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Supreme Court Judgment in *Coventry and Ors v Lawrence and another* [2015] UKSC 50

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The Supreme Court has handed down its Judgment in Coventry v Lawrence in which it considered the compatibility of the system for the recovery of success fees and ATE premiums under the Access to Justice Act 1999 with the European Convention on Human Rights, Articles 6 and Article 1 Protocol 1. The Court held by a majority of 5-2 (Lord Neuberger, Lord Dyson, Lord Sumption, Lord Mance and Lord Carnwarth in the majority and Lord Clarke and Lady Hale dissenting) that the system is compatible. Success fees and ATE premiums entered into under the AJA 1999 scheme will therefore remain to be recoverable by successful claimants. Whether the decision will be challenged before the ECtHR in Strasbourg and, if so, whether the European Court will take the same view as the Supreme Court remains to be seen.

The issue in *Coventry v Lawrence*

1. The claim in *Coventry* was a claim in nuisance. This Appeal concerned the costs order made in the Claimant's favour having succeeded at first instance, under which the Defendant was ordered to pay 60% of the Claimant's base costs (approx £184,500) and 60% of the success fee to which the Claimant's lawyers were entitled under their Conditional Fee Agreement (approx £129,000) plus 60% of the Claimant's After the Event

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(ATE) Insurance premium (approx £183,000). The Claim went on appeal to the Court of Appeal and the Supreme Court where the Claimant ultimately succeeded. The Defendant was therefore also rendered liable for the further base costs, success fees and premiums incurred on the appeals on the same 60% basis as above.

2. The Defendant accepted its costs liability for the base costs (though reserved its right to make the usual arguments on a detailed assessment as to the reasonableness and proportionality of the sums incurred) but contended that the system under which it was rendered liable for the Claimant's success fee and ATE premium was incompatible with its Article 6 and Article 1 Protocol 1 ECHR rights (peaceful enjoyment of possessions).

3. The Court heard argument on this issue not only from the parties but also from a number of Interveners; the Secretary of State for Justice, Asbestos Victims Support Group Forum UK, The General Bar Council and The Law Society, the Association of Business Recovery Professionals, Department of Justice Northern Ireland, Media Lawyers Association and Association of Costs Lawyers.

The scheme under the Access to Justice Act 1999

4. In short the aspect of the AJA 1999 which was under scrutiny is that which provided for the recovery of success fees under CFAs and of ATE premiums by successful claimants from defendants.

5. The AJA 1999, the Court stated, represented a *"fundamental rebalancing of the means of access to justice by resort to the private sector rather than by the use of public (legal aid) funds. Instead of placing a burden on the legal aid fund, legal proceedings were to be funded in the first instance by a party's lawyers (who*

would undertake the work "on risk" in exchange for a potential success fee) and then, if the proceedings were successful, the success fee would be transferred to the losing party." (§27 per Lord Neuberger and Lord Dyson)

6. The Civil Procedure Rules (CPR) were amended to reflect the approach to recoverability under the AJA and under the new system success fees and premiums were recoverable if they were reasonable in amount and therefore necessary such that they were treated as being proportionate.

Is the AJA 1999 scheme compatible?

The Respondent's (Defendant) case

7. The Respondent's case was that the system set out in the AJA 1999 as implemented in the CPR was incompatible with article 6 and A1P1 of the Convention in that it unjustifiably interfered with the article 6 and A1P1 Convention rights of "non-rich" respondents who unsuccessfully contested litigation instituted by appellants who had the benefit of CFA agreements and ATE insurance (§42).

8. The Respondent pointed to "flaws" in the system which had been recognised by Jackson LJ in his Review of Civil Litigation. The flaws were (i) the lack of focus of the regime and the lack of any qualifying requirements for appellants who would be allowed to enter into a CFA; (ii) the absence of any incentive for appellants to control the incurring of legal costs and the fact that judges assessed costs only at the end of the case when it was too late to control costs that had been spent; (iii) the "blackmail" or "chilling" effect of the regime which drove parties to settle early despite good prospects of a defence; and (iv) the fact that the regime gave the opportunity to "cherry pick" winning cases to conduct on CFAs.

