COVENTRY V UNITED KINGDOM:

RECOVERY OF SUCCESS FEES AND ATE PREMIUM FROM A LOSING PARTY HELD TO BE INCOMPATIBLE WITH THE ECHR AFTER ALL.

1. On 11 October 2022 the European Court of Human Rights in Strasbourg (Fourth Section) ("ECtHR") handed down judgment in *Coventry v United Kingdom*[1]. The issue in the case was whether the costs regime established by the Access to Justice 1999, which made it possible for a costs order against a losing party to include both a success fee payable under a CFA and an ATE premium, was compatible with Article 6 (access to justice) of, and Article 1 of the First Protocol to (protection of private property) ("A1P1"), the European Convention on Human Rights.

Background

2. The applicant, Mr David Coventry, owned and operated a stadium used for various motorsports. In 2009 he (along with various other defendants) was sued by the owners of a neighbouring property who alleged that the noise generated by the activities at the stadium caused a nuisance. The claim succeeded at first instance. The trial judge granted an injunction to restrain the nuisance and awarded damages in the sum of £10,325. He also ordered Mr Coventry to pay 60% of the claimants' costs, subject to a detailed assessment. His decision was overturned by the Court of Appeal, but subsequently restored by the Supreme Court.

3. Throughout the proceedings the claimants' legal team acted on a CFA, which provided for a 100% success fee. The claimants also had the benefit of ATE insurance. At first instance the claimants' base costs amounted to some £307,642, the success fees to some £215,007, and the ATE premium to some £305,000. In the Court of Appeal and the Supreme Court their base costs were respectively £103,457 and £204,226, the success fees were £71,770 and £92,115, and the ATE premiums £70,141 and £126,588. Mr

[1] Application no. 6016/16

Coventry's liability pursuant to the costs orders made against him therefore potentially exceeded £1.1m.

4. After the Supreme Court had allowed the claimants' appeal, Mr Coventry sought to argue that a court order requiring him to pay the success fees and ATE premiums incurred by the claimants would infringe his rights under Article 6 and/or A1P1. He relied, amongst other things, on the criticisms of the scheme created by the 1999 Act in the Review of Civil Litigation Costs by Sir Rupert Jackson, which had resulted in its abolition by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), and on the decision of the ECtHR in *MGN Limited v United Kingdom*[2] that the flaws identified by the Jackson Review rendered the scheme incompatible with Article 10 (free speech).

5. The Supreme Court heard argument on this issue over three days in February 2015. Various interested parties, including the Secretary of State for Justice, the Law Society and the Bar Council, intervened. In a judgment handed down on 22 July 2015[3] it held, by a majority of 5 to 2, that the scheme was compatible with the Convention. Although it had its flaws, and could produce harsh results in individual cases, it was not a disproportionate means of achieving a legitimate aim (i.e. maintaining access to justice to litigants no longer entitled to legal aid). As a general measure, it fell within the wide area of discretionary judgment of the legislature and rule-making bodies. The majority (Lord Neuberger PSC, Lord Mance, Lord Dyson MR, Lord Sumption and Lord Carnwath) held that the decision of the ECtHR in *MGN* could be distinguished because the balancing exercise in relation to Article 10 was of a "wholly different character".

6. The dissenting minority (Baroness Hale DPSC and Lord Clarke JSC) held that the decision in *MGN* could not be distinguished. It found that the scheme was arbitrary, in that it singled out from the class of unsuccessful litigants a subset of those who happened to have been opposed by CFA/ATE-funded litigants and imposed on them a wholly disproportionate burden.

7. Having exhausted his domestic remedies, Mr Coventry then issued proceedings against the United Kingdom in the ECtHR in January 2016.

[2] Application no. 39401/04, 18 January 2011.
[3] *Coventry v Lawrence (No.3)* [2015] UKSC 50, [2015] 1 WLR 3485

The decision of the ECtHR

8. In relation to Article 6, the Court reminded itself that the adversarial principle and the principle of equality of arms, are fundamental components of Article 6. They require that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. The principle of equality of arms is, however, not absolute and the State is entitled to a certain margin of appreciation in this area. Where the State is implementing a social and economic policy, that margin is wide.

