Case No: HQ08X03419

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30 July 2010

Before :

MASTER CAMPBELL, COSTS JUDGE

- -

Between :

MATTHEW PEACOCK	**Claimant**
- and -	
MGN LTD	**Defendant**

- -
- -

Mr Speker (instructed by **Carter Ruck**) for the **Claimant**
Mr Shaw and Mr Ellis (instructed by **Davenport Lyons**) for the **Defendant**

Hearing date: 21 June 2010

- -

Approved Judgment

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

.....

Master Campbell:

1. This judgment addresses my decision about the success fee which I decided in the Claimant's favour on the first day of the detailed assessment of his costs, which are payable by the Defendant ("MGN") pursuant to a Consent Order made by Master Rose on 30 November 2009. Under the terms of a Conditional Fee Agreement ("CFA") dated 16 May 2008, made between the Claimant ("Mr Peacock") his Solicitors Carter Ruck, the success fee in the event of a "win" was payable as follows:

> "Success Fee
>
> This is 100% of the basic charges, where the claim proceeds to 28 days after service of the defence; 50% if the case settles after proceedings are issued but before 28 days after the defence is served; or 25% if the case settles before proceedings are issued …"

2. A second CFA between Carter Ruck and Mr Adam Speker of Counsel had an equivalent provision as follows:

> "10. The success fee has been staged in order to take into account the risks at different stages of the litigation. If the case settles before proceedings are issued, Counsel will not have to accept a significant further risk or incur further costs on the client's behalf and is thus willing to accept a significantly reduced fee.
>
> 11. If the case settles after proceedings issued but before 28 days after the defence is served more costs will have to be incurred including the settling of a reply if justification is pleaded and advising on disclosure and evidence.
>
> 12. If the case proceeds to 28 days after service of the defence then this is the most expensive part of an action. The success fee is therefore set at 100% if the case reaches this stage in order to compensate for this risk."

3. At the assessment, Mr Speker represented Mr Peacock and Mr Shaw and Mr Ellis of Davenport Lyons, appeared for MGN. Before the Court were Carter Ruck's papers together with points of dispute and replies and a bundle containing "Documents for the detailed assessment hearing" ("the bundle"). I gave outline reasons for the decisions I took on that date, on the basis that either side could request a written judgment if they wished. These are my reasons for allowing the success fee as claimed, MGN having made such a request in respect of that discrete item.

BACKGROUND

4. This concerns an action for libel brought by Mr Peacock following publication of an article on Sunday 13 April 2008 in "Celebs on Sunday" a colour supplement

published by the Defendant and sold with editions of the Sunday Mirror Newspaper and on MGN's website. It was his case that the article had been "trailed" over the front page of the magazine with a large picture of his former spouse, Ms Jodie Marsh, and had been described as an exclusive interview with her about the cosmetic surgery she had recently undertaken to enlarge her breasts. The article had been published under the headline "Jodie Marsh: now I've got perfect new boobs I'll be at it like a maniac". The article had then said this:

> "Jodie claims Matt's mood took a disturbing turn off screen. He used to break and smash things all the time: he broke a door in my house, he threw my ipod against the wall, he threw my mobile phone out of the window, she recounts. The last straw was when he came charging at me and shoved me into a door. I fell onto the floor and he shook me, screaming in my face. The minute he walked away I called my dad who came around and threw Matt out."

5. Mr Peacock read the article. He considered that the words used were defamatory of him and consulted Carter Ruck to obtain an appropriate remedy. That firm on his instructions wrote a letter of claim to the Editor of the Sunday Mirror on 16 April 2008. The letter stated that Mr Peacock's "prime concern" was to vindicate his reputation and to ensure that the allegations made in the article were not repeated. To that end, the letter asked for an immediate agreement that the article be removed from the Sunday Mirror website, that best endeavours be used to prevent further publication, that there be no re-publication, that an apology be published in a form and position to be agreed and that a sum be paid in compensation together with Mr Peacock's costs.

6. The legal adviser to the Mirror group replied on 30th April 2008. He stated, inter alia, that "…MGN is satisfied that your client did behave aggressively toward Ms Marsh". However "MGN is open to any alternative method of settling this matter".

7. The bundle of correspondence contained in the bundle thereafter is incomplete in so far as it relates to Carter Ruck and MGN. In these circumstances, the following passages are necessarily selective as they contain extracts of replies by MGN to letters written by Carter Ruck that were omitted from the bundle.

