The cost of Coventry v Lawrence

23/07/2015

Dispute Resolution analysis: What is the significance of the Supreme Court's decision that the pre-2013 system of recovering success fees and after the event (ATE) insurance premiums from the losing party is compatible with the European Convention on Human Rights (ECHR)? David Bowden, freelance independent consultant, examines the judgment and talks to Alex Bagnall, associate and costs advocate of Just Costs, as well getting reaction from Mr Coventry and his solicitor Joanne Pooley, partner of Pooley Bendall & Watson.

Original news

Coventry and others v Lawrence and another [2015] UKSC 50, [2015] All ER (D) 234 (Jul)

Lawrence and Shields (Lawrence) brought a noise nuisance claim in relation to Mr Coventry's speedway track. Lawrence's lawyers acted on a 'no win, no fee' arrangement. At trial Lawrence and Shields were awarded damages of just over £10,000. Mr Coventry had that ruling over-turned in the Court of Appeal, but the Supreme Court restored the trial judge's ruling. Lawrence's legal costs for all courts were nearly £1.5m. Lawrence sought recovery of these costs from Mr Coventry. In a previous judgment Lord Neuberger said 'these figures are very disturbing' (Coventry v Lawrence [2014] UKSC 46, [2014] 4 All ER 517 at para [34]). The Supreme Court set another hearing to determine whether the success fee and ATE premiums (which formed over £1.3m of the costs) were recoverable.

In its reserved judgment handed down on 22 July 2015 a majority of five judges in a seven-judge court held that the system set up by the Access to Justice Act 1999 (AJA 1999) in relation to the recovery of additional liabilities (that is success fees and ATE premiums) was compliant with the ECHR. There was a strong dissenting judgment by two judges. Significantly, four of the seven judges were unanimous in labelling this case as 'an awkward case'. There may be a final appeal to the European Court of Human Rights in Strasbourg.

What were the facts of the underlying case?

Mr Coventry and his company Moto-Land UK Limited operate a stadium in Mildenhall in Suffolk. This is used for weekly greyhound racing, stock car racing and speedway racing on summer weekends. Initially Lawrence and Shields complained about a noise nuisance to the local authority. Mr Coventry put up an acoustic barrier to reduce the noise. This satisfied the local authority and it took no further action.

Lawrence then brought a noise nuisance action on a 'no win, no fee' arrangement through Richard Buxton Environmental Law. At trial, HHJ Seymour ruled there was a noise nuisance, dismissed all other claims and made an order that Mr Coventry paid only 60% costs (*Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB), [2011] 4 All ER 1314). Mr Coventry appealed and was successful in the Court of Appeal (*Lawrence v Fen Tigers Ltd* [2012] EWCA Civ 26, [2012] 3 All ER 168). Lawrence appealed and the Supreme Court restored the trial judge's decision (*Coventry v Lawrence* [2014] UKSC 13, [2014] 2 All ER 622). Mr Coventry was responsible for his own costs, 60% of his opponent's costs at trial and his opponent's costs of the appeal.

The Supreme Court took the case to resolve a conflict which had been identified in nuisance in another case, *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312, [2012] 3 All ER 380. With hindsight, it would have been better for Barr to have been heard by the Supreme Court because Biffa was a company with substantial resources.

What damages were Lawrence and Shields awarded?

The trial judge awarded £10,325 only. There is an error in the majority judgment (para [4]) where this is stated to be £20,750. This is wrong and the correct damages figure is set out in para [325] of HHJ Seymour's judgment.

What costs have been incurred?

Lord Mance handed down the judgment and in doing so even he muddled up all the figures. Mr Lawrence's base costs for the trial alone are £307,642. Mr Coventry is liable to pay 60% of this (£184,585). The success fee for trial is £215,007 and the ATE for trial is £305,000. The costs of the substantive proceedings up to and including the first Supreme Court hearing that Lawrence seeks in total from Mr Coventry are £1,067,000 (see paras [32], [33] of judgment at [2014] UKSC 46). Mr Lawrence estimates that the total costs now sought against him are £1.25m and this does not include the costs of the Supreme Court costs appeal.