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9. It was the third of the above "flaws" which the Court stated lay at the heart of the appeal (§53). Lord Dyson stating that "*Another way of describing it [the third flaw] is as imposing a costs burden on opposing parties which is excessive and in some cases amounts to a denial of justice. Whether this flaw rendered the 1999 Act scheme incompatible with article 6 or A1P1 is the central question that arises in this case....*"

Relevance of European jurisprudence

10. These flaws had been considered by the ECtHR in the case of *MGN Ltd v United Kingdom* (2011) 53 EHRR 5. *MGN* was a claim for breach of confident brought by Naomi Campbell in respect of material published about her by the Daily Mirror. On costs similar arguments arose as here in respect of the recoverability of success fees and premiums and the ECtHR considered the compatibility of the scheme under the AJA 1999 with the article 10 (freedom of expression) rights of the defendant. The European Court held that the flaws referred to above were sufficiently serious to lead it to conclude that the system was incompatible with article 10. For further analysis on the *MGN* case see the following article by another member of Chambers, Paul Skinner - *Freedom of expression, subsidiarity and "no win no fee" agreements: MGN Limited v United Kingdom [2011] EHRLR 329.*

11. The Supreme Court considered whether the decision in *MGN* required it to hold that the AJA 1999 scheme was incompatible with article 6 or A1P1 rights. The majority held that it did not and distinguished *MGN* because it was specifically considering article 10 rights which are given particular weight:

    "*...the context in which the court [the ECtHR] made these criticisms was its concern about the effect of the scheme in defamation and privacy cases...The*

right of freedom of expression is always given particular weight by the ECtHR. As the court said at para 201, the most careful scrutiny is called for when measures are capable of discouraging the participation of the press in debates over matters of legitimate public concern. It concluded that a fair balance had not been struck between the article 10 rights of defendant publishers and the article 6 rights of appellants who allege defamation or breach of privacy. ***But in our judgment the balancing of the article 6 rights of appellants against those of respondents is an exercise of a wholly different character.*** *There is no basis for concluding that it was implicit in the reasoning of the court that it would have held that the scheme violated the article 6 rights of the respondents in that case. We reject the submission that the decision in MGN v United Kingdom requires us to hold that the 1999 Act scheme is incompatible with article 6. Essentially for the same reasons, we do not consider that MGN v United Kingdom assists the respondents in relation to their case under A1P1. (§52)* [Emphasis added]

12. It is notable that Lord Clarke (with whom Lady Hale agreed) dissenting, took the view that the exercise with which the court was engaged in Coventry could not properly be said to be so different from that which the European Court in MGN undertook so as to justify a different outcome:

"the question is whether that decision [MGN] can properly be distinguished from the issue in this appeal on the footing that there is here no competing interest comparable to freedom of expression. Lord Neuberger and Lord Dyson say that it can. I respectfully disagree. In my opinion, the principles identified by the ECtHR apply to the facts of this case, where the respondents are relying upon their own right of access to justice and to a fair trial under article 6 and/or their right to protection of their property under paragraph 1 of protocol 1 to the Convention ("A1P1").

The decision of the majority on compatibility

13. The majority therefore held that it was not bound by the decision in MGN. The Court considered other criticisms of the AJA 1999 scheme in addition to the above "four flaws", which it as described as "*unique and regrettable features*" (§54):

"The first feature was that appellants had no interest in the level of fees which they agreed to pay their lawyers. The second was that in many cases unsuccessful respondents found themselves paying, in addition to their own costs, three times the appellants' "real" costs. The third was that proportionality was excluded from consideration in relation to the recovery of the success fee or ATE premium. The fourth was that the stronger the respondents' case, the greater their liability costs would be if they lost, since the size of the success fee and the premium should have reflected the appellants' prospects of success."