22 May 2008: "…As you are aware, both parties are required by the Defamation Pre-Action Protocol to consider Alternative Dispute Resolution. One of the suggestions offered in the Protocol is a referral to the Press Complaints Commission (PCC). MGN would be happy to have this matter resolved fully and finally by the PCC. Please could you indicate whether you agree."

28 May 2008: "… MGN would be happy to meet you with regard to settling this matter. However, I would be grateful if you would indicate what you would expect to achieve from this meeting. As previously indicated, MGN is satisfied that the words complained of are true…."

29 May 2008: "MGN is happy to meet with you to try and avoid litigation. If, however, you are intending to meet MGN with regard to negotiating the wording of an apology and the payment to your client of damages, then I do not believe any progress could be made…"

8. By 18 July 2008, the exchange of correspondence had progressed to the point where a form of words in the nature of a response by Mr Peacock for publication in "Celebs on Sunday" was under discussion. In a letter of that date to the Mirror Group, Carter Ruck also said this:-

> "Because of all these things, our client cannot now settle this action with only a right to reply. However, he would be prepared to settle his claim on the following basis:
>
> 1. You publish in the hard copy of The Mirror and online for one month in a position to be agreed the above statement.
>
> 2. If you agree to publish the above reply, you also undertake to indemnify him in case Ms Marsh sues him in respect of these comments. Since you are not prepared to make a statement in open court, a report of which would be protected by privilege, our client should not be exposed to being sued by Ms Marsh, even though he would invariably be successful were she to bring such a claim.
>
> 3. You undertake not to publish the allegations made by Ms Marsh again.
>
> 4. You undertake to make reasonable efforts to contact our client at least 24 hours before you publish any further articles about him which are based on information from Ms Marsh. Again, our client is understandably concerned that you will publish further articles that defame him without taking elementary steps to contact him since you did not do so before and are not prepared to accept his word that the allegations are not true.
>
> 5. Taking into account that (a) the allegations are untrue and hurtful to our client; (b) it has been nearly 3 months since the allegations were published; (c) for all that time they remain uncorrected; (d) even now, your paper will not accept the truth of what our client tells you and (e) you will not agree to apologise unequivocally, you pay our client a sum in damages to be agreed. As to which we would suggest a figure of £10,000.
>
> 6. You pay his reasonable legal costs to date. It goes without saying that had you given him the right to reply prior to publication you would not need to offer to do so now and he would not have incurred any costs. Further, you should have made this offer from

> the outset. Instead, you dismissed his claim out of hand on 30 April 2008.
>
> We should say, that even if you are unwilling to agree points 3-6 at this stage, our client would still welcome 1 and 2. Not only do we consider that this is required under the PCC Codes, but it will go someway to mitigate the damage to his reputation."

9. The Mirror group's response dated 25 July 2008 said this:-

> "With regard to your other numbered requests:
>
> 1. The publication will be in Celebs on Sunday magazine where the original article appeared. MGN will, however publish this online for a period of one month with the appropriate prominence.
>
> 2. MGN will not undertake to indemnify your client if Ms Marsh sues him in respect of the statement. I note with interest that your client's concern that this could happen, but do not share your confidence that your client would win such a claim. However, if your client accepts MGN's offer to settle this complaint in the manner set out in this letter, then I have been assured that Jodie Marsh will consent to the publication of the statement, thus giving your client a defence to any potential libel action. This will be formalised within any settlement agreement. Please note, however for the avoidance of doubt that Jodie Marsh stands by her allegations and MGN is satisfied in the truth of those allegations. This offer is made to draw a line under this matter in an amicable way.
>
> 3. Purely as a gesture of goodwill, if your client accepts MGN's offer, MGN will not repeat the allegations complained of, subject to confirmation by the editors of other MGN publications, of which I don't anticipate there will be an issue.
>
> 4. If, at any stage in the future, MGN is planning on publishing an article in the future based on any allegations made by Ms Marsh against your client then MGN will make best efforts to contact your client in good time before publication.
>
> 5 & 6 MGN will not be making any financial offer to your client."

