Claim No: HQ02X03462
SCCO Ref: PTH 0408205 & 0408206

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
SUPREME COURT COSTS OFFICE

Clifford's Inn, Fetter Lane
London, EC4A 1DQ

Date: 2 December 2005

Before :

SENIOR COSTS JUDGE HURST

- -

Between :

ADAM MUSA KING	**Claimant**
- and -	
TELEGRAPH GROUP LIMITED	**Defendant**

- -
- -

Mr Justin Rushbrooke (instructed by **Peter Carter Ruck & Partners**) for the **Claimant**
Mr Jeremy Morgan QC (instructed by **Farrer & Co**) for the **Defendant**

Hearing dates: 28 & 29 November 2006

- -

Approved Judgment
On Preliminary Issues

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

.....

Senior Costs Judge Hurst

BACKGROUND

1. These detailed assessment proceedings arise out of a claim for damages for defamation brought by the Claimant against the Telegraph Group Ltd in respect of two articles which appeared in The Sunday Telegraph on 21 October 2001 and 9 December 2001. The detailed background is set out by Lord Justice Brooke in his judgment dated 18 May 2004, with which the other two members of the court agreed, (paragraphs 1 – 14).

2. By its Order of 26 May 2004 the Court of Appeal permitted the Defendant to apply to the court below for permission to amend its defence of justification to reinstate certain paragraphs which had been struck out by the order of Mr Justice Eady on 9 June 2003. The remainder of the Defendant's appeal was dismissed, although in giving judgment, Lord Justice Brooke was extremely critical of the way in which the Claimant's legal representatives had gone about certain aspects of the claim. I will return to this topic in due course. Nonetheless the court affirmed the costs order in the court below and ordered the Defendant to pay 70% of the Claimant's costs of the appeal.

3. On 28 May 2004 the whole action was compromised by consent in the following terms:

> "1. The Defendant do pay the Claimant the sum of £50,000 by way of damages.
>
> 2. The Defendant do pay the Claimant the sum of £10,000 by way of contribution towards his expenses incurred in relation to this matter.
>
> 3. Permission be given to read the agreed statement in open court annexed hereto.
>
> 4. The Defendant to publish in the Sunday Telegraph Newspaper a reasonable report of the statement in open court in the issue of the newspaper next practicably following the reading of the statement, such report to be published with reasonable prominence above the fold having regard to the position of the article complained of dated 9 December.
>
> 5. The Defendant to pay the Claimant's reasonable and proportionate costs of the action on the standard basis to be assessed if not agreed.
>
> 6. All further proceedings in this action be stayed save for the purpose of carrying the terms of the settlement

> into effect for which purpose the parties have liberty to apply."

4. The agreed statement in open court indicated that the Defendant accepted that there was in fact no truth in any of the suggestions made in the articles which had been published and apologised to the Claimant for the injury and distress caused by the publication of those articles.

5. The Claimant's Solicitors served two bills of costs, one in respect of the Court of Appeal and the other in respect of the proceedings in the lower court. The Claimant had been represented by both solicitors and counsel on CFA terms. The CFAs all included a 100% success fee, although in respect of the solicitors the amount claimed between the parties was 96.5% to take account of the irrecoverable element based on the fact that the solicitors would not be paid until the end of the case.

6. The Defendant raised three preliminary issues for decision before the item by item assessment of the bills, namely: (a) proportionality; (b) success fee; (c) backdating of CFA and success fee. Proportionality is an issue only in relation to the costs of the main action. In addition to those preliminary issues I have also heard argument from the respective costs draftsmen on the issue of hourly rates.

PROPORTIONALITY

7. Before the Court of Appeal the Defendant, relying on the witness statement of their solicitor Mr Beabey, raised concerns that the costs burden if the Defendant were to lose would have a chilling effect on freedom of expression contrary to Article 10 of the European Convention on Human Rights.

8. The Court of Appeal (at paragraph 37) quoted from Mr Beabey's witness statement, including the following passage:

> "The costs of defending this action are likely to be extremely high. The defendant has entered a substantive defence pleading justification and qualified privilege. The best estimate at this early stage of the costs that will be incurred to defend the claim to judgment after a jury trial is approximately £300,000. For the reasons given above, this amount is likely to be irrecoverable if the defendant wins. If the claimant were to win at trial his bill of costs is likely to be at least as high as the defendant's and subject to uplift by way of a success fee which I have mentioned. This could result in total costs in excess of £1 million plus any award of damages which the court may make."

9. In respect of this Lord Justice Brooke said (at paragraph 99):

> "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 of which Mr Beabey spoke in his witness statement, and to lead to the danger of self-imposed restraints on publication which he so much feared."

10. Having recognised the limitations on the court's powers to deal with this situation Brooke LJ continued, in relation to the Defendant's costs capping application:

> "101. 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.
>
> 102. If this means, now that the amount at stake in defamation cases has been so greatly reduced, 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."

11. The hearing of this detailed assessment was adjourned to await the decision of the House of Lords in *Campbell v MGN Ltd (No.2)* [2005] UKHL 61. In that case it was argued, unsuccessfully, that it was disproportionate, and thus in breach of Article 10, to allow any success fee to a litigant who could afford access to justice without needing to enter into a CFA. Mr Morgan submits that the Defendant's concerns about Article 10 were clearly accepted by the majority of the Law Lords and Lord

Justice Brookes' sentiments and suggestions were specifically endorsed by Lord Hoffman (at paragraph 34):

> "Furthermore, neither capping costs at an early stage nor assessing them later deals with the threat of having to pay the claimant's costs at a level which is, by definition, up to twice the amount which would be reasonable and proportionate."

Lord Hoffman referred to "the blackmailing effect of such litigation" (at paragraph 31).

What Does Proportionality Cover?