9. Nevertheless, the Court concluded that the depth and nature of the flaws in the scheme were such as to take it outside this wide margin of appreciation. The flaws relied upon were principally those identified by the Jackson Review, namely (i) the lack of focus of the scheme and lack of any qualifying requirements for claimants who would be allowed to enter into a CFA, (ii) there was no incentive on the part of the claimant to control the incurring of legal costs on his or her behalf and those costs were assessed only at the end of the case, when it was too late to control what had been spent, (iii) there was a "chilling" effect due to the fact that the costs burden was so excessive that a party was often driven to settle early despite good prospects of a successful defence, and (iv) the scheme allowed solicitors and barristers to "cherry pick" winning cases to conduct on CFAs with success fees.

10. The Court noted in relation to the third flaw that it was one of the principal objections to the scheme, especially when viewed through the prism of the principle of equality of arms. It was particularly acute in the cases where the defendant was uninsured. While the obvious risk was that such a defendant would be pressured into an early settlement, the Court held that the potential prejudice was wider. The very different financial risks faced by the opposing parties would be likely to impact every decision concerning the conduct of the case. It could also preclude settlement, even in the early stages, if a party was simply not in a position to pay the opposing party's costs (which was the position Mr Coventry found himself in). The Court also noted that it was a curious feature of the scheme that the stronger the defendant's case, the greater his liability for costs would be if he lost, because the size of the success fee and ATE premium reflect the claimants' prospects of success. This meant that a defendant in an finely balanced case who ultimately lost (such as Mr Coventry) could find himself liable for three times the claimants' base costs (plus his own costs).

11. The Court did not agree, however, with the majority in the Supreme Court that only the third flaw was potentially relevant. It considered that, in assessing whether the scheme struck a fair balance between litigants in CFA-funded litigation, the second flaw was also relevant. The UK Government had not been able to point to any safeguards built into the scheme to protect a defendant against rapidly escalating costs. Although ATE insurance could, in principle, be taken out by defendants as well, in practice such insurance was usually only available to litigants whose prospects were better than evens. Further, although costs were subject to assessment at the end, this was too late to address the imbalance between the parties during the course of the proceedings, and proportionality had no part to play in assessing the recoverability of success fees and ATE premium under para. 11.9 of the Costs PD. Such sums merely had to be reasonable, which depended essentially on the reasonableness of the percentage uplift compared to the risk of losing.

12. The Court also agreed with Lord Clarke that the scheme was arbitrary in that it did not place the burden of widening access to legal services on unsuccessful litigants generally; rather, it singled out unsuccessful litigants who happened to be opposed by CFA/ATE-funded litigants and imposed on them the burden of funding other, unsuccessful cases which did not involve them at all.

13. Finally, the Court considered that, while the fourth flaw (i.e. "cherry picking") did not interfere with the Article 6 rights of opposing parties, it did imply that the scheme did not in fact achieve the intended objective of extending access to justice for those no longer entitled to legal aid. The scheme enabled lawyers to pursue only meritorious cases and to avoid claimants whose claims were less meritorious but still deserving of being heard.

14. In light of these factors, the Court concluded (at para. 87) that:

> *"…in respect of uninsured defendants, who bore an excessive and arbitrary burden in CFA litigation, the impugned scheme, when viewed as a whole, infringed the very essence of the principle of equality of arms as guaranteed by Article 6 §1 of the Convention".*

15. In relation to A1P1, whilst the Court acknowledged the legitimate aim behind the "loser pays" principle, its finding that the scheme placed an excessive costs burden on uninsured defendants in CFA litigation meant that the scheme exceeded even the wide margin of appreciation accorded to the state in matters of social and economic policy, and therefore violated the A1P1 rights of such defendants. It further acknowledged that litigants who entered into CFAs may, at the time, have had a legitimate expectation that it would be

enforced, but held that this was no answer to the question whether the scheme itself was compatible with the convention.

16. On the question of just satisfaction under Article 41, Mr Coventry claimed an indemnity from the UK Government in a sum equivalent to his liability for success fees and ATE premiums, and for the costs he has incurred in vindicating his Convention rights. The Court considered that this issue was not yet ready for decision, and has given directions for further submissions on it.

