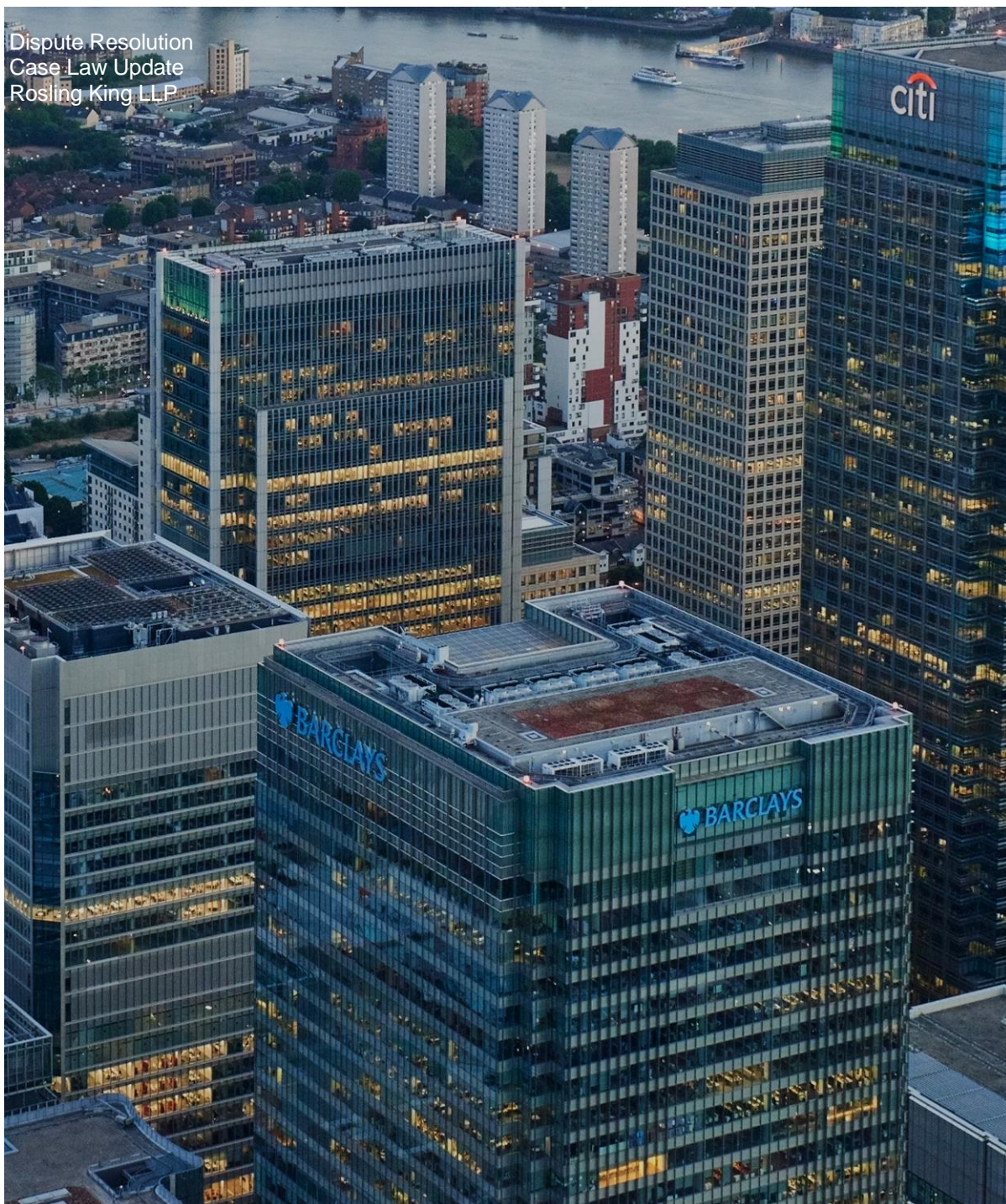


Dispute Resolution
Case Law Update
Rosling King LLP



Basis of the Appeal

In all three underlying claims the claimants (the Respondents in the Supreme Court action) had relied on the costs regime (“**the 1999 Regime**”) introduced by the Access to Justice Act 1999, which has now been replaced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“**LASPO**”). Under the 1999 Regime, parties were permitted to:

1. Enter into Conditional Fee Arrangements (“**CFA**”) which often operated on the basis that the party would pay no costs if the claim failed but in the event that the claim was successful, pay costs as well as a success fee; and
2. Take out After the Event Insurance (“**ATE**”) against the risk of having to pay the other party’s costs in the event that the claim was unsuccessful.

Where a claim was won the successful party could recover the success fee payable under the CFA and the ATE premium from the losing party.

On appeal to the Supreme Court, the Appellants submitted that domestic law should reflect the decision of the European Court of Human Rights (“**ECtHR**”) in MGN Ltd v United Kingdom ((2011) 29 BHRC 686) (“**the MGN Case**”) which held that where a claim involved the restriction of a defendant’s freedom of expression, and the defendant was a newspaper publisher, it would, under domestic law, be an infringement of the defendant’s rights under Article 10 of the European Convention on Human Rights (“**the Convention**”) to require the defendant to reimburse the claimant for the costs it was liable for.

The issues for determination by the Supreme Court were:

1. Whether, as the Appellants contended, domestic law should follow the ruling of the ECtHR in the MGN Case;
2. If so, should a declaration of incompatibility be made in relation to the 1999 Regime or the costs regime which applied following subsequent legislation;
3. In light of the above, whether the costs orders in Miller and Flood should be amended to exclude the Appellants paying the success fee and ATE premiums as ordered.
4. In addition, in the event that domestic law should follow the decision in the MGN case, whether it should apply in the Frost claim (this claim concerned phone hacking and the unlawful collection of private information).
5. Finally, whether the decision of the lower Courts to award Flood full recovery of his costs in the proceedings was a permissible exercise of judicial discretion.

May 2017
Page 3

The Judgment

The Supreme Court unanimously dismissed all three appeals.

In reaching its conclusion, the starting point for the Supreme Court was the decision of the ECtHR court in the MGN Case. Whilst the Supreme Court accepted the reasoning of the ECtHR, it was noted that the UK Government was not a party to these appeals. Accordingly, it would be inappropriate for the Supreme Court to conclude whether or not there was a general rule under UK domestic law that meant it would usually infringe newspapers rights under Article 10 of the Convention to require it to reimburse the claimants' success fee in defamation and privacy cases. Further, it was not necessary for the Supreme Court to make such a decision in determining the three appeals before it.

The Supreme Court took the view that the Respondents had incurred costs with the legitimate expectation that the statute upon which they relied (and the 1999 Regime it contained) would not be retrospectively invalidated to their detriment.

In conclusion, the Supreme Court submitted that even if upholding the costs orders granted in respect of Miller and Flood did infringe the Appellants' Article 10 rights, the fundamental principle that citizens could expect the law would not change retroactively was of greater importance in this instance. The rule of law must prevail. It was therefore entirely appropriate to dismiss these appeals.

Commentary

The decision is a welcome one for parties who rely on the 1999 Regime in terms of recoverability of their costs and confirms that the position in respect of recoverability of costs remains the same for claims instigated pre-LASPO.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.