings before the relevant date."

52. The expression "publication and privacy proceedings" is defined as follows in CPR 48.2(2)(c):

> "publication and privacy proceedings" means proceedings for—
>
> (i) defamation;
>
> (ii) malicious falsehood;
>
> (iii) breach of confidence involving publication to the general public;
>
> (iv) misuse of private information; or
>
> (v) harassment, where the defendant is a news publisher."

53. The expression "the relevant date" is defined in CPR 48.2(2)(e) as being the date on which sections 44 and 46 of the 2012 Act came into force in relation to proceedings of the sort in question.

54. It is common ground before us, as it was before the Senior Costs Judge, that these are "privacy" proceedings within CPR 48.2(2)(c) and that "the relevant date" for the purposes of CPR 48.2(1)(b) has not yet occurred as sections 44 and 46 of the 2012 Act have not yet come into force in relation to such proceedings.

55. The new Costs Practice Direction 48 ("PD 48"), which supplements CPR 48, contains provisions regarding the transitional provisions in sections 44 and 46 of the 2012 Act. Sections 1.3 and 1.4 provide as follows:

> "1.3 The provisions in the CPR relating to funding arrangements have accordingly been revoked (either in whole or in part as they relate to funding arrangements) with effect from 1 April 2013; but they will remain relevant, and will continue to have effect notwithstanding the revocations, after that date for those cases covered by the saving provisions.
>
> 1.4 The provisions in the CPR in force prior to 1 April 2013 relating to funding arrangements include—
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> (a) CPR 43.2(1)(a), (k), (l), (m), (n), (o), 43.2(3) and 43.2(4);
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> (b) CPR 44.3A, 44.3B, 44.12B, 44.15 and 44.16;
>
> (c) CPR 45.8, 45.10, 45.12, 45.13, Sections III to V (45.15 to 45.19, 45.20 to 22 and 45.23 to 26), 45.28 and 45.31 to 45.40;
>
> (d) CPR 46.3;
>
> (e) CPR 48.8".

56. Section 2 of PD 48 concerns mesothelioma claims. Section 3 relates to insolvency-related proceedings and publication and privacy proceedings. Section 4 relates to new provisions in relation to clinical negligence claims.

57. The definition of "costs" in the new CPR 44.1(1), for the purposes of the new CPR Parts 44 to 47, contains no reference to "any additional liability incurred under a funding arrangement" as was present in the equivalent definition of "costs" in the old CPR 43.2(1)(a).

58. The standard basis of assessment is also worded differently in the new costs rules, in particular in relation to proportionality. The new CPR 44.3(2) and (5) provide as follows:

> "(2) Where the amount of costs is to be assessed on the standard basis, the court will—
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be

> disallowed or reduced even if they were reasonably or necessarily incurred; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party."
>
> (Factors which the court may take into account are set out in *rule 44.4*.)"

> "(5) Costs incurred are proportionate if they bear a reasonable relationship to—
>
> (a) the sums in issue in the proceedings;
>
> (b) the value of any non-monetary relief in issue in the proceedings;
>
> (c) the complexity of the litigation;
>
> (d) any additional work generated by the conduct of the paying party; and
>
> (e) any wider factors involved in the proceedings, such as reputation or public importance."

59. It is expressly provided in the new CPR 44.3(7) that rr.44.3(2)(a) and (5) do not apply to cases commenced before 1 April 2013 or to the cost of work done before that date. CPR 44.3(7) is as follows:

> "Paragraphs (2)(a) and (5) do not apply in relation to—
>
> (a) cases commenced before 1st April 2013; or
>
> (b) costs incurred in respect of work done before 1st April 2013,
>
> and in relation to such cases or costs, *rule 44.4(2)(a)* as it was in force immediately before 1st April 2013 will apply instead."

