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Phone hacking victims' solicitors are entitled to high success fees and ATE premiums in full

Alcorn, André, Ashworth, Eriksson, Flitcroft, Frost, Gascoigne, Gibson, Gulati, Horlick, Noble, Reed and Yentob v. Mirror Group Newspapers Limited
[2016] EWHC B29 (Costs)

Article by David Bowden

Executive speed read summary

In the phone hacking litigation, the senior costs judge has had to determine what costs are due to the solicitors and counsel which acted on a 'no win, no fee' basis for the victims who suffered a gross invasion of their privacy. He has ruled that these were specialized cases which justified the services of specialist London media firms and awarded hourly rates in excess of the guideline hourly rates including £400 per hour base costs for Grade A fee earners.

He allowed 100% success fees for conditional fee agreements taken out before February 2013 when liability was strenuously denied and these were very risky cases. Broadly he allowed 67% success fees for the other claimants with an additional 5% success fee where the CFA had staged success fees and an extra 3% success fee where solicitors or counsel assumed a CPR part 36 risk.

The premiums for the Temple Litigation Advantage ATE policies were allowed in full including one premium for £87,450 for a claim which went to trial. For 2 cases in which notice of funding was served late, the costs judge refused to allow a success fee to be claimed on profit costs.

Alcorn, Peter André, Ashworth, Sven Goran Eriksson, Flitcroft, Sadie Frost, Paul Gascoigne, Gibson, Gulati, Horlick, Noble, Reed and Alan Yentob v. Mirror Group Newspapers Limited
[2016] EWHC B29 (Costs) 9 November 2016
High Court of Justice, Senior Courts Costs Office (Senior Costs Judge, Master Gordon-Saker)

What are the facts?

A number of celebrities and other public figures believed that their phones had been hacked which resulted in sensational stories being published about their private lives in Sunday or tabloid newspapers. They instructed various firms of solicitors to make claims for breach of privacy. The newspapers denied liability initially saying there had only been 1 rogue reporter. Eventually criminal charges were brought. . Claims were tried by Mann J and damages were awarded. The solicitors acted on a 'no win, no fee' basis. The solicitors having achieved success asked for the court to assess their costs.

What did Mann J rule in the underlying litigation?

Following a 13 day hearing in March 2015, Mr Justice Mann handed down his reserved judgment **[2015] EWHC 1482 (Ch)**. In it he decided on the appropriate amount of damages to be awarded to 8 people who claimed that their telephones had been hacked by the Mirror Group Newspapers (MGN) who publish the Daily Mirror, the Sunday Mirror and The People newspapers. Many of these claimants were well known public figures including Sadie Frost, Paul Gascoigne and Alan Yentob. There are reporting restrictions still in place. The newspapers had initially denied liability, then made a series of non-admissions and denied that there had been any systematic phone hacking. The judge ruled against the newspaper and determined the appropriate amounts of compensation for breach of privacy.

What did the Court of Appeal rule on MGN's appeal?

The Court of Appeal unanimously rejected all challenges made by Mann J in its judgement dated 17 December 2015 - **[2015] EWCA Civ 1291.** MGN argued that there could not be an award of damages solely on the grounds of an infringed right to privacy. It was argued that there had to be some damage limited to distress or hurt to feelings which could be proved before damages were awarded. MGN said damages could not be awarded simply to punish a party for infringing someone else's rights.

The claimants pointed to other cases including the *Paul Weller* case **[2015] EWCA Civ 1176** in which children have been awarded damages despite being oblivious to their privacy rights being violated. It was argued that *Vidal-Hall* **[2015] EWCA Civ 311** did not apply as distress and injury to feelings were the only form of damages claimed in that case. The Court of Appeal agreed that depriving the claimants of their right to control their own privacy was a separate head of damage and that damages were not limited to distress: *"the respondents are entitled to be compensated for that loss of control of information as well as for any distress."*

What happened in the Supreme Court?

On 23 March 2016 the Supreme Court declined to hear a final appeal. It ruled **UKSC 2016/0016** that:

> '*The Court ordered that permission to appeal be refused because the application does not raise an arguable point of law.*'

Which solicitors acted for the phone hacking victims?
These London firms acted for 1 of more of the claimants:

- Atkins Thompson,
- Clintons,
- Hamlins,
- Lee & Thompson,
- Steel & Shamash,
- Steward-Moore, and
- Taylor Hampton

How were these cases funded?
These cases were funded by means of a 'no win, no fee' conditional fee agreement ('CFA'). In some cases a CFA-lite had been entered into. Most, but not all, of the CFAs were entered into before April 2013 such that success fees and 'after the event' ('ATE') premiums were recoverable from the other side in the event of success. The CFAs adopted the Law Society model wording in relation to the definition of 'success'.

The ATE policies were all arranged by Temple Legal Protection Limited and the policy offered was a 'Temple Litigation Advantage' one. There was no challenge made by MGN as to the selection of ATE policy because it was unable to say that another product should have been chosen. MGN accepted there is a limited market for ATE policies for this sort of litigation.