10. The dispute was not settled on these terms or indeed any terms at that stage and proceedings were issued on 2 September 2008 for damages (including aggravated

damages) for libel and an injunction restraining MGN from publishing any similar words. The Particulars of Claim amounted to 3 pages and 9 paragraphs and said this:-

> "3. On Sunday 13 April 2008 the Defendant published on pages 12 to 15 of Celebs on Sunday an interview with Ms Marsh written by Lynne Hyland and headlined, "NOW I'VE GOT PERFECT NEW BOOBS I'LL BE AT IT LIKE A MANIAC". The interview, described as an "exclusive", contained a photograph of the Claimant with Ms Marsh and the following defamatory words about the Claimant:
>
> > "The last straw was when he came charging at me and shoved me into a door. I fell onto the floor and he shook me, screaming in my face. The minute he walked away I called my dad who came round and threw Matt out."
>
> 4. The words complained of referred to and would have been understood to have referred to the Claimant who was named elsewhere in the article and a photograph of whom with Ms Marsh appeared in the article above the caption "Jodie with ex Matt Peacock – their marriage only lasted a month".
>
> 5. Further and/or alternatively, from on or about 13 April 2008, until it was removed on or about 16 April 2008, the Defendant published the defamatory words set out in paragraph 3 above on its website under the headline, "Jodie Marsh: Now I've got perfect boobs I'll be at it like a maniac". Save that no photograph of the Claimant appeared in the website version of the article, paragraphs 1, 2 and 4 above are repeated. Pending disclosure and/or the provision of Further Information and/or acceptable admissions by the Defendant in its Defence, the Claimant will invite the Court to infer that a very substantial number of persons within the jurisdiction will have accessed the said article and that the said article was published to such persons.
>
> 6. In their natural and ordinary meaning the said words meant and were understood to mean that the Claimant violently charged at his wife, Ms Marsh, shoving her into a door causing her to fall to the floor before resuming his attack on her by shaking her and screaming in her face. So concerning were his violent actions on this occasion that as soon as the Claimant walked away Ms Marsh called her father for help in order to expel the Claimant from the marital home for ever.
>
> 7. By reason of the publication of the words complained of the Claimant has been injured in his reputation and has been caused distress, humiliation and embarrassment."

11. On 24 October 2008, MGN, which had by then instructed Davenport Lyons in place of its own in-house legal Department, served its Defence. This denied that the words

complained of bore the meanings alleged in paragraph 7 of the Particulars of Claim and that in their context and correct meaning, were true in substance and in fact. The Defence continued at paragraph 7 (a):-

> "(a) during his relationship with Jodie Marsh the Claimant had a furious temper, would shout obscenities at Jodie Marsh and frightened Jodie Marsh by breaking and smashing things all the time;
>
> (b) At the end of the Claimant's relationship with Jodie Marsh the Claimant charged at her and shoved her into a door, causing her to fall to the floor, then shook her and screamed in her face;
>
> (c) the Claimant frightened Jodie Marsh to the point where she felt she needed to call her father, who came and threw the Claimant out of her house."

12. The Defence then set out in paragraphs 7.1 et seq., 49 paragraphs which, it asserted, justified the words complained of. These were grouped under the following headings and, by way of illustration, said this:-

> *"The Claimant's jealousy and violent temper*
>
> 7.3 The relationship between Ms Marsh and the Claimant was turbulent. The Claimant regularly lost his temper and became aggressive towards Ms Marsh. He was extremely prone to jealously, especially when Ms Marsh received attention from other men.
>
> 7.4 Throughout their relationship, the Claimant abused Ms Marsh verbally. In front of friends he often shouted "*fuck off*", "*go fuck yourself*" and "*go on fuck off*" at her, and called her abusive names such as "*stupid slag*". He burned fan mail she received.
>
> …
>
> *Honeymoon*
>
> 7.6 During the second week of their honeymoon, in September 2007, they had a row which culminated in the Claimant throwing his wedding ring across a car park and calling her a "*disease ridden slag*".
>
> …
>
> *Intervention by Mr Marsh*
>
> 7.11 Ms Marsh's parents live very close to Ms Marsh. Shortly after the wedding of Ms Marsh to the Claimant, Ms Marsh telephoned her father and said that, as was the fact, the

Claimant was being aggressive towards her, towering over her and pointing his fingers in her face while shouting and swearing at her. Mr Marsh went to the house. When he arrived, the Claimant was pacing up and down in the living room, in an angry and agitated state. As Mr Marsh spoke to Ms Marsh, the Claimant called out that he was going to take the car and half the house as these now belonged to him.