12. Mr Morgan posed the question: does proportionality relate to base costs alone; to the total costs; or, should there be a separate exercise in respect of both base costs and additional liabilities? He repeated an argument which was put to the House of Lords in *Campbell* which, he says, was not dealt with in that judgment. He submits that the requirement of proportionality appears in CPR 44.4 and 44.5. By rule 44.4(2) "the court will only allow costs which are proportionate to the matters in issue". Wherever the CPR refer to proportionality in the context of costs it is "costs" which are required to be proportionate, not merely "base costs". The definition of "costs" at rule 43.2(1) specifically includes additional liabilities as well as base costs. Thus, he argues, the requirement of proportionality applies to costs as a whole and not to some element of the total costs.

13. Section 11 of the Costs Practice Direction deals with the factors to be taken into account in deciding the amount of costs:

> "11.15 In deciding whether the costs claimed are reasonable and (on a standard basis assessment) proportionate the court will consider the amount of any additional liability separately from the base costs.
>
> 11.6 In deciding whether the base costs are reasonable and (if relevant) proportionate the court will consider the factors set out in rule 44.5.
>
> …
>
> 11.9 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."

14. Mr Morgan submits that those provisions are inconsistent with the clear language of the CPR. He suggests that the Practice Direction excludes from any consideration of proportionality an important element of costs, namely the success fee.

15. In my judgment Mr Morgan's submission is fundamentally flawed. The Costs Practice Direction clearly envisages that the court will assess the base costs and any additional liability separately. This exercise, although carried out in two stage, deals

with the whole of the costs in accordance with the rules. CPD 11.7 and 11.8 set out the correct approach to the assessment of an additional liability. Paragraph 11.9 was inserted to prevent a Judge having assessed reasonable and proportionate base costs, and, separately, reasonable and proportionate additional liability, from then considering the combined total and deciding that it was itself disproportionate and therefore making further reductions. The exercise of assessing base costs at a reasonable and proportionate amount means that any addition or reduction from that amount must result in unreasonable and disproportionate costs (whether too high or too low). The will of Parliament is that litigants who are represented on CFA terms should be able to recover a reasonable and proportionate success fee in addition to the reasonable and proportionate base costs. Lord Hoffman recognised this position at paragraph 34 of his opinion in *Campbell*, which I have quoted above.

16. Lord Hope in his opinion stated:

> "45. In my opinion it is plain that rule 44.2 is intended to provide the paying party, who was not of course party to the funding arrangement entered into between the receiving party and his solicitor, with an opportunity to seek a modification of the amount of the success fee on the ground that it is either unreasonable or is not proportionate. The way the rule is intended to operate is described in section 11 of the Practice Direction. ... The effect of these directions is that the exercise of applying the tests of reasonableness and proportionality to the percentage increase is, when compared with the task of applying these tests to the base costs, a separate exercise."

17. Mr Morgan's alternative submission, which I accept, is that each element of costs must be proportionate, ie both base costs and additional liabilities. Support, which I regard as conclusive, is to be found in the opinion of Lord Hope at paragraph 47:

> "There remains the question of proportionality. The [Costs Practice] direction does not attempt to identify any factors that may be relevant, other than directing that the question whether the success fee is proportionate is a separate question from that relating to the proportionality of the base costs. On the other hand it would be wrong to conclude that this is an empty exercise. It is, in the end, the ultimate controlling factor which the court must apply if it is to ensure, in a case such as this which is for breach of confidence, that the right of access to the court of the receiving party to vindicate her right to privacy under article 8 of the Convention is properly balanced against the losing party's article 10 right of free speech ..."

18. Mr Rushbrooke, relying on Lord Hope at paragraph 46, argues that the most important question for the court in assessing reasonableness is the risk that the client might or might not be successful:

> "In evenly balanced cases a success fee of 100 per cent might well be thought not to be unreasonable."

19. He suggests that in most CFA cases a claimant can never hope to litigate without a CFA, it is therefore necessary to adopt Lord Hope's balancing exercise. He argues that there is a risk of the claimant's lawyers being penalised retrospectively if the total costs are reduced because of perceived disproportionality. He submits that the success fee should not be taken into account in considering proportionality. In my judgment that is too simplistic an approach. Both the base costs and the success fee separately must be assessed at reasonable and proportionate figures but, if the two figures taken together appear, as they inevitably will, to be disproportionate, that is not a factor to be taken into account.

What is the Amount at Stake?

20. In the judgment of the Court of Appeal in this case it was said to be common ground that it was worth no more than £150,000, even if the Claimant succeeded on every issue including his claim for aggravated damages (paragraph 56). Before me it was agreed that the Claimant's Leading Counsel had told the court that the maximum figure was £130,000. The Defendant says that the settlement figures which I have quoted are a fair reflection of the actual worth of the case. Mr Morgan did accept that the value of a libel action is worth more than damages alone, because vindication of reputation has to be taken into account but he relies on Lord Justice Brooke (at paragraph 57) who stated in regard to vindication:

> "… but that consideration cannot go far to bridge the gulf between the value of this action to the claimant and its value to the lawyers instructed in the case."

21. Mr Morgan argues that base costs of £317,523 plus success fees of £294,903 (a total of £612,427) in an action which did not go to trial is, on its face, disproportionate when compared with the value of the claim. He put in a table in which he attempted to calculate the base costs had the matter gone to trial and lasted for the ten days which the Claimant indicated was appropriate, rather than the five days for which it was set down. On this basis he reached a figure for base costs of £488,598. Even using figures for a five day trial Mr Morgan came to a total of £537,198 for the Claimant's base costs, as against the Defendant's costs including their Court of Appeal costs of £353,831. By his calculation the Claimant's base costs were £183,000 or 52% higher than the Defendant's, even without the addition of the success fee.

22. Mr Rushbrooke suggested that Mr Morgan's figures for the Defendant's costs were too low in that they did not include refreshers for a ten day trial. He also pointed out that the Defendant's estimate for the Court of Appeal was £34,815 which he suggested was a significant under estimate. He also suggested that from the figure of £317,523 the Claimant's costs draftsman's figures for drawing the bill should be deducted. This appears to be a figure of £8,550. He suggests that the appropriate figure for base costs when considering proportionality is just under £300,000. He points out that the consent order was agreed less than two weeks before the date fixed for trial. In response to Mr Morgan's suggestion that the prize did not justify the expenditure, he argues that the Defendant caused the costs to be very heavy by its

conduct of the litigation. In addition Mr Rushbrooke points out that, in their bill of costs, the Claimant's solicitors have omitted counsel's fee for settling the letter of claim, the tone of which was heavily criticised by the Court of Appeal and they have also "slashed" the solicitor's time in connection with this letter.