At the February 2015 hearing, it was said by counsel that the total additional liability (that is success fee and ATE) that Coventry seeks from Mr Lawrence was then £1.3m. Of course, all figures will be subject to a detailed assessment of costs which has not yet occurred.

Why is this case of such significance?

Legal aid was abolished for the majority of civil cases when 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 Lawrence subject to an assessment. Mr Coventry challenged paying both the success fee and ATE and said the AJA 1999 system is 'grotesque'. If the AJA 1999 system had been held to be invalid, then the UK government could potentially have had to pay compensation to lawyers and insurers who could not recover success fees or ATE premiums for the 13 years the AJA 1999 provisions were in force. The potential bill could have been very large indeed. The AJA 1999 scheme did not apply in Scotland or Northern Ireland.

How is the judgment structured?

The majority judgment is a joint judgment that was co-written by the President of the Supreme Court, Lord Neuberger of Abbotsbury, and the Master of the Rolls and head of the Civil Division of the Court of Appeal, Lord Dyson. Lord Sumption agrees with this joint majority judgment and adds nothing else of his own. Lord Mance gives a short judgment concurring with this joint majority judgment. Lord Carnwath agrees with the joint majority judgment and with Lord Mance.

Lord Clarke (a former Master of the Rolls) gives a strong dissenting judgment which on the critical issues comes to conclusions diametrically opposed to the majority judgment. The Deputy President of the Supreme Court, Baroness Hale agrees with Lord Clarke's dissent and adds nothing of her own.

This piece will focus on the majority view but, in view of its importance, a summary of the minority view is also set out below.

What issues did the Supreme Court address?

There were essentially two issues:

- Should a costs judge consider the circumstances of a paying party when assessing costs?
- Is the AJA 1999 system compliant with the ECHR?

What did the majority of the Supreme Court rule on the paying party's circumstances?

Under the Costs Practice Direction (CPD) (pre-1 April 2013), a costs judge assesses base costs and then goes on to assess success fees and ATE separately. Mr Coventry submitted that this is wrong and that the overriding objective in the Civil Procedure Rules 1998, SI 1998/3132 (CPR) means that his circumstances must be taken into account too. Mr

Coventry said he fell into a category of ordinary uninsured non-rich litigants and that an exemption should be carved out for this category of litigants. On the first issue, the majority ruled against Mr Coventry.

What did the majority of the Supreme Court rule on the ECHR?

ECHR, art 6 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 (A1P1) 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 submitted that the system under AJA 1999 was effectively a block on these rights of his. Again, on the second issue, the majority ruled against Mr Coventry.

What does the majority judgment say?

The majority note that AJA 1999 was introduced and was there to plug the gap caused by the withdrawal of legal aid for most civil claims. It notes that there was proper prior consultation by the UK government before AJA 1999 was introduced. AJA 1999, ss 27 and 29 introduced the requirement for losing parties to pay a success fee and the ATE premium of the other side when its case was funded on a 'no win, no fee' basis. CPR 43.2 and CPR 44.5 sets out how a costs judge assesses these.

The majority endorse the well-known costs judgment of the Court of Appeal in *Lownds v Home Office* [2002] EWCA Civ 365, [2002] 4 All ER 775 that on the standard basis, a costs judge applies a test of reasonableness.

The CPD is neither primary nor secondary legislation and does not strictly form part of the CPR. Paragraph 11.9 of the CPD provides that a percentage increase for a success fee (a maximum success fee of 100% was permitted under AJA 1999) 'will not be reduced simply on the ground that, when added to base costs which are reasonable...the total appears disproportionate.'