The November 2015 judgment and the June 2016 judgment

Prematurity of the proceedings

60. As I have already said, this issue was addressed in the November 2015 judgment.

61. The Senior Costs Judge summarised (in [11]) MGN's contention as being that it was unreasonable for BNM to issue proceedings because this was a claim which would have stood a realistic chance of settlement without the issue of proceedings and that, accordingly, BNM should not be allowed the costs attributable to the issue of proceedings, including the costs of the anonymity application. As the Senior Costs

Judge observed, one consequence of that submission, if it found favour, was that the solicitors' success fee, which was staged, and the ATE insurance premium, which was staged, both being staged by reference to the issue of proceedings, would inevitably have to be reduced significantly.

62. The Judge's reasoning for dismissing that objection of MGN is contained in paragraphs [12] to [14] of the November 2015 judgment, which are as follows:

> "12. The question it seems to me is whether it was reasonable for the claimant to approach the matter in the way that she did and to issue proceedings when she did. On the face of it in a different case one may well point to the absence of communication between the parties before issue as being a very obvious indication that proceedings would be premature. It is rarely the case that the parties should not attempt to resolve their issues before issuing proceedings. In some cases, however, in particular where the claimant is concerned that the defendant may do something which would harm the claimant's position were it given advance notice of the proceedings such as, for example, where the claimant is seeking an Anton Piller order, then inevitably proceedings will be issued without advance warning.
>
> 13 In my judgment, this is such a case. As at July 2013 the claimant did not know what information the defendant had in relation to the data which had been taken from her mobile phone. She could not know what use the defendant would make of that information. She did know that the defendant had considered it appropriate to make use of information obtained from her mobile phone without her consent; and she would have known or her lawyers would have known that even if she lost her phone somebody with whom the defendant had acted had converted that phone and had downloaded confidential information from it. Perhaps more significantly she would not have known what the defendant's stance would have been in relation to her request for anonymity. As a result of obtaining the anonymity order, all of the correspondence between her solicitors and those acting for the defendant was anonymised. She has, as far as I am aware, two years on, remained anonymous.
>
> 14. It may be that other claimants may have approached this differently but given the misuse, including misuse by the defendant, of the claimant's confidential information I cannot say that it was unreasonable for her to issue proceedings at the outset without prior warning and I have no doubt that the issue of proceedings, including the very detailed way in which the claimant's case is set out in the witness statements in support of the anonymity application and in the particulars of claim, would have helped to resolve this matter reasonably speedily."

Proportionality

63. As I have said, the question whether the old or the new test of proportionality should apply to the success fees and the ATE insurance premiums was addressed by the Senior Costs Judge in the June 2016 judgment.

64. The Senior Costs Judge noted (in [24]) that the conditional fee agreements entered into by BNM with her solicitors and by her solicitors with her barristers and the ATE insurance policy purchased by BNM were all "pre-commencement funding arrangements" for the purposes of CPR.48.2(1)(b).

65. He observed (in [27]) that the old CPR 44.4(2) was not identified in paragraph 1.4 of PD 48 as continuing in relation to funding arrangements after 1 April 2013. He continued as follows:

> "28. It seems to me that the intention was that the rules as to the recoverability of additional liabilities would be preserved in relation to those additional liabilities which remain recoverable after 1st April 2013. However the old test of proportionality was not preserved in relation to those additional liabilities. Had that been intended it could have been achieved quite easily by a further exception in CPR 44.3(7).
>
> 29. CPR 44.4(2), the test of proportionality in force before 1st April 2013, was not a provision "in relation to funding arrangements" … CPR 44.4(2) does not therefore survive beyond 1st April 2013 by virtue of CPR 48.1(1), as in force after that date. It survives only in the circumstances set out in CPR 44.3(7).
>
> …
>
> 31. A consequence of the reduction of the base costs to a proportionate figure will be that the success fee, a percentage of those base costs, also reduces. It would be absurd and unworkable to apply the new test of proportionality to the base costs, but the old test of proportionality to the success fee.
>
> 32. Ringfencing and excluding additional liabilities from the new test of proportionality would be a significant hindrance on the court's ability to comply with its obligation under CPR 44.3(2)(a) to allow only those costs which are proportionate."