What is the Value of Vindication of Reputation?

23. Mr Morgan puts this value at something between £50,000 and £130,000 on the basis that the Claimant's leading counsel would have put the highest possible value on the claim when addressing the Court of Appeal. He therefore suggests that if I were to take the figure of £130,000, this would include an element for vindication of reputation. He did not think that the fact that the Claimant would, after trial, also have had a judgment in his favour added anything to that figure.

24. Mr Rushbrooke submits that the value of vindication is not just a numbers game. He relies on Mr Justice Gray in *Rackham v Sandy & Ors* [2005] EWHC 482 (QB):

> "13. … [Miss Page's] first argument is that the libel action served no legitimate aim and was punitive rather than vindicatory. Reliance is placed on the modest award of damages relative to the costs incurred. I can well understand that if this were a commercial action a claimant who had recovered so small a sum at such a large cost might be deprived of a significant proportion of his costs. But libel actions are often not about money. Where an individual has been seriously defamed and the defamer refuses to apologise, that individual is not in my judgment to be criticised if, instead of abandoning his complaint, he commences proceedings. That is what Mr Rackham did. Mr Sandy chose to contest the proceedings and, in the course of doing so, to ventilate in open court what were in my view exceedingly serious allegations of criminal dishonesty and other impropriety on the part of Mr Rackham in his capacity as a director of a public company. I awarded him a small sum in damage in part because it appeared to me that a reasoned judgment would vindicate Mr Rackham's reputation more efficaciously than a more substantial award of damages would do.
>
> 14. I reject the submission that an award of costs of the kind which I have provisionally have in mind would be disproportionate … As to Musa King, I read that case as being concerned with the inter action of conditional fee agreements and Article 10 of the ECHR. It does not appear to me that Article 10 is engaged in relation to the costs of this case. I note that Brooke LJ referred to the financial value of the claim as being no more than "a useful starting point" when determining the

> amount of costs which might reasonably be incurred …"

25. In that case Gray J had awarded the claimant damages of £2,000 against one of three defendants and also awarded two thirds of the costs against the first defendant.

26. Mr Rushbrooke also relies on the judgment of Brooke LJ in the Court of Appeal:

> "95. … While counsel were correct to observe that in a defamation action the maximum financial value of a claim should not necessarily be decisive when determining the amount of costs it is reasonable to incur in pursuing it (because the claimant may prize the vindication of his/her reputation far above any monetary compensation), it is likely to provide a useful starting point in most cases.
>
> 96. A costs capping regime is one thing. A costs capping regime in a CFA context (without or without ATE cover) is another. As a general rule Parliament has decided that it is appropriate to order a party opposed to one funded by a CFA to pay costs <u>at a level that would not ordinarily be regarded as reasonable or proportionate</u>. This principle is most clearly articulated in CPD paras 11.8 – 11.9. …" (emphasis added)

27. Mr Rushbrooke submits that one cannot overstate the importance of the numbers involved in vindication of reputation. What the Claimant achieved, he suggests, was far more than the sum of £50,000 in damages, although that alone was a considerable award, bearing in mind the difficulties associated with the case (not the least being the Claimant's avowed support for the Libyian Regime of Colonel Gaddafy). He suggests that an unqualified apology and retraction in a statement in open court provides "priceless vindication" and is more than any claimant gets in a case which goes all the way to the jury's verdict. He submits that the base costs figure claimed should not be regarded as disproportionate absent some conduct of the litigation on the part of the Claimant which caused unnecessary costs to be incurred. He puts the blame for the level of the costs on the Defendant's conduct of the litigation.

The Team

28. Mr Morgan refers to the dictum of HHJ Alton cited with approval in *Lownds v Home Office* [2002] EWCA Civ 365 at paragraph 23:

> "We would repeat the approach of Judge Alton, which was approved in *Jefferson v National Freight Carriers Ltd* [2001] 2 Costs LR 313, 321-322. The Judge said, in particular:
>
> > "In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of

> the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate [to] spend on the various stages in bringing the action to trial and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality.""

29. Mr Morgan argues that Brooke LJ's criteria, set out at paragraph 102 of the *King* judgment (see para 9 above), must be applied. Therefore the case should have been conducted by a category B assistant solicitor with only limited supervision from a category A partner and, in respect of counsel, should have been run by junior counsel only. On the Defendant's side the case was largely conducted by Mr Beabey, an assistant solicitor with three years PQE at the time when the action commenced. Mr Clinton, the partner, played a limited supervisory role. He suggests that on the Claimant's side an experienced partner had the conduct of the case on his own, save for some assistance from a trainee, from August 2002 until May 2003, and partners continued to play the leading role throughout. Miss Basha an assistant solicitor has the same PQE as Mr Beabey.

30. Mr Morgan suggests that the use of two counsel was disproportionate, particularly since the Claimant's junior counsel was very senior. He points out that Brooke LJ made the point about CFA libel claimants being in the same position as claimants in a legally aided case.

31. Mr Morgan argues that costs capping is not the answer to the selection of a team to run litigation, because frequently, as in this case, an application for a costs cap will be made too late in the day. The correct approach is that set out by HHJ Alton quoted above. In any event he submits, correctly in my view, that the same criteria must apply whether the court is considering a costs capping application or a detailed or summary assessment.

32. Mr Rushbrooke argues that there has been sensible division of labour and proper delegation by the partners. He points out that the Defendant newspaper group is well used to litigation and requires no handholding, whereas the Claimant is a one off client who accordingly needs more attention. In any event he suggests that Brooke LJ's remarks were directed specifically to costs capping.