Implications

17. As noted above, the impugned scheme was abolished by LASPO. It still applies, however, in on-going cases which involve a CFA entered into prior to the coming into force of the new regime on 1 April 2013[4] (although there are unlikely to be very many of those). At the conclusion of such cases, it would be open to an uninsured losing party to argue that an order requiring him to pay any success fees and ATE premium payable by the winning party would violate his Convention rights for the reasons given by the ECtHR in *Coventry v United Kingdom*.

18. The court would then be faced with conflicting decisions of the Supreme Court and the ECtHR in the same case. Whilst section 2(1)(a) of the Human Rights Act 1998 would impose a duty on the court to take the ECtHR's decision into account, the principle of *stare decisis* would require it to follow the decision of the Supreme Court. That principle has been held to apply, even if the binding domestic precedent conflicts with later Strasbourg authority. The appropriate course in such cases is for the lower court faithfully to apply the domestic precedent and give leave to appeal (possibly using the leap-frog procedure)[5].

19. It would then be left to the Supreme Court to decide whether to depart from its earlier decision[6]. The House of Lords has previously held that, in the absence of special circumstances, the domestic courts should follow any clear and constant jurisprudence of the ECtHR, recognising that the Convention is an international instrument, the correct

[4] 1 April 2016 in the case of claims brought by liquidators, administrators or trustees in bankruptcy under the Insolvency Act 2006, and 6 April 2019 for publication and privacy proceedings.
[5] *Kay & Ors v Lambeth LBC* [2006] 2 AC 465 at para. 44 per Lord Bingham. He went on to suggest in para. 45 that there might be a partial exception to this in an extreme case where the basis for the earlier domestic decision had very largely eroded. It is difficult to see how this could apply here. See also *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] 1 AC 311 at para. 64 per Lord Neuberger.
[6] It is free to do so following a conflicting decision of the ECtHR: see e.g. *Smith & Anr v Ministry of Defence* [2014] AC 52.

interpretation of which can be authoritatively expounded only by the ECtHR[7]. The ECtHR has now held on two separate occasions (in *MGN* and in *Coventry*) that the flaws in the scheme created by the Access to Justice Act 1999 where so serious that the scheme as a whole exceeded even the wide margin of appreciation accorded to the state in matters of social and economic policy, and that it has given rise to violations of Article 6 and A1P1 (in *Coventry*), and Article 10 (in *MGN*). That is starting to look a lot like "clear and constant jurisprudence".

20. However, even if the Supreme Court were to depart from its own earlier decision, and hold that the scheme created by the 1999 Act violated the Convention rights of uninsured defendants insofar as it permitted the recovery of additional liabilities from them, it would not necessarily follow that such liabilities would be held to be irrecoverable. In *Flood v Times Newspapers Ltd (No.2)* [2017] 1 WLR 1415 the Supreme Court had to-revisit the issue of the compatibility of the scheme with Article 10 of the Convention in defamation cases. It was asked to depart from the decision of the House of Lords in *Campell v MGN Ltd (No.2)* [2005] 1 WLR 2000, and hold that the later decision of the ECtHR in *MGN* laid down a general rule, to be applied domestically, that it would normally infringe a newspaper publisher's Article 10 rights to require it to pay the success fee and ATE premium for which the successful claimant is liable. The Supreme Court declined to express a concluded view on this issue on the grounds that the UK Government, which would potentially be most detrimentally affected by the decision, was not before the Court, although it is worth noting that Lord Neuberger (with whom the other members of the Court agreed) expressed doubt that there was sufficient justification for refusing to follow the reasoning and conclusion of the ECtHR (at para. 41).