The appeal

66. I would allow the appeal on the ground that the assessment should have been conducted on the footing that the proportionality test in the old CPR 44.4(2), and the relevant provisions in the old Costs Practice Direction, applied to the success fees and the ATE insurance premiums.

67. At the hearing of the appeal Mr Alexander Hutton QC, for MGN, advanced additional grounds to those given by the Senior Costs Judge to support the conclusion that the

new proportionality test applies. It is convenient to begin with an argument raised by him, but not a ground mentioned by the Senior Costs Judge, that, on the ordinary and natural meaning of the words in the definition of "costs" in the new CPR 44.1(1), a success fee is a "fee" and an ATE insurance premium is an "expense".

68. Mr Hutton reinforced that argument by reference to the provisions in section 4 of the new PD 48 for recovery of ATE insurance premiums in clinical negligence cases where a costs insurance policy is taken out on or after 1 April 2013. Those provisions, which were made pursuant to the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 (SI 2013/92) ("the Clinical Negligence Regs"), which were themselves made pursuant to section 46 of the 2012 Act, state that "the provisions in force in the CPR prior to 1 April 2013 relating to funding arrangements will not apply". It was common ground between Mr Simon Browne QC, for BNM, and Mr Hutton that the new proportionality provisions in CPR 44.3(2) will apply to such premiums. Mr Hutton submitted that this carries the necessary implication that such premiums are "costs" within the new CPR 44.1 since there are no other rules which specifically extend recoverable costs to the insurance premiums mentioned in the Clinical Negligence Regs and PD48 section 4. That too was not a reason relied upon by the Senior Costs Judge.

69. Allied to this submission about the natural and ordinary meaning of the words "fees" and "expenses" in the new CPR 44.1(1) extending to success fees and ATE premiums was Mr Hutton's explanation as to why the phrase "any additional liability incurred under a funding arrangement" appears in the old CPR 43.2(1)(a) definition of "costs" but was deliberately omitted from the definition of costs in the new CPR 44.1(1). In his oral submissions he initially said that the phrase had only been included in the old definition for the avoidance of doubt and must have been thought to be unnecessary clarification in the new Rules. I do not accept that explanation since, on MGN's interpretation of the meaning of "costs" in the new Rules, it would have been more important than ever to clarify that, notwithstanding the abolition generally of the right to recover success fees and ATE premiums except in certain specific cases and subject to transitional provisions, where they are recoverable they fall within the meaning of "costs".

70. On reflection and prompting from junior counsel for MGN, Mr Jamie Carpenter, I understood Mr Hutton to give an alternative explanation for the omission of the phrase in the new CPR 44.1(1), namely that the relevant primary or secondary legislation required there to be an express reference to additional liabilities under a funding arrangement in the old CPR 43.2(1)(a). Again, this hardly seems to be an adequate explanation as to why the express reference was deliberately removed in the new CPR 44.1(1) if success fees and ATE insurance premiums, where still recoverable, were intended to be recoverable as "costs".

71. I assume that the relevant legislative provisions to which Mr Hutton was alluding in that submission were section 58A(6) of the 1990 Act and section 29 of the 1999 Act. They are set out or summarised above. Both provide for recoverability "subject in the case of court proceedings to rules of court". The amendments to the Civil Procedure Rules 1998 made pursuant to those provisions were effected by the Civil Procedure (Amendment No. 3) Rules 2000 (SI 2000/1317). If rules of court were required to provide expressly for the recoverability of success fees under conditional fee agreements (the enforceability of which was only established by section 58 of the

1990 Act), then that must still be the position as regards those success fees which remain recoverable under the saving and transitional provisions in the 2012 Act. That is indeed achieved, not by the ordinary meaning of "fees" in the definition of "costs" in the new CPR 44.1(1), but by the express provisions in the new CPR 48.1.

72. Similarly, ATE insurance premiums, in those cases where they are still recoverable under the transitional and saving provisions in the 2012 Act, are expressly addressed in CPR 48.1.