The majority note and endorse the three legitimate aims of the Westminster Parliament when AJA 1999 was introduced:

- containing the rising cost of legal aid
- improving access to the courts for meritorious claims, and
- discouraging weak claims

The majority are at pains to point out that 'proportionality' has a double meaning:

- in relation to rights under the ECHR, it means a value judgment as to whether UK law meets the stated objective to justify limiting rights under the ECHR, and
- in relation to costs, the *Lownds* test that a costs judge will only permit costs 'which are proportionate to the matters in issue'

The majority also endorse the Court of Appeal's approach to ATE assessment in the well-known costs case of *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134, [2007] 1 All ER 354. The majority agree that a costs judge does not ask whether an ATE premium was proportionate to the importance of the case. Instead, if an ATE premium was necessarily incurred, a costs judge can find it to be proportionate. The majority also endorse the Court of Appeal's 'ready-reckoner' approach to assessing success fees set out in *Atack v Lee* [2004] EWCA Civ 1712, [2004] All ER (D) 262 (Dec).

The majority note the flaws in AJA 1999 that were set out in the Jackson review of civil litigation:

- lack of focus of the regime

- absence of any incentive for appellants to control costs
- costs were only assessed at the end of proceedings
- blackmail or chilling effect of a regime which drove a party with a good case to settle, and
- claimant's solicitors could cherry pick cases to take on a CFA

In *MGN Ltd v United Kingdom* [2012] ECHR 39401/04, the Strasbourg court held this was enough to prevent the recovery of a success fee. However, the majority held that this case founded on ECHR, art 6 (access to the court) is different and therefore is distinguished.

As to 'unfairness' this holds no sway with the majority who brutally say this is irrelevant. Instead, the majority say the question is whether the AJA 1999 system 'was a disproportionate way of achieving a legitimate aim'. The majority pray in aid an early judgment of Lord Dyson in *Swift v Secretary of State for Justice* [2013] EWCA Civ 193, [2013] All ER (D) 155 (Mar) to support this.

The majority hold that the Westminster Parliament had to make hard choices but that the scheme in AJA 1999 was put in place after wide public consultation. It has to be noted that in these consultations it was never considered what would happen on appeals where the exposure for ATE snowballed in the way it has here. The majority brush this aside saying 'a few unfortunate results are inevitable'. Similarly, the majority say *MGN* permits it to rule that AJA 1999 is ECHR compatible because 'a legislative or regulatory scheme may in some circumstances be compatible with the Convention even if it operates harshly in individual cases'.

The majority say AJA 1999 is compatible with the ECHR because it is a general measure which was:

- justified by the need to widen access to justice following the withdrawal of legal aid
- made following wide consultation, and
- fell within the wide area of discretionary judgment of the UK government and rule makers

Mr Coventry submitted that better alternatives were available, such as a levy on all litigants. However, this is rejected by the majority as 'speculative' and 'highly controversial'. Mr Coventry's attempt to carve out an exception for ordinary 'non-rich' litigants that were embroiled in a once-in-a-lifetime piece of litigation also had cold water poured on it by the majority who lambasted this idea as 'uncertain and arbitrary'.

The majority view Mr Coventry's best submission as that relating to the CPD where a costs judge cannot stand back and assess the overall reasonableness of success fees and ATE at the end of litigation. To this the majority brush this substantial submission aside by saying 'it would have imperilled the whole scheme'.

In conclusion, the majority find the AJA 1999 scheme (which Mr Coventry's counsel branded 'grotesque') as not incompatible with ECHR, art 6 or A1P1.

Rather oddly, the majority go on to consider what they would have ruled in relation to remedy if they had found in Mr Coventry's favour. Perhaps this is an indication the majority know at heart that the majority judgment cannot survive in its present form after the Strasbourg court has scrutinised it. The majority say the CPD cannot be read down as this would involve a departure from *Lownds*. The majority say a revisiting of the CPD to allow costs judges to look at the financial circumstances of a paying party (in the case of Mr Coventry of comfortable but not overly substantial means) 'cannot be achieved under the guise of interpretation'.