33. When the Claimant found himself faced with the Defendant's firepower the criteria set out in *Juby v London Fire & Civil Defence Authority*, April 24, 1990, Evans J, (unreported), should apply (see Civil Procedure 2005, 48.14 p.1318). The note in the White Book states:

> "Evans J first listed the most likely factors affecting the decision whether or not to instruct a leader; they include:
>
> (a) the nature of the case …

> (b) its importance to the client;
>
> (c) the amount of damages likely to be recovered;
>
> (d) the general importance of the case, eg as affecting other cases;
>
> (e) any particular requirements of the case, eg the need for legal advice, or for special expertise, eg examining or cross examining witnesses; and
>
> (f) other reasons why an experienced and senior advocate may be required.
>
> The fact that the other party has instructed leading counsel or intended to do so cannot and should not be disregarded as a factor to be taken into account when deciding the question whether or not it is reasonable to have instructed leading counsel. It was treated as relevant though not conclusive in *British Metal Corp Ltd v Ludlow Brothers (1913) Ltd* [1938] Ch 787."

34. Mr Morgan points out that *Juby* was pre CPR and that proportionality was not in the Judge's mind.

Conduct of the Litigation

35. Each party blames the other for increasing the costs by the way in which they have conducted the litigation. At paragraph 59 onwards Brooke LJ is very critical of the way in which the Claimant's representatives have conducted themselves, particularly in respect of the initial letter of claim which departs markedly from the pre action protocol. He remarks that there are allegations of extravagant behaviour in relation to the request for further information. He points to the Claimant's own witness statement, which runs to 114 pages. At paragraph 104 Brooke LJ states that he thinks the Defendant was right to complain, continuing:

> "It will be sufficient only to say that the claimant's lawyers appear to have advanced their client's claim from time to time in a manner that is wholly incompatible with the philosophy of the Civil Procedure Rules, and that I would expect a costs judge to take an axe to certain elements of their charges if the matter ever proceeds to an assessment. If the action goes to trial, the trial judge should express his views on matters of this kind and direct that they be transcribed for the benefit of the costs judge, since the trial judge will be much better able than the costs judge to identify those parts of a case in which costs have been wastefully or extravagantly incurred."

36. Mr Rushbrooke submits that a number of the criticisms are unfair or misconceived. Mr Morgan relies on those criticisms. Mr Caldecott QC had set out the arguments in his skeleton for the Court of Appeal but they were apparently never dealt with by the

Claimant's counsel. He says it is no answer now for the Claimant to say that these criticisms were never dealt with.

37. Mr Morgan relies on the Pre-Action Protocol for Defamation, particularly paragraphs 1.3, 1.5 and 3.6. So far as relevant these paragraphs provide:

> "1.3 … This protocol is intended to encourage exchange of information between parties at an early stage and to provide a clear framework within which parties to a claim in defamation acting in good faith, can explore the early and appropriate resolution of that claim.
>
> …
>
> 1.5 This pre-action protocol embraces the spirit of the reforms to the civil justice system envisaged by Lord Woolf, and now enacted in the Civil Procedure Rules. It aims to incorporate the concept of the overriding objective, as provided by the rules at Part 1, before the commencement of any court proceedings …
>
> …
>
> 3.6 Proportionality of Costs
>
> In formulating both the letter of claim and response and in taking any subsequent steps the parties should act reasonably to keep costs proportionate to the nature and gravity of the case and the stage the complaint has reached."

38. The letter of claim is dated six days before the expiry of the limitation period. It appears from the Claimant's bill that the solicitors were first instructed in August 2002. The letter of claim is dated 15 October 2002. Prior to that letter being sent the Claimant's legal representatives had incurred large costs which Mr Morgan put at £17,420 for base costs, or £33,000 including the success fee. These costs were incurred before the Defendant had any chance to respond to the Claimant's claim and were therefore, in his submission, disproportionate.

39. In the Claimant's replies to the Points of Dispute it is pointed out that the solicitors had to assess the merits of the case both to advise the client and with regard to the CFA:

> "This was not an easy exercise in that there were many strands to these allegations (see article complained of) and a difficult factual background requiring very careful consideration."

40. The reply goes on to point out that the solicitors do not offer CFAs in what they believe to be unmeritorious cases but they also need to assess a case to be properly able to advise clients on whether or not to sue. This response, says Mr Morgan, misses the point. At this early stage the solicitors should be concerned only with writing a letter of claim in accordance with the pre-action protocol, in respect of

which it is not necessary to have investigated fully or contacted witnesses. Mr Morgan also argues that the Claimant's solicitors could have written the protocol letter before signing the CFA. He suggests that the only reason not to sign the CFA after the protocol letter is to maximise the success fee.

41. Although *Callery v Gray* decided that it was appropriate to sign a CFA and obtain ATE insurance at an early stage the sort of cases considered there were completely different, ie, low value RTA cases. In addition Mr Morgan suggests that the ATE insurers want an early take up of policies in order to keep premiums low. Mr Morgan suggests that in defamation cases signing the CFA early is not economically rational behaviour. He relies on Lord Hoffman in *Callery v Gray (Nos 1 & 2)* [2002] UK HL 28 at paragraph 25:

> "The difficulty is that while, in principle, it may be rational to agree a success fee at the earliest moment, it is extremely difficult to say whether the actual "premium" paid by the client was reasonable or not. This is because the client does not pay the "premium", whether the success fee is agreed at an earlier or later stage. The transaction therefore lacks the features of a normal insurance, in which the transaction takes place against the background of an insurance market in which the economically rational client or his broker will choose the cheapest insurance suited to his needs. Since the client will in no event be paying the success fee out of his pocket or his damages, he is not concerned with economic rationality. He has no interest in what the fee is. The only persons who have such an interest are the solicitor on the one hand and the liability insurer who will be called upon to pay it on the other. And their interest centres entirely upon whether the agreed success fee will or will not exceed what the costs judge is willing to allow."