7.12 Mr Marsh explained to the Claimant that he was frightening Ms Marsh. The Claimant then calmed down.

Bag Punching

7.13 On 15 May 2007 the Claimant and Ms Marsh returned home from a night out with friends. The Claimant was drunk. Ms Marsh, along with her friend Lauren Roberts tried to help the Claimant go upstairs. The Claimant was shouting and trying to punch at a paper bag with a woman's face on it. The Claimant was aggressive and shouted "*fuck off*", making Ms Roberts concerned for Ms Marsh's welfare. He broke a toilet seat. Eventually, after the Claimant and Ms Roberts managed to get the Claimant upstairs to the bedroom, he passed out.

Threats to animals

7.14 The Claimant also made threats to kill Ms Marsh's dogs, and on occasions waved his airgun around and threatened to shoot the dogs. This was a threat Ms Marsh took seriously after her brother told her that when he went on expeditions to shoot rats with the Claimant, the Claimant often tried to shoot other wildlife, including garden birds and squirrels.

Breaking items

7.15 During fits of rage the Claimant threw and smashed a number of items belong to Ms Marsh including her ipod (as particularised below), a living room light and Ms Marsh's mobile phone. He also broke a door in her house and broke a mini motorcycle.

…

Lloyd's Bar

…

7.20 At Lloyd's Bar, the Claimant, Ms Marsh and their friends played a game which involved writing on each other. When Ms Marsh drew on the Claimant, a small amount of ink went onto his t-shirt. The Claimant acted aggressively, grabbing Ms Marsh and drawing all over her face.

7.21 Ms Marsh left the table and cleaned her face. When she returned to the table, the Claimant said to her, "*you're fucking thick*". Ms Marsh responded by pulling a face and said "*what*?" The Claimant continued, saying "*don't you know what that means, do you want me to spell it out to you*?" Ms Marsh said, "*I'm not the one who is thick*". The Claimant then picked up a full pint of beer that was on the table and threw it directly over Ms Marsh, who was sitting less than a metre away.

…

Sugarhut Club

7.24 On 10 November 2007 the Claimant went with Ms Marsh and some friends to the Sugarhut Club in Brentwood. After Ms Marsh had made a joke about one of her girlfriends kissing her, the Claimant flew into a rage. He demanded the door key to the house, shouted abuse at her and made aggressive remarks, including "*if you don't give me the door key I will smash the door down*". A friend of Ms Marsh's called Russell Ellenby told the Claimant to calm down.

…

Steering wheel incident

7.26 In preparation for the Claimant's wedding to Ms Marsh, they drove to pick up a tiara from a woman based near Oxford. The Claimant and Ms Marsh rowed throughout the journey. The Claimant said to Ms Marsh that if she got out of the car when they reached their destination he would drive off and leave Ms Marsh there.

…

7.29 On the way back from the woman's house, the rows continued. While Ms Marsh was driving at about 70 mph on the motorway, the Claimant grabbed the steering wheel in rage, causing the car to veer across the middle and slow lanes, narrowly missing another car which had to sound its horn and cross lanes to avoid them.

…

Bruising

7.31 On occasions the Claimant and Ms Marsh would play fight on their bed. On one occasion during a play fight Ms Marsh leant over to pinch the Claimant, and he said that she had pinched him too hard. He then suddenly became aggressive,

grabbing Ms Marsh and starting to pinch and squeeze the top of her arms. Ms Marsh started sobbing and asked him to stop, which he did not do immediately.

…

7.33 Several people asked Ms Marsh how she had got the bruises. She was embarrassed and responded that she had received the bruises through play fighting or through sex. Her brother Jordan told her he had guessed the truth behind the bruises, and became angry.

Ms Marsh's response to the Claimant's violent temper

…

7.36 Ms Marsh was particularly anxious about the risk that the Claimant may be violent towards her after she learned during MTV filming that he Claimant had criminal convictions for offences of violence. The Claimant was in the habit of telling others about violent incidents he claimed to have been previously been involved in (see, for example, paragraph 7.9 above); he told Ms Marsh that he had knocked out his best friend Alex Webber during a fight, and that he had an ASBO imposed upon him after being accused of hitting a woman outside a bar in Wilmslow.

7.37 Given what Ms Marsh knew of the Claimant's past, and the incidents particularised above, she was anxious about his temper and felt she was walking on eggshells throughout the relationship. She was also anxious because she had seen his Myspace page, where he exhibited pictures of himself with facial injuries after having been involved in a fight, and pictures of himself in a Ninja outfit brandishing a weapon in the street.

