devereux

Our legal specialists review the latest developments in personal injury law and offer a practical insight on how these may affect you and your clients.

Coventry v Lawrence: old style costs regime survives human rights challenge

By Rob Weir QC

In an article first published by the PI Brief Update Law Journal in August 2015, Rob Weir QC comments on Coventry v Lawrence [2015] UKSC 50. He acted for the Asbestos Victims Support Group Forum UK which intervened before the Supreme Court.

Introduction

On 23 July 2014, in a judgment in *Coventry v Lawrence* [2014] UKSC 46 also covering the issue of a landlord's liability for nuisance, Lord Neuberger endorsed the arguability of the defendant's case that its liability to pay the successful party's success fee and ATE premium breached the defendant's Convention rights under article 6 (the right to a fair trial) and Article 1 of the First Protocol, known as A1P1 (the right to possessions). This nuisance claim had been run under an old style CFA, that is one under Access to Justice Act 1999 under which success fees and ATE premium are recoverable from the losing party. Lord Neuberger did not hold back, describing this old style CFA regime as having 4 "unique and regrettable features", not least that the unsuccessful defendant could be liable for 3 times base costs (by virtue of paying 100% uplift and an ATE premium at about the level of base costs). Lord Neuberger required that the issue, which clearly extended well beyond nuisance claims and into the arena of personal injury CFAs, be resolved at a further hearing. The Supreme Court permitted interventions from the Law Society and the Bar Council as well as from the Asbestos Victims Support Group Forum UK and others.

Having set the cat among the pigeons, there followed a period of uncertainty lasting 1 day less than 1 year during which time all of us barristers and solicitors, with run off work under old style CFAs and representing ongoing mesothelioma claimants (who still operate under the old style CFA regime), were left not knowing whether our agreements would be held viable and enforceable. In the event, the Supreme Court by a majority of 5:2 tempered their criticisms of the old regime and backed away from any finding of Convention non-compliance. So we are left (thankfully) where we thought we were prior to the earlier judgment in *Coventry v Lawrence* in July 2014: old style CFAs do not fall foul of defendant's Convention rights and are fully enforceable. Those interested only in the result need read no further.

Defendant's case

The defendant in this particular piece of litigation had clearly fared very badly: he was (so it was asserted) uninsured and he had defended the case on arguable grounds having lost at first instance but won in the Court of Appeal before having that judgment overturned in the Supreme Court.

He had been left with a liability to pay a total success fee and ATE premium (covering the 11 day trial and repeated appeal hearings) of hundreds of thousands of pounds, in addition to the bill for base fees.

Faced with the unappealing prospect of having to meet these costs out of his business, the defendant turned to human rights. He adopted the fairly trenchant criticisms made in the Jackson report of the old style CFA regime (and readily adopted by the Government at that time, albeit the Secretary of State in this litigation now argued that the old style regime was Convention-compliant), arguing that this regime 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 that subset the burden of funding other unsuccessful cases which did not involve them at all. He had a point. In *MGN v UK* (2011) 53 EHRR 5, the European Court of Human Rights had approved all these criticisms and held that "the depth and nature of the flaws in the system, highlighted in convincing detail by the public consultation process, and accepted in important respects by the Ministry of Justice" was not compliant with MGN's convention rights. Importantly, however, MGN (faced with a claim for breach of privacy by Naomi Campbell, which it lost in the House of Lords) relied on article 10 (right to freedom of expression).

The defendant's case was apparently and beguilingly straightforward: all that was required to make the old style CFA regime Convention-compliant was to read para 11.9 of the Costs Practice Direction down so that the court, when assessing uplift and ATE premium, should consider all the circumstances including (a) the proportionality of the total of based costs and uplifts and premiums, and (b) those of the payer such as his means, whether he was insured, the importance of fighting the case and his reasonableness in fighting the case.