42. Mr Rushbrooke relies on the opinion at paragraph 22. Lord Hoffman was examining three arguments which had been put forward for fixing the success fee at once. Lord Hoffman was here merely reciting the arguments and at paragraph 31 stated:

> "My Lords, the Court of Appeal gave this question the most anxious consideration and, as I have said, it has unrivalled knowledge of the problem. But I rather doubt whether, at any rate in their judicial capacities, they had the material on which to make a decision. … The real questions are, first, whether the level of success fees chargeable by lawyers gives the motoring public reasonable value for the money it has to spend on funding litigation and, secondly, whether assessment by costs judges (with guidance from the Court of Appeal) is the best way to ensure that such value for money is obtained."

43. In my judgment there is little help to be gained from the judgment of the House of Lords in *Callery* in relation to defamation cases won with the benefit of a CFA.

44. In relation to the protocol letter Mr Rushbrooke does not accept that there were issues which could have been omitted from that letter, it had to be lengthy and forceful.

There was difficulty and sensitivity about the issues complained of and it was necessary to explain in the letter why the complaint had merit. Although the Court of Appeal has criticised the tenor of the letter it would, even without adopting that tone, still have been long and, in his submission, would not have produced any different result. He suggests that it is fanciful to say that there might have been an offer of amends. The Defendant's response to the letter of claim was a robust defence accompanied by an application to strike out the claim as an abuse of process.

45. Mr Rushbrooke points out that the limitation period was due to expire but that there were extremely good reasons why the complaint was made late. When the two articles appeared the Claimant was abroad in Thailand where he remained until August 2002. Mr Rushbrooke says that there were proper reasons for his absence abroad. The Claimant's solicitors invited the Defendant to waive the limitation point. This invitation was refused by the Defendant on the basis that, as Mr Morgan puts it, the client had waited ten months to instruct his solicitors, who then took a further two months to write the protocol letter.

46. Mr Rushbrooke argues that the Defendant cannot criticise the Claimant for acting disproportionately when they launched what he called a "nuclear missile" in the shape of their application to strike out.

The Claimant's Witness Statement

47. In respect of this statement Mr Rushbrooke says that the Claimant's solicitors edited a far longer statement produced by the client, and, in response to the criticism of the Court of Appeal, have reduced their bill. Nonetheless, as Mr Morgan points out, the bills claims 20 hours of partner's work, together with a further 30 hours for an assistant solicitor, and counsel's fees which Mr Morgan calculates to equate to a further 30 hours. He suggests that the total time claimed by the team is in the region of 80 hours, or two weeks work, producing a claim for base costs of £23,260 or £46,000 including the success fee. These figures are, he argues, grossly excessive and disproportionate even allowing for the reductions which the Claimant's representatives have made in the bill.

48. Mr Rushbrooke in his skeleton points out that 127 hours of partner's time and 177 hours of assistant's time have been excised from the bill, representing an axing of some £94,530 from the bill that would otherwise have been lodged. He argues that the Defendant must take the Claimant as they find him. If the Claimant produces a statement which is too long, it is part of the general civil process that his representatives should have to spend time reducing it to manageable proportions. He points out that the Defendant's counsel suggested that the Claimant had not fully pleaded his case. He asserts that by their amended defence of 24 June 2003 the Defendant was trying to push back the boundaries of the meaning of the repetition rules and conduct rules. It was as a result of these amendments that the Claimant applied to Eady J to strike them out. Both the pleas of justification and qualified privilege were supported by a large mass of factual material relating to the Claimant. It was therefore inevitable, he submits, that the Claimant's costs should be significantly increased.

Disclosure

49. The original basis for the Defendant's articles was material seized in a police raid on the Claimant's premises when his computer was seized. Mr Morgan argues that rather than the Defendant's demands for disclosure being unreasonable they were vital. All material was in the possession of the Claimant and was vital to the trial. He suggests that the Defendant's approach was reasonable and proportionate. The Defendant made application for specific disclosure but when Mr Taylor put in his witness statement on behalf of the Claimant the main part of that application was not pressed. The Defendants had had worries that there had not been full disclosure. Mr Morgan took me through correspondence between August and October 2003 in which the Defendant's and Claimant's solicitors discussed disclosure. The documents were finally supplied on 7 October. Mr Morgan said it was like drawing teeth.

50. Mr Rushbrooke suggested that the Claimant's disclosure lists were reasonably substantial and included seized material which had been returned to him by the police. There was a dispute as to disclosure of the computer hard disk and CD roms and this aspect alone added substantially to the costs. The matter ended up in front of Pitchers J who adjourned it but the Defendant did not restore the application and therefore had to pay the Claimant's costs.

51. In conclusion Mr Rushbrooke submits that the Claimant's costs are not disproportionate and are comparable to the Defendant's costs. He suggests that the proper starting point for consideration of the Claimant's costs is £300,000 and given that costs fall more heavily on the Claimant the Defendant's costs provide a useful cross check.

Conclusions on Proportionality

52. In my experience, the way in which defamation actions are conducted in the High Court is unnecessarily confrontational and aggressive, in contravention of the overriding objective. This case is no exception, and it must be said that the tenor of the letter of claim of 15 October 2002 goes far beyond the approach envisaged by the pre action protocol or the overriding objective. Mr Rushbrooke complains that the Court of Appeal in its severe criticism of the conduct of the Claimant's action, may not have been aware of the full facts. Having had the opportunity to consider in more detail the basis of the Court of Appeal's remarks I have to say that I agree with them.

53. Lord Woolf in *Lownds v Home Office* [2002] EWCA Civ 365 stated that a two stage approach to proportionality is required (paragraph 31), namely a global approach and an item by item approach:

> "If … 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."

The judgment goes on to explain how the test of necessity is to be applied (paragraph 36 and following). I have no hesitation whatsoever in stating that the Claimant's costs in this case, on a global view, appear disproportionate having regard to all the circumstances and in particular the potential level of recovery in respect of which I

accept Mr Morgan's submission, ie a maximum of £130,000 together with a judgment in the Claimant's favour at a cost (ignoring the success fee) of £317,000 as claimed (or even £300,000 as suggested by Mr Rushbrooke).