…

The final straw

7.39 On the morning of 24th November, the Claimant and Ms Marsh had an argument at the Claimant's house. This was the culmination of a number of rows they had had over previous weeks.

7.40 The Claimant became increasingly angry, and punched a wall. As Ms Marsh was standing at the bottom of the stairs by the front door, the Claimant came charging down the stairs. He shoved Ms Marsh backwards into the door. Her back, head and shoulders hit the door. She was badly shaken and fell to the floor.

…

9. As to paragraph 8 of the Particulars of Claim:

9.1 It is admitted that the Defendant did not contact the Claimant prior to publication. No admissions are made as to the seriousness of the allegation. Ms Lynne Hyland believed Ms Marsh to be telling the truth about the Claimant.

9.2 No admissions are made as to the Claimant's reaction to reading the words complained of in the light of the interview of 8 January. It was not alleged in the article complained of that the Claimant hit Ms Marsh. Moreover, the *Love It* interview makes reference to the Claimant screaming in Ms Marsh's face, to how his shouting would bring back her old fears and to the fact Ms Marsh was "*always on the edge and walking on egg shells*" during the relationship."

13. On 27 January 2009, Mr Peacock applied by notice returnable on 31 March 2009 to strike out parts of the Defence. By Notice dated 4 March 2009, MGN applied by notice returnable on the same date for a costs capping order. Both applications came before Eady J, Mr Speker having in advance lodged a 63 paragraph skeleton argument and his opponent, Mr Wolanski, one that ran to 102 paragraphs. In respect of the strike-out application, Eady J gave his ruling on 31 March 2009. He dismissed Mr Peacock's application with costs and gave MGN leave to file and serve an amended defence by 8 May 2009. On 8 April 2009, Eady J gave his judgment on the costs capping application when he refused to cap Mr Peacock's costs. On 21 April 2009, Eady J gave further directions and thereafter Carter Ruck commenced work on disclosure and witness statements. Discussions also took place with a view to settling the claim and as I have said, an agreement was eventually reached which became embodied in Master Rose's order dated 30 November 2009 on terms that (1) MGN would pay the Claimant £15,000 damages (2) MGN would agree "not to further publish or cause to be published whether by its directors, servants or agents or otherwise the allegation complained of" (3) Carter Ruck would be permitted to read a Statement in Open Court (as attached to the Order) (4) that MGN would pay the Mr Peacock's costs on the standard basis to be assessed if not agreed between the parties.

14. It will be observed that under the terms of the agreement, Mr Peacock received 50% more in damages than Carter Ruck had suggested as a figure for agreed damages in their letter of 18 July 2008, a unilateral statement in Open Court broadly on the lines of the right of reply that had been under discussion on that date, plus his legal costs, in respect of which, it will be recalled, MGN would make no financial offer, either for these or for damages (see MGN's letter dated 25 July 2008). To achieve these results, Mr Peacock's bill claims costs of £382,071.24. Of this sum, £140,622.53 relates to the success fee on Carter Ruck's base costs, £500 for the success fee sought on summarily assessed costs and £15,446.43 for Counsel' success fee under his CFA. In its Points of Dispute, MGN contends that the success fee should not have been 100% but 53%, reflecting 70% prospects of success.

LAW

15. The principles which apply in deciding the level of success fee are set out in CPR 44.4 (the basis of assessment). Under CPR 44.4-1, where the Court is to assess the amount of costs it will assess those costs either on the standard or indemnity basis, but the Court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. The rule continues:

> "(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)."

16. It is common ground that the costs which are payable by MGN to Mr Peacock are to be assessed on the standard basis.

17. Section 11 of the Costs Practice Direction addresses factors to be taken into account in deciding the amount of costs under rule 44.5 as follows:

> "11.4 Where a party has entered into a funding arrangement the costs may, subject to rule 44.3B include an additional liability.
>
> 11.5 In deciding whether the costs claimed are reasonable and (on a standard basis) proportionate, the court will consider the amount of any additional liability separately from the base costs.
>
> …
>
> 11.7 When the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appear to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.
>
> 11.8(1) In deciding whether a percentage increase is reasonable relevant factors to be taken into account may include:
>
> (a) the risk that the circumstances in which the costs, fees or expenses will be payable might or might not occur …"

18. CPR 44.3B deals with limits on recovery under funding arrangements and is not relevant to the issue I have to decide. "Funding arrangement" is defined in CPR 43.2, and means an arrangement where a party has entered into a CFA within the meaning of Section 58(2) of the Courts and Legal Services Act 1990 (the position here). "Additional liability" means "the percentage increase" which is defined at CPR 43.2-(1)(l) as "the percentage by which the amount of a legal representative's fee can be increased in accordance with a conditional fee agreement which provides for a success fee."