73. In any event, I do not consider that ATE insurance premiums fall within the natural meaning of "expenses" of litigation. They have nothing to do with the cost of issuing and progressing the litigation, any more than the premiums on a householder's or car owner's insurance which contains litigation cover. Both before the event insurance and after the event insurance offset the risk of a person's financial exposure as a result of litigation but they are not expenses of the litigation itself.

74. MGN's argument on this point of interpretation of the definition of "costs" in new CPR 44.1(1) is not advanced by the new provisions regarding ATE insurance premiums in clinical negligence cases which are recoverable pursuant to section 46 of the 2012 Act and the Clinical Negligence Regs. As is stated in paragraph 4.2 of PD 48, the Clinical Negligence Regs apply only to a costs insurance policy taken out on or after 1 April 2013 and, as is common ground before us, the old costs provisions do not apply to them. A costs order may make provision for the recovery of such premiums, not because they fall within the ordinary meaning of the word "expenses" in the definition of "costs" in the new CPR 44.1(1) but because they are expressly made recoverable in an order for costs by the Clinical Negligence Regs.

75. Passing, then, to the two principal reasons given by the Senior Costs Judge for his decision on the applicable proportionality test, the first (in [28]) was that:

> "Had [it] been intended [that the old test of proportionality would be preserved in relation to those additional liabilities which remain recoverable after 1 April 2013] it could have been achieved quite easily by a further exception in CPR 44.3(7)".

76. I respectfully do not agree. It would not have been appropriate to include such a further exception in the new CPR 44.3(7) because that provision creates exceptions from the new CPR 44.3(2)(a) and (5) but those provisions are not capable of catching "any additional liability incurred under a funding agreement" as defined by the old CPR 43.2(1)(k) and (o) since (contrary to the argument on behalf of MGN, which I have rejected) such liability no longer falls within the expression "costs" as defined by the new CPR 44.1(1).

77. The second principal reason given by the Senior Costs Judge (in [29]) was that the old test of proportionality in the old CPR 44.4(2) was not a provision relating to funding arrangements within CPR 48.1, as borne out by its absence from paragraph 1.4 of PD 48.

78. Again, I respectfully disagree. The provisions in paragraph 1.4 are those where the expression "funding arrangements" is expressly mentioned. They are introduced by

wording which states that what follows is inclusive and not exhaustive. The old CPR 44.4(2), which contained the old proportionality test, applied to costs as defined in the old CPR 43.2(1)(a). The latter is expressly mentioned in paragraph 3.1 of the new PD 48 and so the old CPR 44.4(2) is itself a provision relating to funding within that paragraph even though it was not itself expressly mentioned in paragraph 4.1 of PD 48.

79. That is consistent with the plain intention to continue the application of all the old costs rules which formerly governed funding arrangements, as is apparent not only from the transitional provisions in the 2012 Act and the wording of the new CPR 48.1(1) but also the following statement in paragraph 2.1 of PD 48 relating to mesothelioma claims:

> "It will accordingly remain possible for a costs order in favour of a party to such proceedings to include provision requiring the payment of success fees and premiums under after the event insurance policies, and so the provisions of the CPR relating to funding arrangements as in force immediately prior to 1 April 2013 will continue to apply in relation to such proceedings, where commenced before or after 1 April 2013."

80. Furthermore, as Mr Browne submitted, the new CPR 48.1 provides not merely that the provisions of the old CPR Parts 43 to 48, as they were in force immediately before 1 April 2013, would continue to apply to a "pre-commencement funding arrangement" but so also would the attendant provisions of the old Costs Practice Direction. Section 11 of the old Costs PD dealt with the treatment of an additional liability under a funding arrangement. Paragraph 11.9 provided that a percentage increase would not be reduced simply on the ground that, when added to base costs which were reasonable and (where relevant) proportionate, the total appeared disproportionate. That provision is inconsistent with the new proportionality test in CPR 44.3(2) and (5) and again shows that it was never intended that the new test should apply to such pre-commencement funding arrangements and that the old CPR 44.4(2) should continue to apply notwithstanding that it is not expressly mentioned in paragraph 1.4 of the new PD 48