In conclusion, the majority say that if, contrary to its view, the AJA 1999 scheme was incompatible with ECHR, art 6 and/or A1P1, they would neither read it down so as to make it compatible, nor strike the AJA 1999 scheme down nor disapply it.

What else did Lord Mance say in agreeing with the majority view?

Lord Mance is clear that 'this is an awkward case'. He notes the 'eye-catchingly large costs exposure'. Lord Mance feels that even a small business should have carried some form of insurance--and that one carrying on motor racing should have had insurance against noise nuisance. This is all wise after the event, but neglects the reality that a motor racing business had been carried on at the site for 40 years and that sound insulation had been installed which satisfied the local authority that there was no such noise nuisance.

Lord Mance says that legal certainty, consistency and the legitimate expectations of claimant lawyers acting on 'no win, no fee' deals (that they will recover success fees in due course) 'all militate in favour of the Supreme Court upholding the system'.

What did the minority rule?

The minority agree with two judges in the majority that 'this is an awkward case'. However, because of its awkwardness, they rule that the AJA 1999 scheme is not compatible with the ECHR. They are swayed by the academic criticism of the scheme by Professor Zuckerman in his book on civil procedure where he notes that:

> 'An individual defendant without the benefit of a CFA is in a worse position that the CFA claimant because he is exposed to the risk of having to pay as much as twice the claimant's reasonable and proportionate costs.'

The minority say this point has great force and the AJA 1999 system is 'unfairly discriminatory against some classes of respondent by comparison with others'.

The minority note the striking feature of a CFA that it is available to poor litigants such as Lawrence as well as rich litigants such as Naomi Campbell. The minority note that the AJA 1999 scheme provides a 'risk free means or providing access to lawyers to those who could afford to fund it in other ways'. The minority say the facts of this case bear this out and again reassert that Lawrence's costs in this case 'are very disturbing'.

The minority note and endorse the extra-judicial adverse criticism of the AJA 1999 scheme. They cite a speech from Sir Anthony May where he asks:

> 'Is it in principle right that an eventual losing party to litigation should be at risk of paying a greater uplift if he has a strongly arguable case he nevertheless loses, whereas, if he has a rotten case, the justifiable uplift will be less?'

The minority respectfully disagree with the majority on the balancing exercise they have struck on the ECHR rights. The minority say that:

> 'The interest of any defendant in being able to defend himself...in litigation, at a reasonable and proportionate cost is also one of some weight and it certainly engages...a balancing exercise.'

The minority are clear that 'just as a claimant is entitled to a fair trial, so too is a defendant'.

The minority are swayed by that fact that Mr Coventry was 'faced with one-off litigation which has involved him in eye-catchingly large costs exposure'. The minority find the AJA 1999 scheme to be 'discriminatory and disproportionate and disregards their rights' (ie those of Mr Coventry).

The minority consider what order they should make in view of their incompatibility finding. The minority say it is at least arguable that the CPD can be read down but say there would be scope for further argument on this if they were in the majority.

Any thoughts on the case now that it is finished in the UK?

At the February hearing, 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.'

This is still the thoughts now of Mr Coventry and his solicitor, Mrs Pooley, who agree that this is an awkward case.

What should lawyers do next?

Mr Coventry is considering any next steps with his counsel. There are powerful indications in the minority judgment that the costs outcome for Mr Coventry does not comply with either the ECHR or A1P1. There is a time limit of six months from the handing down of the Supreme Court judgment to lodge an application with the European Court of Human Rights in Strasbourg. If this case does go to Strasbourg, there will be a delay before it is heard.

The Attorney General of Northern Ireland supported Mr Coventry in submissions before the Supreme Court. His case was structured around two recent cases from the Strasbourg Court (*Stankov v Bulgaria* [2007] ECHR 68490/01 and *Klauz v Croatia* [2013] ECHR 28963/10 where high court fees were held to infringe ECHR, art 6. There is no mention of these cases in any of the Supreme Court judgments. In *MGN*, the Strasbourg Court ruled unanimously that there has been a violation of ECHR, art 10 in relation to the success fees payable by Miss Campbell. If *Coventry* does go on to Strasbourg, then these two cases, taken with the Naomi Campbell ruling, could be an indicator of which way the Strasbourg court might ultimately rule.