SUBMISSIONS

19. In advancing an offer of 43% success fee, it is no part of MGN's case that the "discount" from 25% to 100% "ran out too soon" (see skeleton argument at paragraph 10). The thrust of MGN's argument is that where, as here, the success fee is staged, it is unreasonable for this to be fixed at 100% at an early stage in the proceedings, such as 28 days after service of the defence. Mr Ellis further advances the proposition that the risk assessment undertaken by Carter Ruck is not "bespoke" but is akin to block-rating, because if the firm decides to accept a case funded by a CFA, a "one-size-fits-all" success fee of 100% is invariably agreed at the final stage. Moreover, in an interview given by Mr Nigel Tait, a partner in the firm, in the BBC programme "Law in Action" on 23 February 2010, Mr Tait had stated that only about "15 sort of big ones" had been lost out of 200 – 300 CFA cases undertaken by the firm. It followed, in Mr Ellis' submission, that the starting point of 100% was far too high.

20. For the Claimant, Mr Speker submits that the question for the Court is whether, taking into account what Mr Peacock's legal advisers knew at the time it was agreed, and giving some leeway in regard to this difficult decision, what is the success fee that it would be reasonable to allow? In this respect he refered me to the decision of Brooke LJ in *KU v Liverpool City Council* [2005] EWCA Civ 475 when he said this:

> "Finally, we have benefited from reading the careful judgment of Judge Barnett in the Chester County Court, on 9 May 2003, in *Cheshire County Council v Lea* (unreported). Although what we have said about the law (and particularly about paragraph 11.8(2) of the Costs Practice Direction) must supercede what is said in that judgment, this represented a bold attempt to combat what Lord Hoffmann described as a ratchet effect in *Callery v Gray* (Nos 1 and 2) [2002] 1 WLR 2000, para 32, leading to ever higher success fees. We end by reiterating that costs judges should be more willing to approve what appear to be high success fees in cases which have gone a long distance towards trial if the maker of the CFA has agreed that a much lower success fee should be payable if the claim settles at an early stage: see In *re Claims Direct Test Cases* [2003] 4 All ER 508, paragraph 101, for an earlier exposition of this principle."

21. In *Callery v Gray* [2001] EWCA Civ 1117 Woolf CJ explained the logic behind a staged success fee:

> "The logic behind a two-stage success fee is that, in calculating the success fee, it can properly be assumed that if, notwithstanding the

> compliance with the protocol, the other party is not prepared to settle, or is not prepared to settle upon reasonable terms, *there is a serious defence* [emphasis added]. By the end of the protocol period, both parties should have decided upon their positions …"

22. In the present case, the decision taken to enter into staged success fees had been reasonable. At the time of entry, both Solicitors and Counsel had known the stance that MGN were going to take, since in correspondence MGN had stated that Ms Marsh stood by what she had said and that MGN believed her. The outcome would, accordingly, be a straightforward fight to decide who was telling the truth, a decision which would be determined by a panel of jurors who, it was common ground, were likely to be unpredictable, particularly when faced with "celebrities". In the event, the case had settled only six weeks before trial. Having moved to the stage where it was apparent that MGN believed it had a "serious defence" (see *Callery v Gray* above), then it was reasonable for the level of success fee to rise in accordance with the other side's view of the merits and MGN's apparent belief that the claim would fail. For these reasons the staged success fees were reasonable.