81. Standing back from the minutiae, it seems perfectly clear that the reference to "any additional liability incurred under a funding arrangement" was deliberately omitted from the definition of "costs" in the new CPR 44.1(1) because, subject to specific saving and transitional provisions in the 2012 Act, the recoverability of success fees and ATE insurance premiums in an order for costs was abolished by the 2012 Act and, where they remain recoverable by virtue of those saving and transitional provisions, they are recoverable in accordance with the old costs rules, including those relating to proportionality, reasonableness and assessment. If it had been intended that the new proportionality test was to apply to funding arrangements to which the statutory saving and transitional provisions applied, that would have been made clear in the statutory provisions or the new costs rules or both and it was not.

82. Mr Hutton did not place any reliance in his oral submissions on the Senior Costs Judge's observations in paragraphs [30] and [31] of the June 2016 judgment, and, in particular, on the Senior Costs Judge's observation that: "It would be absurd and

unworkable to apply the new test of proportionality to the base costs, but the old test of proportionality to the success fee".

83. The Senior Costs Judge in his June 2016 judgment and both parties in their written and oral submissions referred to Sir Rupert Jackson's Review of Civil Litigation Costs and to statements in Sir Rupert's Final Report on that Review. I do not consider that these assist the resolution of the proportionality issue in dispute on this appeal. It is common ground that the applicable post 1 April 2013 statutory provisions, costs rules and practice direction did not entirely reflect all the recommendations in the Final Report, and so the latter, even if properly admissible as an aid to interpretation (as to which we heard no submissions), is an unsound basis for undermining what I consider to be the clear intention of the drafters of those provisions, rules and practice direction.

84. For all those reasons, I would hold that that the Senior Costs Judge's discretion in subjecting both the base cost and additional liabilities to the new proportionality rule was wrong in principle. I would set aside his decision and the Final Costs Certificate in the sum of £83,964.80.

85. In BNM's skeleton argument, it is said that the Court of Appeal, exercising our own discretion, should order a Final Costs Certificate to be issued in the sum of £163,389.45 plus interest, "that being the amount of costs assessed by the Senior Costs Judge to have been reasonably incurred and reasonable in amount (and in the case of the ATE Premium also reasonably and necessarily incurred)". At the hearing of the appeal, however, Mr Browne accepted that, if BNM succeeded in the appeal on the point of principle, the more appropriate course would be for the assessment to be remitted to the Senior Costs Judge to consider the proportionality of the costs again. I would so order.

The cross-appeal

86. There is a cross-appeal by MGN arising out of the November 2015 judgment. This is now confined to the issue whether it was reasonable for BNM to issue the proceedings without giving prior notice (ground 3(a) in the Respondent's Notice).

87. The skeleton argument sets out the following five arguments in support of the cross-appeal on this point.

    i) The Senior Costs Judge was wrong to equate BNM's situation with the situation in which an *Anton Piller* order is sought.

    ii) The Senior Costs Judge gave no or insufficient weight to the limited protection which BNM should have expected to obtain from the form of anonymity sought.

    iii) The Senior Costs Judge was wrong to regard BNM's lack of knowledge of what MGN's stance in relation to anonymity would be as a factor in her favour when BNM could have ascertained that stance before making the application.

    iv) The Senior Costs Judge gave excessive weight to the fact that MGN had misused BNM's confidential information.

v) The Senior Costs Judge gave no or insufficient weight to the very great increase in costs which BNM would or ought to have known would result from issuing proceedings and which would otherwise have been avoided.

88. Mr Browne emphasised that the Senior Costs Judge had asked (in [12]) "the right question", namely "whether it was reasonable for the claimant to approach the matter in the way that she did and to issue proceedings when she did", and that he had heard full argument on this point the day before he gave his judgment.