54. One way of testing the proportionality of the costs is to ask whether a litigant, paying the costs out of his own pocket, would have been prepared to pay that level of costs in order to achieve success. For the purpose of the test the Claimant must be deemed to be a person of adequate means. That is someone whose means are neither inadequate nor super abundant (see *Francis v Francis & Dickerson* [1956] P.87). If such a person were informed by his solicitors that the cost of bringing the case to a satisfactory conclusion with an award of damages of £130,000 plus a judgment in his favour was likely to be £317,523 (the actual base costs in this case) it is inconceivable that the claimant would wish to go ahead.

55. The effect of this decision is that the test of necessity will have to be applied throughout on an item by item basis. The constitution of the Claimant's team will have to reflect a great deal more delegation to assistant solicitor level and the use of counsel will have to be restricted to one counsel, although it is a matter for argument whether that should be leading or junior counsel.

SUCCESS FEE

56. Mr Morgan puts his arguments under this head in two compartments, namely reasonableness and proportionality. He suggests that, following from the decision of the Court of Appeal in *U v Liverpool City Council* [2005] EWCA Civ 475 and the holding that it is not open to the court to allow different success fees for different periods of the litigation, if the parties have opted for a single success fee agreement, if left unchecked the application of this principle risks resulting in substantial over remuneration of solicitors. Whilst in a single success fee case the success fee is set at the outset, having regard to the risks known at that time, the solicitor will invariably make worst case assumptions, ie the risk of losing if the case goes to trial. Mr Morgan submits, however, that in almost all cases if the level of risk changes it will normally be a reduction of risk, eg because of an admission or concession by the opposing party. Work done after the risk changing event is carried out with a reduced risk with the same level of success fee, this he says cannot be right and will certainly lead to substantial over remuneration of solicitors. It follows therefore that the possibility of a risk reducing event taking place must be factored into the calculation of the success fee in all cases at the time when the risk assessment is made.

57. In defamation where the solicitor writes the protocol letter only after making a CFA, it is not possible to know which claims will be fought and which will be met by an offer of amends or some other risk reducing event. He therefore submits that the possibility of risk being reduced in this present case, for example by an offer of amends or admission of liability, must be factored in to the success fee even when viewed from the stand point of the solicitors at the outset of the claim.

Reasonableness

58. In respect of reasonableness Lord Hope in *Campbell v MGN* stated:

> "46. … The means of the client are irrelevant to the question whether or not it was reasonable for her to enter into a conditional fee agreement. The most important question for the court in assessing reasonableness is the risk that the client might or might not be successful: see paragraph 11.8(1)(a). In evenly balanced cases a success fee of 100 per cent might well be thought not to be unreasonable."

59. The solicitor's risk assessment was made in September 2002, no actual figure is given for the prospect of success but the success fee is put at 100% (although only 96.5% is claimed) which indicates a 50% chance of success. Counsel, Mr Starte, entered into a CFA with the solicitors on 5 February 2003 which indicates a 50% prospect of success, the success fee being 100%. The defence was served on 18 January 2003, and, following a consultation with the Claimant both Mr Starte and Mr Rampton QC entered into CFAs dated 9 May 2003 in which the prospects of success were put at 60%, the success fee was nonetheless set at 100%.

60. Mr Morgan accepts that on a traditional analysis using what he calls the ready reckoner approach, and ignoring the decision in *U v Liverpool*, a 96.5% success is reasonable having regard to risk. In relation to counsels' success fee this he says should be 67% given their risk assessment. He also argues that since Mr Starte had had a conference with the client on 2 October 2002 his earlier risk assessment should also have been 60%.

61. Mr Morgan suggests that if the solicitor wins the case, either at trial or by settlement, there is then no risk in respect of the detailed assessment proceedings, the success fee is a bonus which is recoverable although the risk has gone. This element, he argues, must be reflected in the success fee. He argues that there may be other events, such as an admission of liability or the offer of amends procedure which could result in a significant reduction in risk but still require considerable work to be carried out.

62. Since the Claimant's solicitors signed the CFA before the protocol letter this demands an adjustment, necessary so as not to over compensate the solicitors. He did not accept that the case had the hallmarks of a fight from the moment the letter of claim was written. In respect of the solicitors he suggests that a 75% success fee would be appropriate although he had no evidence upon which to base this figure.

63. With regard to counsel he suggests that the same considerations apply but to a lesser extent since counsel do not become involved in the detailed assessment procedure and have no opportunity to take advantage of the offer of amends. There is still however the possibility of risk being reduced and he therefore suggests a reduction of between 5% and 10% in counsels' success fee.

Proportionality

64. Lord Hope at paragraph 47 of *Campbell* dealt with proportionality and stated that it would be wrong to conclude that the exercise of deciding the proportionality of the success fee is an empty exercise. He stated:

> "It is, in the end, the ultimate controlling factor which the court must apply …"

65. Mr Morgan cites the opinion of Lord Hoffman in *Campbell* at paragraph 22 and following, and in particular:

> "25. There is in my opinion nothing in the relevant legislation or practice directions which suggests that a solicitor, before entering into a CFA, must inquire into his client's means and satisfy himself that he could not fund the litigation himself. ..."

66. There is, submits Mr Morgan, no separate rule for rich people. He suggests that the principles enunciated by Lord Hope can be encapsulated in this way:

> "What amount would it be proportionate for the claimant to pay his lawyers as a success fee having regard to the value of his claim?"

67. He urges that a balance has to be struck by looking at, among other things, the period when success fees were not recoverable (1995 to 2000) and the client had to pay the success fee out of the damages recovered. The Law Society imposed a limit of 25% of the damages which was thought by the professional body to be a proportionate percentage. Even taking the Claimant's upper figure for damages of £130,000 he suggests a success fee which exceeds the entire value of the litigation must be disproportionate. He suggests that the success fee should be capped and divided pro rata between the solicitor's and counsels' base costs.

