Success fees under scrutiny--update on Coventry v Lawrence

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Dispute Resolution analysis: Is the pre-2013 system of recovering success fees and after the event (ATE) insurance premiums from the losing party compliant with the access to the court provisions under the Human Rights Act 1998? Should costs judges look at the paying party's circumstances too? David Bowden of David Bowden Law comments on the submissions made to the Supreme Court in the case of Coventry v Lawrence.

Original news

David Coventry t/a RDC Promotions v Lawrence & Shields and others UKSC 2012/0076

Lawrence & Shields (L&S) brought a noise nuisance claim in relation to Mr Coventry's speedway track. L&S's lawyers acted on a 'no win, no fee' arrangement. At trial L&S were awarded damages of just over £10k. Mr Coventry had that ruling over-turned in the Court of Appeal, but the Supreme Court restored the trial judge's ruling. L&S's legal costs for all courts are £1.5m. L&S seek recovery of these costs from Mr Coventry. In a previous judgment Lord Neuberger said 'these figures are very disturbing'. The Supreme Court set another hearing to determine whether the success fee and ATE premiums (which form over £1.3m of the costs) were recoverable. The case was heard over 3 days on 9-12 February 2015 by a seven-judge court. Ten other parties intervened in the case. Judgment was reserved.

Why is this case of such significance?

Legal aid was abolished for the majority of civil cases when the Access to Justice Act 1999 (AJA 1999) was brought into force. In England and Wales, to replace it, lawyers were allowed to act instead under conditional fee agreements (CFAs). These CFAs meant no costs were payable if a litigant lost but, to compensate, a success fee of up to 100% of the base costs could be recovered from the other side on successful cases. A CFA litigant usually took out a policy of ATE insurance to pay the other side's costs if his claim failed. Where a CFA litigant won, the other side also had to pay this ATE premium. AJA 1999 envisaged that litigants facing a CFA opponent would usually have insurance to cover claims, for example, third party liability under a car insurance policy.

In April 2013, this system was reformed when the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) came into force. For CFAs entered into after April 2013, a CFA litigant had to pay success fees and ATE premiums out of any damages recovered.

Mr Coventry says he has no objection to paying the base costs of L&S subject to an assessment. Mr Coventry challenges paying both the success fee and ATE and says the AJA 1999 system is 'grotesque'. If the AJA 1999 system is held to be invalid, then the UK government could potentially have to pay compensation to lawyers and insurers who cannot recover success fees or ATE premiums for the 13 years the AJA 1999 provisions were in force. The potential bill would be very large indeed. The AJA 1999 scheme does not apply in Scotland or Northern Ireland.

What issue is the Supreme Court being asked to address?

Although over 8,000 pages of documents and authorities were produced for the Supreme Court by the litigants and interveners, this boils down to two issues.

The first issue is whether a costs judge should consider the circumstances of a paying party when assessing costs. Under the Costs Practice Direction, a costs judge assesses base costs and then goes on to assess success fees and ATE separately. Mr Coventry says this is wrong and that the overriding objective in the Civil Procedure Rules 1998, SI 1998/3132 means that his circumstances must be taken into account too. Mr Coventry says he falls into a category of ordinary uninsured non-rich litigant and that an exemption should be carved out for this category of litigants.

The second issue is whether the AJA 1999 system is compliant with the European Convention on Human Rights, art 6 (ECHR). This provides that:

> 'In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Article 1 of the First Protocol to the ECHR deals with protection of property and provides:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

Mr Coventry says the AJA 1999 system effectively is a block on these rights.

What were the key submissions made to the Supreme Court?

Mr Robert McCracken QC for Mr Coventry submitted:

> 'The law like the Ritz is open to rich and poor alike but here we are expected to pay for our own meal, that of our opponents (from an unpriced menu) and those of their lawyers and insurers on a future occasion.'

The Attorney General of Northern Ireland supports Mr Coventry. He derives support from two recent cases from the Strasbourg Court (*Stankov v Bulgaria* (App No 68490/01) and *Klauz v Croatia* (App No 28963/10)) where high court fees were held to infringe ECHR, art 6.

The Media Law Association also supports Mr Coventry because the LASPO 2012 changes do not apply to defamation cases where the AJA 1999 scheme still applies and which it submits has a chilling effect on press freedom.

The Ministry of Justice submits it consulted on changes leading to AJA 1999 and received many responses but that no-one complained about the point that arises in this case then. It submits the Supreme Court should be slow to extend the ECHR, art 10 regime (freedom of expression) to art 6 rights, that the UK government has generous margin of appreciation and that AJA 1999 was within that margin.

The ATE insurer (Burford Capital) submits Mr Coventry too could have sought ATE cover to protect him, or could have sought either a costs capping order or made a CPR, Pt 36 offer or sought public liability insurance. It also says that AJA 1999 is within the UK margin of appreciation.

The Law Society of England and Wales put in expert evidence from Libero Rocco Pirozzolo, broadly saying the ATE market works well and supporting the status quo. It submits solicitors are entitled in principle to recover success fees and that proportionality is kept in check because costs judges apply *Lownds v Home Office* [2002] EWCA Civ 365, [2002] 4 All ER 775.

The General Council of the Bar of England and Wales submits that the definition of 'costs' includes success fee. While the word 'may' is used in AJA 1999, s 29, it submits this has led to an expectation of entitlement to success fee. It submits that if a costs judge looks at the means of paying party it will erode the system and will change shape, course and length of detailed assessment hearings. It says that costs judges do not just rubber stamp ATE premiums and substantial reductions are made in practice.

What should lawyers do while we await the Supreme Court's decision?

Lawyers acting for a litigant who has an obligation to pay adverse costs to a CFA funded litigant should consider applying for a stay of costs proceedings. Whatever the Supreme Court rules, an unsuccessful litigant will still have to pay an opponent's base costs (be they assessed or agreed).

If the Supreme Court gives a wide ruling--saying that a paying party's position always has to be considered--then this could reduce the success fee and ATE payable by all unsuccessful litigants. If, on the other hand, the ruling is narrow--so that it only applies to a narrow class of uninsured non-rich litigants--then the impact for receiving parties will be less.

Both Mr Coventry and L&S have said if they are unsuccessful, they will take the case to Strasbourg. A *Coventry* stay could therefore last for a period of years with obvious implications for cash flow for solicitor's firms.

Interviewed by Nicola Laver.

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