What about those acting for others involved in costs proceedings?

For costs lawyers who are dealing with assessment of costs in more routine costs proceedings in either the Senior Courts Costs Office or before costs judges in the county court, this judgment is a bit of a damp squib and it is business as usual. The majority judgment in particular means the attack on the CPD has been dismissed. This means that costs judges will not have to consider the circumstances of paying party when assessing a receiving party's costs. Further, para 11.9 of the CPD will stand and the additional liabilities (be it success fee or ATE premium) will not be reduced by a costs judge (as is the case now) simply on the ground that when added to the assessed or reasonable base costs the total appears disproportionate.

How will this affect the conduct of costs proceedings?

The outcome of this case does not affect the liability to pay base costs as they are assessed by a costs judge or agreed between the parties. In theory it is possible to ask a costs judge for a stay if Mr Coventry decides to take his case to Strasbourg. However, such a stay, even if granted, would only be in relation to additional liabilities. In practice, as this case has now reached its final resolution in the UK by the Supreme Court it seems highly unlikely that an application for a stay would be granted.

Are there any final thoughts from a costs solicitor's perspective?

Alex Bagnall: Had the Supreme Court declared that the recoverability regime was incompatible with the ECHR, the effects could have been apocalyptic. Commentators have suggested that such a declaration could have resulted in anything from nothing at all through to the unravelling of all costs settlements that have been reached since the recoverability regime was incepted at the turn of the century. Significant amounts of satellite litigation would almost certainly have arisen.

Fortunately, this issue does not fall to be considered.

The mood among costs professionals is relatively unanimous--the decision of the Supreme Court was the correct one. While the recoverability regime was far from perfect, the Supreme Court identified that it is impossible to devise a fair scheme which promotes access to justice for all litigants in the absence of a widely available civil legal aid scheme.

There will, of course, be some who are disappointed by the judgment. There still exists a recoverability regime in certain types of case, for example:

- within mesothelioma
- certain insolvency and defamation cases
- in relation to specified ATE insurance premiums in clinical negligence matters

A declaration of incompatibility would have been welcomed by those who are frequently defendants in such matters. After months of uncertainty, it is now business as usual for costs lawyers.

What been the reaction from Mr Coventry's solicitor, Joanne Pooley?

Ms Pooley agrees that this has been an awkward case but has no regrets about taking this case on. It has been a one-off experience for her and her firm. She doesn't think a case like this will come her way again. The original file of papers has now expanded somewhat to take over her office. Ms Pooley praises the excellent memory of both her client and junior counsel who has had the case from the beginning. She is surprised that the split between the judges was only 5:2. The consultations before AJA 1999 never considered the figures or circumstances that have now arisen in this case.

And we should allow Mr Coventry to have the last word

Mr Coventry is happy with the service he has received from his legal team including Mrs Pooley and his junior counsel (Sebastian Kokelaar) and leader (Robert McCracken QC) who acted pro bono in the Supreme Court costs appeal. It would have been a better outcome if the Supreme Court had dismissed the appeal from the Court of Appeal rather than upholding it. He feels it was unfair that he has been made to pay the price for determining bright line distinctions in the law of nuisance and it would have been fairer if the *Barr* case was taken on appeal on this point as Biffa Waste Management have deep pockets and could afford to lose to clarify the law. Mr Coventry feels he has been let down in this case--particularly in the Supreme Court and especially in view of the indication of Lord Neuberger in the second judgment where he said the costs were 'very disturbing'. He has the stomach though to continue the fight to Strasbourg if that is where he has to go to get justice that the UK courts have denied him.

Interviewed by David Bowden.

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