68. Mr Rushbrooke argues at some length that the prospect of an offer of amends in this case was non existent. This was not the type of case where offer of amends was a possibility and the possibility did not seriously enter into the thinking of the Claimant's lawyers. The fact is that the Defendant made no offer of amends nor did they pick up the phone. The response was a robust defence, together with an application to strike out. It was, he suggests, fanciful to suggest that if the letter of claim had been more reasonable the Defendant would have picked up the phone in an attempt to achieve a settlement.

69. Mr Rushbrooke took me to the Defendant's skeleton argument in respect of the hearing before Mr Justice Eady on 15 May 2003 in which counsel suggest that the Claimant's case:

> "is a quite unusually weak claim for libel … The economically rational defendant in such circumstances would pay off the claim which cannot be worth much (either relative to the costs

> or in absolute terms). Its value lies in the ransom cost of having to defend it …"

70. He also points out that Mr Beabey in his witness statement of 14 February 2003 states:

> "Based upon our assessment of the Claimant's prospects of success it is likely that the success fee provided for in the CFA is the maximum permitted namely 100%."

71. Mr Rushbrooke argues that the solicitors risk assessment was correct, that it was impossible to assess the prospect of success at more than 50%, there had been four substantial attendances on the Claimant, a draft proof of evidence and evidence from the Claimant's mother. The Claimant's solicitor predicted "a bitter battle … the Telegraph will fight". Instructions to counsel were prepared and sent within a day or two of the signing of the CFA. This was a finely balanced case and the success fee was entirely what one would expect.

72. With regard to Mr Morgan's submissions regarding risk reducing events he suggests that the initial risk assessment includes factoring in the possibility of winning before trial. It is not, he says, a worst case scenario. He suggests that detailed assessment is not a bonus since the enforceability of the CFA may still be in issue. He says there is a massive risk attending any CFA funding of litigation. A solicitor taking on litigation under a CFA assumes an equal and opposite risk if he loses the case and is usually under a duty to deal with the detailed assessment even if the case is lost. He suggests it would be wrong in principle to reduce the success fee on the basis put forward by Mr Morgan.

73. It appears that Messrs Carter Ruck have, since the judgment in *U v Liverpool,* adopted staged success fees. That however is not this case. He suggests that Mr Morgan is applying the wrong proportionality tests. If 100% is fair reward at the outset, to use proportionality to discount the success fee would be to undermine the regime and if solicitors went unrewarded the conditional fee method of funding litigation would not work. Any reduction of the success fee would penalise the lawyer not the client.

74. With regard to the strict ready recknorer approach Mr Rushbrooke accepts that this may be a useful starting point but it has its own problems particularly in libel litigation, namely that if the case is lost this will usually happen at trial, whereas settlement frequently occurs very early. It therefore costs the solicitors far more to lose a case than what they gain from early settlement. Whilst what Mr Rushbrooke says may well be correct, I have no evidence as to the actual ratio of costs in won and lost cases, either in respect of Messrs Carter Ruck or libel lawyers generally. It is therefore difficult to see how an approach other than the ready recknor approach can be used in this case.

Conclusions on Success Fee

75. As Lord Hope says in *Campbell* the most important question for the court in assessing reasonableness is the risk that the client might or might not be successful. Defamation has always been a particularly risky area of litigation, and, given the facts

with which the Claimant's solicitors were presented in this case, it is not surprising that they required a 100% success fee.

76. CPD 11.8 sets out a number of factors which may be taken into account in deciding whether a percentage increase is reasonable and proportionate. The first of these is the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur. On the material which has been put before me I am satisfied that the risk assessments of both counsel and solicitors are reasonable and proportionate in accordance with the facts as known to them at the time when the risk assessments were made. Although Mr Morgan's argument that the possibility of risk being reduced must be factored in has some attractions, I have simply no evidence upon which to base his suggested reduction of the success fee either to 75% or to a percentage of the damages.

77. Following the judgment of the Court of Appeal in *U v Liverpool* the correct approach is that now being adopted by Carter Ruck, namely staged success fees, but, as Mr Rushbrooke points out, even if staged success fees been in use in this case the level of success fee now being claimed would still be 100%.

78. In those circumstances therefore I reject Mr Morgan's submissions, save to this extent: in respect of counsels' success fees, from 9 May 2003 there appears to be no valid reason why the success fee, given the prospects of success of 60%, should be more than 67%. With regard to Mr Starte's success fee from 5 February 2003 I am satisfied that there was a sufficient change of circumstances to merit an alteration in his risk assessment. I am not persuaded that it would be correct to find that the prospects of success in February 2003 were as high as 60%.

BACKDATING

79. The CFA in this case is dated 11 September 2002 but it provides:

> "**Basic Charges**
>
> These are for work done by us from the date you first consulted us concerning your case, namely 22 August 2002 until this agreement ends …"

80. Mr Morgan submits that backdating is inconsistent with the statutory scheme, or that alternatively it is not permissible to backdate the success fee. He accepts that at common law parties may make a contract with retrospective effect, but he says that to permit this in this case would be inconsistent with the statutory scheme.

81. He relies on transitional provisions in respect of the statutory scheme, namely the Access to Justice 1999 (Transitional Provisions) Order 2000 which provided that the new regime, which came into force on 1 April 2000, should not have retrospective effect (Article 2). The relevant date was the date of making the agreement. The same argument applies to the transitional provisions relating to the revocation of the 2000 Regulations.

82. He argues that if backdating is possible, the notice requirements of the CPR could be easily circumvented, since the obligation to give notice only arises when the party has

entered into the funding arrangement. He submits that the whole scheme of the Regulations is prospective and the solicitor is required by Regulation 4 of the CFA Regulations to give information to the client before the CFA is made. If the backdating of a CFA were permissible, then during the period of backdating, the client would be incurring liabilities for costs in respect of which he had not been given any relevant information. Mr Morgan accepts that if there is a traditional retainer in force during the pre CFA period, base costs will be recoverable. If however, there is, at best, an oral agreement that the arrangement will be a CFA then such an agreement is invalid and unenforceable for failure to comply with the statutory scheme.