21. The Supreme Court went on to hold, however, that even if *MGN* laid down a general rule which applied domestically, the defendant newspapers should not be granted the relief it sought. The claimants had entered into CFAs and commenced proceedings in the expectation that, if they succeeded, any order for costs in their favour would include success fees and ATE premiums. To deprive them of that expectation would infringe their rights under A1P1 (and possibly also under Articles 6 and 8) and would undermine the rule of law by offending against the fundamental principle that citizens were entitled to act on the assumption that the law was as set out in legislation. A refusal to allow the claimants

[7] See *R(Ullah) v Special Adjudicator* [2004] 2 AC 323 at para. 20 per Lord Bingham, citing *R(Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295. Indeed, as Lord Bingham went on to point out, it is unlawful under section 6 of the Human Rights Act 1998 for a public authority, including a court, to act in a way which is incompatible with a Convention right.

to recover the additional liabilities would directly infringe this fundamental principle. Whilst freedom of expression is also a fundamental principle, it was not so centrally engaged by the issue in the case, i.e. the indirect, chilling, effect of a very substantial costs order on freedom of expression. Accordingly, any failure to uphold the claimants' legitimate expectation would involve a significantly greater injustice than the defendants would suffer by the infringement of their Article 10 rights.

22. The Supreme Court's decision in *Flood* was considered by the ECtHR in *Coventry.* Whilst the Strasbourg Court acknowledged the Supreme Court's finding that depriving claimants of their ability to recover success fees and ATE premiums for which they were liable to their lawyers and insurers could potentially infringe their rights under A1P1 (para. 87), it did not express a view of its own on this. Further, it held that the existence of a legitimate expectation by claimants that they would be able to recover success fees and ATE premiums was no answer to the question whether the impugned scheme was itself compatible with the Convention (para. 98).

23. Any unsuccessful party in cases still governed by the old regime wishing to resist an order that he pay the successful party's additional liabilities on the basis of the ECtHR's decision in *Coventry* would need to find a way of navigating around the Supreme Court's decision in *Flood*. An obvious point of distinction is that *Flood* was an Article 10 case. As noted above, the Supreme Court held that Article 10 was only indirectly engaged (through the chilling effect of a very substantial costs order on freedom of expression). This was an important factor in its decision to dismiss the appeals. By contrast, in cases such as *Coventry*, the unsuccessful party's Article 6 rights are directly engaged; indeed, the ECtHR has held that the impugned scheme, when viewed as a whole, infringed "the very essence of the principle of equality of arms" guaranteed by Article 6. Further, it has held that the scheme directly infringed the paying party's A1P1 rights by imposing an excessive and arbitrary costs burden. This must affect the balancing exercise to be conducted by the domestic court.

24. Factors that would militate in favour of not enforcing the impugned scheme would include: (i) the fact that the ECtHR was untroubled by the legitimate expectation point in both *MGN* and *Coventry*, (ii) the legitimacy of an expectation that a court would enforce a scheme which breaches the Convention rights of others must be very limited indeed, (iii) the impugned scheme was heavily criticised from the outset, so that litigants must be taken to have known that there was a potential issue under the Convention, (iv) since it is the court's duty to act compatibly with the Convention, it should not make an excessive costs order which directly infringes a losing party's rights, even though this may have a deleterious

effect on the winning party, (v) it may not have such an effect because solicitors may not enforce their rights against their clients (particularly if they failed to advise their clients that the right to recover additional liabilities could be challenged), (vi) the winning party may have rights against the United Kingdom, and (vii) the losing party is in no way responsible for the legitimate expectation that the winning party may have had (whereas the winning party at least had a choice as to whether to enter into the CFA and take out the ATE insurance)[8].

25. What of concluded cases governed by the old regime in which the point was either not raised, or raised and rejected (and permission to appeal not sought at the time)? In such cases, it would be necessary for the unsuccessful party to seek permission to appeal out of time against the costs order. The prospects of such an application being successful must be limited. Although it would seem harsh, in light of the Supreme Court's decision in *Coventry v Lawrence (No.3)*, to criticise the unsuccessful party for not taking the point when the costs order was made (it would have gone nowhere before the domestic courts), the court would in all likelihood be very reluctant to re-open costs orders and require successful parties to repay sums paid to them, particularly where the order was made a long time ago and the successful party has changed his position in the meantime.

26. If permission to appeal were refused, or the Supreme Court were to decline to follow *Coventry v United Kingdom*, the only remedy would be an application to the ECtHR against the United Kingdom. There is, however, a strict time limit for the making of such an application. As of 1 February 2022 such an application has to be brought within 4 months after a final ruling at domestic level.

[8] See *Coventry v Lawrence (No.3)* at para. 135 per Lord Clarke.