14. The Court also took into account that the scheme had generally be viewed as unfair (§56)

15. However, Lord Dyson reiterated that *"the issue is not whether the system was unfair or had "flaws". It is whether it was a disproportionate way of achieving the legitimate aim." (§56).*

16. The majority held that the AJA1999 scheme struck the correct balance and was a proportionate way of achieving the aim of access to justice in a post legal aid era for the following reasons stating:

"In our judgment, there is a powerful argument that the 1999 Act scheme is compatible with the Convention for the simple reason that it is a general measure which was (i) justified by the need to widen access to justice to litigants following the withdrawal of legal aid; (ii) made following wide consultation and (iii) fell within the wide area of discretionary judgment of the legislature and rule-makers to make. On that basis, it is no answer to say that other measures could have been taken which would have operated less harshly on non-rich respondents..." (§64)

17. Lord Dyson stated that the Court did not base its conclusion solely on the above basis but also relied on the following:

(a) The withdrawal of legal aid in most areas of civil litigation presented a real problem for the government. It had to decide how to secure access to justice for those who previously qualified for legal aid. (§65)

(b) There was, and indeed there is, no perfect solution to the problem of how best to enhance access to justice following the withdrawal of legal aid for most civil cases. (§69) The majority rejected the other "less intrusive" schemes contended for by the Respondent (§74-75) and addressed the flaws that exist in the new scheme introduced under LASPO (§70-72) which it said demonstrate that "*it is impossible to devise a fair scheme which promotes access to justice for all litigants*."

(c) The potential unfairness of the 1999 Act scheme on unsuccessful litigants was mitigated by the fact that district judges and costs judges would perform the role of "watchdog" in assessing both base costs and additional liabilities (§67).

(d) That it was necessary to concentrate on the scheme as a whole and not the outcome in individual hard cases. The scheme as a whole was "*a rationale and coherent scheme for providing access to justice to those to whom it would probably otherwise have been denied*" and "*it was subject to certain safeguards*".

(e) Given that the scheme had been implemented by the courts for many years, litigants and their lawyers had a legitimate expectation that the court would not (at least without reasonable notice) decide that these fees were in principle incompatible with the Convention. (§89 Lord Dyson noted that *"A decision to declare that the 1999 Act scheme was incompatible with the Convention would have a serious impact on many thousands of pre-April 2013 cases which are in run-off, as well as claims to which the pre-Jackson costs rules continue to apply, such as mesothelioma, insolvency and publication and privacy cases." (§90)*

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18. Even had it held the scheme to be incompatible, the majority held that it did not consider that it could read the CPR down in the way that the Respondent contended for such that the proportionality to the matters in issue of the total of base costs and uplifts and premiums and the financial circumstances of the paying party were relevant considerations when assessing recovery.

The dissenting view

19. As above, Lord Clarke and Lady Hale did not consider that *MGN* could be distinguished from the present case. It is also notable that Lord Mance and Lord Carnwarth (part of the majority but giving a separate judgment from Lord Dyson and Lord Neuberger) also noted that "*While freedom of expression is a particularly powerful interest under the Convention, the interest of any respondent in being able to defend himself or itself in litigation, at a reasonable and proportionate cost is, in my opinion, also one of some weight...*"

20. The minority agreed that the question was not whether the system was unfair or had flaws but was whether it was a disproportionate means of achieving a legitimate aim and determined that it was "*because it did not treat all respondents in the same way but chose a particular class of respondents on whom to impose liabilities far beyond the bounds of what was reasonable or proportionate*" (§131).

21. The minority considered that even taking into account the legitimate expectation of litigants and lawyers the conclusion was the same. As to remedy they considered that it was "at least arguable" that the CPR could be read down as submitted by the Respondent or that the relevant provisions of the Practice Direction could be struck down as incompatible.

Comment

22. For now, success fees and ATE premiums under the pre April 2013 scheme survive and remain recoverable which will be of relief to claimants and their lawyers who are still running claims under 'old' agreements. For defendants, they continue to be on the receiving end of large costs bills if unsuccessful.

23. However, this decision may well go on appeal to the ECtHR and if it does it is questionable whether the European Court will consider that the balancing exercise being carried out really was of a "*wholly different character*" to than in *MGN* or whether, as the minority view held, the two cases cannot properly be distinguished on that basis, and, if not distinguishable, whether there is any reason for the determination on compatibility in this case to be different from *MGN.*

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