What were the issues which the Senior Costs Judge had to resolve in the detailed assessment proceedings?
There were 4 issues that the senior costs judge had to resolve:

- The appropriate hourly rates for the claimants' solicitors' firms,
- The appropriate success fees due under the CFAs,
- The recoverable level of ATE premium from MGN, and
- Whether relief from sanction should be granted in 2 cases where notice of funding served on MGN advising them that the case was CFA funded was served late.

What does CPR part 44.4 say about costs?
This deals with the factors to be taken into account in deciding the amount of costs and provides:

> **'44.4** .....
> *(3) The court will also have regard to –*
> *(a) the conduct of all the parties, including in particular –*
> *(i) conduct before, as well as during, the proceedings; and*
> *(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;*
> *(b) the amount or value of any money or property involved;*
> *(c) the importance of the matter to all the parties;*
> *(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;*
> *(e) the skill, effort, specialised knowledge and responsibility involved;*
> *(f) the time spent on the case;*
> *(g) the place where and the circumstances in which work or any part of it was done; and*
> *(h) the receiving party's last approved or agreed budget*.'

What did the costs judge decide was the appropriate hourly rates?
The costs judge referred to the 2010 guideline hourly rates (which Lord Dyson MR refused to increase in 2015) which provide rates for London based solicitors of £317 (Grade A fee earner – more than 8 years post-qualification experience) going down to £126 (Grade D fee earner). The costs judge said that whilst '*he had no hesitation in concluding that in the present case rates higher than the guideline rates were reasonable*' it seemed to him that '*some of the rates claimed are nevertheless too high'*. In his judgment these were the reasonable rates:

- Grade A - £400 per hour plus VAT,
- Grade B - £280 per hour plus VAT,
- Grade C - £230 per hour plus VAT, and
- Grade D - £140 per hour plus VAT.

In coming to this assessment the costs judge took account of these factors:

- The seriousness of these cases and the importance to the claimants,
- The substantial amount of damages awarded,
- The complexity of the cases both on liability and quantum,
- The difficulty the claimants faced in proving their cases against MGN,
- The specialist skill needed in analyzing the evidence, and
- The vigour by which MGN defended the claims which was '*well resourced'*.

What did the court rule in *Spiralstem* about setting success fees?
Master Campbell sitting in the SCCO gave his judgment in *Spiralstem Ltd v. Marks & Spencer PLC* **[2007] EWHC 90084 (Costs).** He said that a 'ready reckoner' to calculate success fees was '*recognized by the court and applied as a proper measure in calculating success fees*'. A 60% chance of success would give a 33% success fee based upon the modified ready reckoner. In the case of a 75% chance of success, 1 in 4 cases will be lost, requiring a success fee of 33.3%. For cases with 50% chances of success or less, a success fee of 100% is appropriate. There is a chart issued by the Law Society of England & Wales which enables success fees to be converted in this way which is also set out in *Cook on Costs.*

Are there any other prior authorities of relevance?
These authorities are relevant in this case.

Kellar v. Williams **[2004] UKPC 30** (Privy Council – Lords Hope, Hutton, Scott & Carswell and Dame Sian Elias)
A party may not recover costs attributable to an increase in its liability to its lawyers created after the order entitling it to costs.

KU v. Liverpool City Council **[2005] EWCA Civ 475** (Court of Appeal – Brooke, Rix & Dyson LJJ)
Staged success fees would lead to a greater chance of establishing the reasonableness of a higher success fee given that the claim did not settle within the agreed period.

JN Dairies Limited v. Johal Dairies Limited **[2011] EWHC 90211 (Costs)** (Senior Courts Costs Office – Master Gordon-Saker)
The Claimant's solicitors moved from a conventional retainer to a retrospective CFA shortly before the hearing of an appeal. Whilst it may have been reasonable as between the solicitor and client to enter into a '*double or quits'* arrangement, it was not however reasonable as between the parties to double the losing party's liability so late in the day.

What did the costs judge rule were the appropriate success fees for the claimants' solicitors?
The costs judge had to assess 60 separate success fees relating to the various claimants, the different firms of solicitors and counsel. In summary the costs judge allowed these success fees:

- **100%** - for CFAs entered into **before** February 2013,
- **75%** - for Ms Alcorn's CFA for costs after September 2014,
- **67% -** for the CFAs entered into between February 2013 to September 2014,
- **50%** - for Ms Gibson's CFA as stage 5 of her ATE premium was not engaged,
- **5% additional** success fee – post-2013 claims with staged success fees, and
- **3% additional** success fee – where solicitors or counsel had assumed a CPR part 36 risk,

In arriving at the 100% success fee figure, the costs judge ruled at that time these cases were very risky because the defendant denied liability and there had been no arrests or prosecutions of journalists engaged in phone hacking.