89. The Senior Costs Judge's reasoning was contained in paragraphs [12] and [13] of the November 2015 judgment. The essence of it was that, in the light of the misuse of BNM's confidential information, including misuse by MGN, BNM could not know what use MGN would make of the information if she gave any prior notice of her intention to make the anonymity application: in other words, she was entitled to be apprehensive that, if she gave prior notice of her intention to issue proceedings, MGN would make wrongful use of the confidential information.

90. I agree with MGN that the Senior Costs Judge's assessment was flawed because either he failed to take into account, or at any event he did not make clear that he had taken into account, that (1) BNM had not taken any steps to make a claim or pursue any avenue of redress between May 2011, when BNM's phone was returned to her, and early April 2013 when she instructed Atkins Thomson in relation to the present claim; (2) MGN had not published or indicated any intention to publish relevant confidential information within that time; (3) BNM did not seek any interlocutory injunction in the present proceedings; (4) there is no evidence that BNM feared, or feared on reasonable grounds, that, if she were to give notice of the intention to issue the proceedings, MGN would seek to deal with the confidential information in an unlawful way.

91. As to (4), Mr Hutton correctly pointed out that the anonymity order sought and granted by Mann J related solely to the application and the proceedings, if and when issued. There was no application for an interlocutory injunction to prevent wrongful use of the confidential information by BNM. Indeed, the written submissions of BNM's counsel for the hearing of the anonymity application stated that:

> "She does not seek to prevent the prospective Defendant or non-parties from publishing information to the effect that she is the Claimant …The Claimant's application is merely that the court does not <u>itself</u> identify her. [emphasis in the original]. If the order sought is granted it will mean that if either the Defendant or a non-party did publish her identity in conjunction with the relevant private information, it would not be protected by absolute privilege …"

92. Further, when Mann J asked, on the *ex parte* anonymity application, whether there had been a letter before action, the explanation that he was given by BNM's then counsel for there having been no prior notice was not that BNM was concerned that, if notice was given, MGN might misuse the confidential information in some way. The explanation was that there was "a tacit agreement that a letter before action [was] just an additional expense" and that Tugendhat J in *CVB v MGN* [2012] EWHC 1148 (QB) had said that notice, in such a case as this, was not necessary for an anonymity

application under then then CPR 16 (if no application was made at the same time for an injunction). Neither of those matters was relied upon by the Senior Costs Judge for his rejection of MGN's prematurity argument and, for what it is worth, there is in any event no evidence of any such tacit agreement by MGN, which it denies.

93. Further, there is no evidence in the witness statements made by BNM, her father or her solicitor in support of the application for the anonymity order of any such concern on the part of BNM as was relied upon by the Senior Costs Judge.

94. It is also to be noted that the matter of the prematurity of the proceedings was expressly raised in MGN's points of dispute on the assessment. BNM's points of reply dated 12 December 2014 refer in detail to the exchanges between BNM's counsel and Mann J on the application for an anonymity order, the absence of any procedural requirement for prior notice, and the unlikelihood that there would have been a negotiated settlement if prior notice had been given of the intention to issue proceedings. There was no statement, however, that BNM was concerned that, if such notice was given, MGN might misuse the confidential information. Nor has any such evidence been given by BNM or on her behalf since then.

95. The Senior Costs Judge is highly experienced. Notwithstanding the points I have mentioned, I do not consider that it would be right for us to say on the appeal that there is only one answer to the question whether it was reasonable for BNM to make the anonymity application and issue the proceedings without prior notice to MGN and without any attempt to reach an agreement which would have avoided litigation. I consider that the appropriate course would be to remit the matter to the Senior Costs Judge to re-consider the issue of prematurity, making it explicit that he has taken the matters I have mentioned into account.

96. I would, therefore, allow the cross-appeal to that extent.

Lord Justice Longmore:

97. I agree.

Lord Justice Irwin:

98. I also agree. I add only that, whilst I agree the decision on the question remitted following the successful cross-appeal must take into account all of the matters identified by the Master of the Rolls, it is nevertheless certainly not a question in respect of which there is only one answer.