The Supreme Court's decision

The majority judgment was given by Lord Neuberger and Lord Dyson (with whom Lord Sumption and Lord Carnwath agreed). Lord Mance gave a short judgment, to similar effect, with which Lord Carnwath agreed, and Lord Clarke (with whom Lady Hale agreed) dissented. Turning to the joint judgment of Lord Neuberger and Lord Dyson, the rock on which the defendant's case foundered was the informed legislative choice of Parliament in establishing the old style CFA regime. Parliament back in the 1990s made one key decision: to reduce the legal aid bill, not least by removing personal injury from its scope. That left it having to put in place a regime which provided indigent injured people with a means of accessing the courts. It made a deliberate choice to make unsuccessful defendants pay. At the same time, Parliament knew that it had to make a scheme under which claimants were effectively insulated from paying (and so able to access the courts) workable for the lawyers who would taking costs on. To counter the risk of losing, it provided for the uplift on successful cases, the uplift being assessed at the outset by reference only to the risks of the litigation and not by other factors such as the wealth of the defendant. As a counterbalance, the provision of ATE insurance meant not just that the successful claimant kept his damages (as the ATE premium was met by the unsuccessful defendant) but also that the successful defendant would be paid his costs. So it was a good system for successful claimants and for successful defendants; clearly not, on the other hand, for unsuccessful defendants.

It was not enough for the defendant to point out that the system worked in harsh or unfair way towards it. Fairness was not to the point; proportionality was, in the sense of whether Parliament had chosen a regime which was proportionate to the legitimate aim of increasing access to justice for claimants.

The Supreme Court would have none of the defendant's argument that the issue had effectively been decided by the ECtHR in *MGN v UK*. It batted that case away on the basis it concerned article 10. The Supreme Court understood that what the defendant was actually proposing constituted a fundamental rewriting of the old style CFA regime. If the recovery of a success fee and ATE premium was governed by a decision made at the end of litigation, which embraced factors peculiar to the defendant and an overview of the actual costs incurred in the litigation, then claimants' lawyers could have no confidence that the success fees they had agreed at the outset would be maintained. That would discourage them from entering into the CFA in the first place and so undermine the whole system.

It followed that, even if the Supreme Court was wrong, it would not have been prepared to read down the Costs Practice Direction. To do so would have involved more than interpretation; the scheme would have been re-written.

What we learn from the *Coventry* decision

Apart from the result itself, I think the following are of most interest when looking ahead to possible future litigation:

(a) In any human rights challenge, it is hard work indeed to attack a statute if what you are attacking is the deliberate and informed choice of Parliament. There is the world of difference between highlighting an unintended consequence of a particular statute and challenging what Parliament set out to achieve, hence the failure to undermine an obvious unfairness in the Fatal Accidents Act 1976 in *Swift v Secretary of State for Justice* [2014] QB 373.

(b) The courts are naturally anxious to avoid opening up an area to satellite litigation. Had the Supreme Court held that the defendant's rights had been infringed, it knew it would have been inviting a raft of further litigation as defendants sought to challenge either ongoing old style CFAs (signed pre-April 2013 or in respect of mesothelioma claims) or even sought to unpick concluded cases. This concern was not articulated by the majority but I have little doubt the spectre of such litigation weighed with them.

(c) There is some interesting commentary on the LASPO regime. The Supreme Court now clearly understands that there are restrictions to justice inherent in the LASPO regime just as there were under the old style CFA regime.

(d) Given my point (a) above, I cannot foresee any traction for a challenge to the LASPO regime. This, too, was a deliberate, informed choice of Parliament with its advantages and disadvantages.

Rob Weir QC focuses on all aspects of personal injury and clinical negligence and the impact of the Human Rights Act on those areas. He has appeared in numerous reported cases over the years and has been shortlisted or won as 'PI & Clinical Negligence Silk of the Year' on numerous occasions. For more information on his latest case highlights or Devereux's leading personal injury team, please contact our practice managers on 020 7353 7534 or email clerks@devchambers.co.uk.
Follow us on twitter on @devereuxlaw.

Devereux Chambers
Devereux Court
London WC2R 3JH

Tel 020 7353 7534
DX 349 London Chancery Lane

clerks@devchambers.co.uk
www.devereuxchambers.co.uk
@devereuxlaw