22 July 2015

PRESS SUMMARY

Coventry and others (Respondents) v Lawrence and another (Appellants) [2015] UKSC 50

On appeal from [2012] EWCA Civ 26

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Clarke, Lord Dyson, Lord Sumption, Lord Carnwath

BACKGROUND TO THE APPEAL

The underlying proceedings in this case, which concern a claim in nuisance by the owners of a bungalow against the operators of a nearby stadium used for motorsports, have been the subject of two previous judgments of the Supreme Court (see [2014] UKSC 13, [2014] UKSC 46). This judgment addresses the outstanding question of whether the system for the recovery of costs in civil litigation in England and Wales under the Access to Justice Act 1999 ("**AJA**") is compatible with the European Convention on Human Rights. The issue relating to the AJA regime was adjourned to give the Attorney General and the Secretary of State for Justice and other interveners (including the Asbestos Victims Support Group Forum and the General Council of the Bar) the opportunity to make submissions.

The Appellants, the owner of the bungalow, had agreed with their lawyers that they proceed on the basis that the lawyers would act under a conditional fee agreement ("**CFA**"), i.e. on a "no win no fee" basis. They were successful at trial. Consequently, the judge ordered the Respondents, the operators of the stadium, to pay 60% of the Appellants' costs as assessed on the standard basis. The Appellants' base costs were £307,642. The Respondents would therefore be liable for 60%, i.e. £184,585. Because of the CFA, the Respondents were also liable to pay 60% of (1) a success fee of £215,007 to the appellant's lawyers (i.e. £129,004) and (2) an After the Event ("**ATE**") insurance premium of about £305,000 (i.e. £183,000). The Appellants incurred further bases costs, success fees, and ATE premia on the subsequent appeals to the Court of Appeal and Supreme Court. They were ultimately successful in the Supreme Court.

The Respondents accepted that they cannot challenge their liability for the base fees (subject to any challenge to the Appellants' bill of costs), but challenged their liability to pay the success fee and ATE premium on the basis that this would infringe their rights under article 6 of the Convention (which protects the right to a fair trial), and/or article 1 of the first protocol to the Convention ("**A1P1**") (which protects the right to peaceful enjoyment of ones possessions).

*N.B. that the AJA regime has now been replaced by the scheme under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**"). However the AJA scheme will continue to apply for many pending cases.*

JUDGMENT

By a majority of 5-2, the Supreme Court holds that the AJA regime is compatible with the European Convention on Human Rights. Lord Neuberger and Lord Dyson (with whom Lord Sumption and Lord Carnwath agree) give the joint leading judgment and Lord Mance (with whom Lord Carnwath also agrees) gives a concurring judgment. Lord Clarke gives a dissenting judgment, with which Lady Hale agrees.

REASONS FOR THE JUDGMENT

The key aims of the regime under the AJA were (1) to contain the rising cost of legal aid, (2) to improve access to the courts for members of the public with meritorious claim and (3) to discourage weak claims. The

AJA regime deliberately imposed the costs of all CFA litigation on unsuccessful defendants as a class. Instead of placing a burden on the legal aid fund, legal proceedings were to be funded 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 burden of the success fee would be transferred to the losing party. The scheme has the legitimate aim of the widest public access to legal services for civil litigation funded by the private sector **[26-27].** The concept of proportionality lies at the heart of this case in two distinct senses. First, in order to be a proportionate means of reaching its legitimate aim, the scheme must strike the right balance between the rights of different types of litigant. Secondly, the costs rules under the Civil Procedure Rules only permit costs "which are proportionate to the matters in issue"; this involved first asking whether the total sum claimed was disproportionate, and then, if the costs as a whole did appear to be disproportionate, asking whether the work in relation to each item was necessary and, if so, whether the costs of each item was reasonable, in which case it was proportionate. This approach was applied to success fees and insurance premia; fees that were reasonable in amount were necessary, and therefore deemed to be proportionate **[29-41].**

The decision of the European Court of Human Rights in *MGN v UK,* which held that the AJA scheme was incompatible with article 10 of the Convention, concerned the balancing of the rights guaranteed by article 10 with article 6 rights, and was therefore an exercise of a different character to the one in the present case **[50-52].** In that case, the ECtHR identified four flaws in the AJA regime; (1) the lack of focus of the regime and the lack of any qualifying requirements for claimants who would be allowed to enter into a CFA; (2) the absence of any incentive for claimants to control the level 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; (3) the "blackmail" or "chilling" effect of the regime which drove parties to settle early despite good prospects of a defence; and (4) the fact that the regime gave the opportunity to "cherry pick" winning cases to conduct on CFAs **[43, 53].** In the previous judgment in this case, Lord Neuberger had identified four unique and regrettable features of the AJA regime, which overlap to some extent with these four flaws **[54-55].**

However, the issue in this case is not whether the AJA regime has flaws; it is whether it is a proportionate way of achieving the legitimate aim it pursued **[56-57].** The court must give considerable weight to informed legislative choices in circumstances where state authorities are seeking to reconcile the competing interests of different groups in society **[58-59].** The ECtHR recognises that a regulatory scheme may be compatible with the Convention even if it operates harshly in individual cases **[60-63].** There is a powerful argument that the 1999 Act scheme is compatible with the Convention simply because 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 **[64].** 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].** There are restrictions on access to justice inherent in the LASPO scheme which replaced the AJA scheme **[70-72].** The Respondents argue that the scheme fails to take into account the position of the paying party, but the financial position of the paying party had never been a relevant factor in determining the assessment of reasonable and proportionate costs **[79].** The scheme as a whole was a rational and coherent scheme for providing access to justice and in the circumstances this led to the conclusion that the scheme was not incompatible with article 6 or A1P1 **[83-84]**.

In his dissenting judgment, Lord Clarke argued that the AJA regime was disproportionate because it did not treat all defendants in the same way but chose a particular class of defendants to impose liabilities far beyond the bounds of what was reasonable or proportionate. This was a case where a measure was discriminatory in a way that was incapable of objective justification.

References in square brackets are to paragraphs in the judgment