There were some retrospective success fees claimed which the costs judge allowed as well because these phone hacking cases were '*very different'* to the tactical decision made in *JN Dairies*. However the costs judge ruled that there was '*nothing to suggest that there were any conventional retainers in place before the CFAs were entered into*' and that all claimants pursued their claims under CFAs and the Defendant '*was aware of that*'. He said that the '*vast bulk of the retrospective success fees claimed relate to the fees of counsel rather than the solicitors*' and that there was '*no obligation to give notice of funding in respect of CFAs entered into with counsel if notice of funding had been given in relation to an earlier CFA with the solicitor*'.

Rather helpfully for receiving parties the costs judge went on to hold that in his '*experience it is almost invariably the case that work will be done in anticipation of a conditional fee agreement being entered into and without a formal conventional retainer being in place*'. Here he noted that whilst some of the periods over which the retrospective success fees are being claimed were '*surprisingly long'*, he ruled that this was '*not a case of a party unreasonably creating a different liability for costs after the event'*.

What did the costs judge rule in relation to 'after the event' ('ATE') premiums?
The premiums for the Temple Litigation Advantage ATE policies were allowed in full. He assessed in detail the staged ATE policy provide for Mr Ashworth's claim. This provided for 7 stages of premium and a limit of indemnity of £100,000 plus the ATE premium. The costs judge allowed these stage premiums:

- **£1850** – stage ai – claim settled in pre-action protocol period,
- **£82,500** – stage ciii – claim proceeded to judgement.

The costs judge concluded on ATE premiums that there was nothing to enable him '*to conclude that these policies were purchased unreasonably nor that the premiums were staged unreasonably. Accordingly the premiums must be allowed as claimed.*'

What ruling did the costs judge make on the relief from sanctions application?
These were both refused.

The solicitors for Mrs Horlick provided notice of funding in form N251 2½ months late and the solicitors for Alan Yentob were 7 months late. The costs judge adopted a strict approach although he correctly applied the Court of Appeal ruling in *Denton v. White* **[2014] EWCA Civ 905**. The costs judge said the sanction imposed by CPR part 44.3b was automatic and could be '*disapplied only be an order of the court*'.

The costs judge ruled that this was '*a case where the sanction is proportionate to the breach'*. He noted that if relief was not granted '*the solicitors would be denied success fees on the value of their work done over the one and 3 month periods respectively'* but he rightly observed that the Claimants would '*still be entitled to their reasonable and proportionate base costs for work reasonably done over those periods'*. The costs judge felt that the '*sums lost are likely to be relatively insignificant*'. He concluded that because there had been '*failure to comply with the practice directions, court time and the parties' resources have been spent on an application to disapply the sanction*' and he therefore refused relief from sanctions.

What else is happening in the Supreme Court relevant to media law and costs?
On 3 May 2016, Lords Mance, Clark and Hodge JJSC granted permission for a final appeal in the case of *Times Newspapers v. Gary Flood* **[2014] EWCA Civ 1574.** In the Court of Appeal, Lady Justice Sharp dismissed the newspaper's appeal from the libel decision made by Mrs Justice Nicola Davies **[2013] EWHC 4075 (QB)** who had to consider a '*Reynolds*' defence. The judge regarded Mr Flood as the successful party in the litigation and in Sharp LJ's view she was entitled to do so.

There were no CPR part 36 offers made by either side and the judge therefore had a discretion as to costs which fell to be exercised in accordance with CPR 44. 2. Sharp LJ ruled that '*the question of who was the successful party overall, the question of who should pay the costs of the privilege issue at the end of the litigation could not be answered simply by looking at the numbers in respect of which each side had won or lost*'. Nicola Davies J had ordered the newspaper to pay these costs of Mr Flood:

- His costs of the action,
- costs of the trial of damages, and
- reserved costs of the trial of a preliminary issue before Tugendhat J in July and October 2009, which dealt with TNL's defence of *Reynolds* privilege.

Sharp LJ ruled that '*Nicola Davies J could have made a different order on costs than she did, but her discretion on costs was a wide one. I do not accept she erred in exercising it'* and dismissed the appeal. The Supreme Court has not yet fixed a date in 2017 to hear this costs case.

However in a recent development, phone hacking claimants affected by MGN litigation have been joined to the *Flood* case so that the Supreme Court will be able to give a wide ruling indeed on costs liability under CPR part 44.2.

In *Simcoe v. Jacuzzi UK Group Plc* the Court of Appeal **[2012] EWCA Civ 137** held that interest on the costs due under a CFA ran from the date of the *incipitur* (being the date of the order for costs rather than *allocatur* or the date the costs were agreed). However the Supreme Court **UKSC 2012/0067** Lady Hale DPSC, Lords Kerr & Dyson JJSC on 13 June 2012 refused permission to appeal because '*this is a point of practice and procedure more suitable for consideration at Court of Appeal level*'. It should be noted here that it is unusual for the Supreme Court to accept a 'costs only' case such as *Flood*.

9 November 2016

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