DECISION

23. As I informed the parties at the conclusion of argument, I consider that the success fees claimed in both CFAs are reasonable and will, accordingly, be allowed. In reaching these decisions, in addition to the authorities to which I have been referred, I have also drawn from the guidance given in *Ku* by Brooke LJ. At paragraph 21 he said this:

> "21. In October 2001 the claimant's solicitor would not have had access to the post-2001 evidence or other material cited in paragraphs 12-16 above. When deciding upon a success fee he had two choices. He could have taken the view that this claim would probably settle without fuss at a reasonably early stage, but he wished to protect himself against the risk that the claim might go the full distance and might eventually fail. In those circumstances he could select the two-stage success fee discussed by this court in *Callery v Gray* [2001] EWCA 1117 at [106] – [112], [2001] 1 WLR 2112. In this situation he would be willing to restrict himself to a low success fee if the case settled within the protocol period – or within such other period, perhaps until the service of the defence, as he might choose – and to have the benefit of a high success fee for the cases that did not settle early. As things turned out, he would have benefited on the facts of this case if he had adopted this course: a high two-stage success fee would have been more readily defensible in a case which did not settle until proceedings were quite far advanced.
>
> 22. Alternatively, he could have selected, as he did in fact, a single-stage success fee, being a fee which he would seek to recover at the same level however quickly or slowly the claim was resolved. In those circumstances it would not be possible to justify so high a success fee."

24. In *McCarthy v Essex Rivers NHS Trust* (13 November 2009) QB (unreported), Mackay J, at paragraph 18 said this:

> "Secondly, I do believe with all respect that Mr Justice Jack understated the effect on the question of reasonableness of the absence of a staged success fee approach when he said that his interpretation of the Court of Appeal's decision in *Ku* was "it may be harder for a solicitor to justify a high fee if he has not in an appropriate case entered into a two stage agreement". The views of the court as I have already set out at paragraph 22 [of *Ku*] were I believe expressed more firmly than that, namely that in those circumstances it would not be possible to justify so high a success fee."

The reference to Mr Justice Jack is to his decision in *Oliver v Whipps Cross University Hospital NHS Trust* [2009] EWHC 1104 QB.

25. From these decisions I derive the following in relation to the arguments in this case:

i) A party who contends for a high success fee in a matter that has gone a long distance towards trial (the situation here) stands a better prospect of having that fee approved if a lower success fee would have been payable had the claim settled earlier (precisely what could have but did not happen here). A party who enters into a CFA with an unstaged success fee which is payable at that level irrespective of whether the case settles quickly or slowly, will find it more difficult to justify the fee. For that reason, the "high" success fee, having been staged so that it would have been less if the case had settled "quickly", is justified.

ii) It is open to the Claimant to choose the date of staging. Since in *Ku* the Court of Appeal contemplated a low success fee, "perhaps until the service of the defence" and to have the benefit of a high success fee in the cases that did not settle early, I consider there was nothing unreasonable in the Claimant choosing 28 days following service of the Defence as the date on which the 100% success fee would come into effect; *a fortiori* where, as here, this gave MGN an extra four weeks above and beyond the period mentioned by Brooke LJ in *Ku* before it would assume any potential liability for a 100% success fee.

iii) This point has more force given that it is no part of the Defendant's case that the discount ended too early. This was wise given that *Ku* plainly contemplated the second stage of a two stage success fee would take effect on service of the Defence whereas here, the Court is concerned with stage three of a three stage success fee, in which MGN is given an additional opportunity to settle the matter before the final 100% stage is triggered.

iv) Mr Speker is right in my view to invite the Court to draw the inference that a Defendant who denies liability and serves a defence containing multiple paragraphs justifying the offending words, must believe that it has a realistic chance of the defence succeeding at trial, as happened here. In my judgment, having not settled the matter in the protocol period and having thereafter served a Defence giving the particulars of justification in the manner that it did

(see paragraph 12 ante), it is reasonable to suppose that MGN believed it had a "serious defence" in the nature contemplated by Lord Woolf in *Callery v Gray*. Indeed, it will have been noted that paragraph 9 of that Defence was careful to plead that the author of the article at the Mirror Group, Lynne Hyland, still believed that Ms Marsh was telling the truth about what Mr Peacock had done. All these factors in my view militate in favour of allowing a 100% success fee in this case.

v) In so far as it was material upon which the Court could rely, I did not find convincing Mr Ellis' submissions about other cases in which Carter Ruck may have been successful or unsuccessful under CFAs and in which, so he said, the firm always charges a 100% success fee. This was barely more than anecdotal evidence; quite apart from that, I consider it is right to be cautious about making such comparisons since, for example, three cases which are "won" because they settle on receipt of the letter of claim, cannot possibly be expected to pay for a single case that goes to trial and fails.

26. For these reasons the 100% success fee is allowed. If MGN wish to apply for permission to appeal, a written application should be made to me within the next 14 days to save the cost of a further hearing.