83. Mr Morgan points out that the Conditional Fee Agreements Regulations 2000, which were in force at the time when this CFA was entered into, provide:

> "2(1) A conditional fee agreement must specify:
>
> (a) the particular proceedings or parts of them to which it relates (including whether it relates to any appeal, counterclaim or proceedings to enforce a judgment or order),
>
> (b) the circumstances in which legal representative's fees and expenses or part of them are payable,
>
> (c) what payment if any is due –
>
> (i) if those circumstances only partly occur,
>
> (ii) irrespective of whether those circumstances occur, and
>
> (iii) on the termination of the agreement for any reason, and
>
> (d) the amounts which are payable in all the circumstances and cases specified or the method to be used to calculate them and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client."

He argues that this means that the CFA cannot be ambiguous, and, if it is ambiguous, it is in breach of the Regulations.

84. Mr Rushbrooke argues that there is nothing in the primary legislation, or in the CPR or CPD ruling out backdating of CFAs. He accepts that during the transitional period, between April and June 2000, there was a prohibition against making a CFA retrospective but that since that time there is an absence of any such prohibition.

85. As to Mr Morgan's concern that a solicitor might wait until shortly before trial before entering into a CFA he suggests that this would make no economic sense for the solicitor to do so, and thus the retrospective scope of such CFAs is limited. In the

context of this case, given the difficulties facing the Claimant's solicitors he suggests that backdating was not contrary to public policy.

86. In respect of Mr Rampton's fees he has confirmed his intention that his CFA with the Claimant's solicitors should cover his pre CFA work. Mr Rushbrooke argues that if there is a doubt as to the extent of the CFA the court may take the parties' intentions into account. Mr Rampton's CFA does not mention a starting date and merely states at Clause 7:

> "Counsel is not bound to act on a conditional fee basis until he has signed this agreement."

The agreement contains nothing which prevents backdating.

87. I was referred to the judgment of Colman J in *Arkin v Bouchard Lines*, 19 June 2001, in which he considered a CFA dated 14 October 1998 which was expressed to take effect from 30 July 1998. Colman J was of the view that the CFA unambiguously entitled the solicitors to their costs when their client obtained judgment or a pre-trial order for costs. He was however dealing with the question of ambiguity and there does not appear to have been argument as to the recoverability of the success fee which was set at 25%.

Conclusions on Backdating

88. There is no doubt that, as between the Claimant's solicitors and their client, the CFA may be backdated. This would, in my judgment, be sufficient to satisfy the court that there was a proper retainer between the client and his solicitors before the signing of the CFA, ie the client by signing the CFA is ratifying what has gone before. There seems no doubt therefore that the Claimant is entitled to recover base costs from the date when he instructed his solicitors until the signing of the CFA.

89. Although there is no prohibition in the legislation against backdating a success fee, such backdating seems to me to fly in the face of the CFA Regulations and the CPR. As Mr Morgan has pointed out the solicitors are placed under a strict duty to explain the position to their client, which they did not do until shortly before the CFA was signed. The solicitors do not assume any risks under the CFA until it is signed (although they may well have been at the normal commercial risk of not being paid prior to that point). The solicitors are under no duty to give notice of funding until the CFA has been signed. It is of great importance that an opposing party should be aware of any additional liability as early as possible. The Claimant is, to an extent, protected in that the level of the success fee does not have to be disclosed, but, unless and until the Defendants are made aware that they are potentially liable for a success fee this may fundamentally affect the way in which they choose to conduct the litigation.

90. It seems to me therefore to be quite wrong, and contrary to public policy, to permit the Claimant's solicitors to recover a success fee prior to the signing of the CFA.

HOURLY RATES

91. This issue was argued by Mr Reader, a costs draftsman, on behalf of the Claimant and Mr Bothwick, also a costs draftsman, on behalf of the Defendant. The rates claimed by the Claimant's solicitors are: grade A £375 per hour; grade B £265 per hour; grade D £150 per hour; costs draftsman £150 per hour. The Defendant argues that the appropriate rates should be: grade A £300 per hour; grade B £175 per hour; grade D £105 per hour; and costs draftsman £125 per hour.

92. Mr Bothwick based his argument on *Wraith v Sheffield Forgemasters Ltd* and *Truscott v Truscott* [1998] 1 WLR 132 CA on the basis that the Claimant was wrong to instruct City solicitors. Although both he and Mr Pepper of the Claimant's solicitors made extensive submissions on the topic, that issue is, in my view, easily resolved. City rates for City solicitors are recoverable where the City solicitor is undertaking City work, which is normally heavy commercial or corporate work. Defamation is not in that category, and, particularly given the reduction in damages awards for libel, is never likely to be. A City firm which undertakes work, which could be competently handled by a number of Central London solicitors, is acting unreasonably and disproportionately if it seeks to charge City rates.

93. Mr Bothwick makes the telling point that newspapers and insurers control defendants' lawyer's fees and are not prepared to pay the level of fees which the lawyers may wish to charge. The clients apply real market forces. A claimant, such as Mr King, has no real prospect of ever being able to pay his lawyer's fees, his only hope of being able to litigate is by means of a CFA. The terms of the CFA are such that the claimant will, in reality, never have to pay anything. The claimant therefore has no real interest in the hourly rates being charged, still less can he bring market forces to bear. The Defendant's solicitors have apparently charged their client: grade A £325 per hour; grade B £195 per hour, rising to £210 per hour, no explanation was given as to why the hourly rates put forward by Mr Bothwick were lower than this. Given what I have said about market forces, the best evidence which I have about Central London solicitors conducting libel litigation is the rates charged by the Defendant's solicitors to their client.

94. Mr Reader produced a table of all the rates allowed and conceded on detailed assessments in libel actions since 1995. Whilst these are of historical interest they do not assist me in arriving at appropriate rates in this case.

95. On the information before me, having considered the submissions, I allow: grade A £325; grade B £210; grade D £105; and costs draftsman £125. The last two rates being those put forward by the Defendants.