Conditional Fee Agreements and Risk Assessment: Supreme Court sets new rules for damages liability

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Abstract

The claimants in a civil action in the UK can recover from the other party their success fee and after the event insurance (ATE) premium. The recovery of costs under the Access to Justice Act 1999, based on the conditional fee agreement (CFA) covering both these head of damages increases the risk of litigation of the party who is being sued by someone covered for loss. The UK Supreme Court has made a decision in *Coventry v Lawrence*[2] that has implications for litigation in which one party has an agreement with their legal representative of that is based on a condition that they will be paid only if they win. The law firm is usually paid by the insurers if they consider the risk of taking part in the law suit to be worthwhile. The judgment in the apex Court sets out a settled formula that will determine the computation of the sum of the award when the losing party is a litigant with a CFA.

Introduction

There has been an important decision in the UK Supreme Court that will affect the risk definition and management of cases when a party is involved in a civil action who has a conditional fee agreement with their legal representatives. The outcome of the case was awaited by liability and insurance lawyers who are responsible for negotiating these agreements with claimant's solicitor prior to the commencement of trial.

The issues that the important judgment in *Coventry v Lawrence* **h**as addressed have to do with regulatory and legal developments and it will be borne by litigants before they defend a civil action where the payment of monetary damages is the only likely solution. The general rule in cases where conditional fee agreements are made out before litigation is that the solicitor for the acting plaintiff will assess the probable result in the case before agreeing to act as the legal representative.

In all cases where there is such an agreement there will be an insurance company guaranteeing payment that will cover the legal firm for their loss in the process before the courts. They will also be liable for paying the other party's costs if they lose the case when the judge orders costs to be paid to the other party.

The Access to Justice Act 1999 provides the option of conditional fee agreements for litigants who cannot afford to pay privately. If they win most of the success fee, if not all, can then be recovered from the losing opponent.[3] This Act on recovery of damages has set out the Conditional fee agreements and success fees in s 27, and in terms of covering third party "Litigation Funding Agreements". Section 28 provides "where a party other than the litigant agrees to pay for the legal services on behalf of the litigant, and that litigant agrees to pay costs to that funder in specified circumstances". Section 29 applies to the Commercial After the Event insurance and s 30 deals with the recovery of an insurance premium equivalent where a Membership Organisation, such as a trades union, has undertaken to cover the risk of a 'member' against incurring liabilities for costs against an opponent.

The Act abolished the Conditional Fee Agreements Regulations 2000 on 1st November 2005 but these contracts were still applicable to the agreements entered prior to that date. However, following Lord Justice Jackson's recommendations, the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 was enacted which became effective in April 2013. This legislation prevented a party from recovering a success fee or ATE insurance premium from a losing party (with some temporary exceptions, including privacy and publication proceedings, and cases involving mesothelioma).

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[2] [2015] UKSC 50,
[3] The Costs Practice Direction 57 of the Civil Procedure Rules sets out the particulars of how the procedures operate in the payment of the damages awards.

The issue now is the recovery of damages in cases where there is an CFA and the need is for the court to set out the award according to a computation that is based upon the damages award from the losing party. The issues have been dealt with by the Supreme Court and the ruling is of immense significance because it has made the payment of damages contingent upon the flexible negotiating framework and also overruled the previous basis of computation that existed in case law.

The damages in lieu are based on the “negotiating” basis are considered a just substitute for non issuance of a compulsory injunction that would be of such sum of money as might reasonably have been demanded by the plaintiffs. This measure has been contrasted with damages based on the diminution of value of the wronged party’s property on the assumption that the latter is a significantly lesser sum than the former.

This article traces the Supreme Court’s approach where the question is when the defendant has agreed to pay damages and the criteria that the Court will adopt in assessing the monetary sum where there is a Conditional Fee Agreement based on the Access to Justice Act 1999 and payment is in lieu of an equitable remedy, such as an injunction. The previous case law has been overruled by the Court and the principles that have been established that will effect the risk definition and management of the solicitors and their insurers when dealing with the claim. There are important legal and regulatory considerations which concern the right to a fair trial, compensation in lieu of an equitable remedy and after the event insurance claims.

Litigation under a Conditional Fee Agreement

The defendants whether insurance companies, public authorities or private litigants have excluded the introduction of capital into litigation by their opponents, using techniques such as champerty, maintenance and consumer protection provisions coupled with the indemnity principle to maintain their financial security.[4] The state has gradually stopped providing the capital through a government funded Civil Legal Aid scheme.[5] This has not caused the availability for finance to diminish but rather has required the provision of capital from the private sector.

The enabling of lawyers to provide at least part of the litigation through making their own fees deferred and conditional on success, is another vital source of capital for litigation funding. In such circumstances their own client can expect to pay an economic “rent” by way of a success fee for the provision of the capital. From 2000 to 2013 this “rent” could be externalised through the scheme of additional liabilities which existed under the Access to Justice Act 1999.

In England since the Statute of Westminster of 1275, the common law of England and Wales disbarred the arrangement of contingency fees (based on payment by results) holding at various times that they “inherently immoral”, “deeply corrupting” or “definitely sinister”. [6] In effect conditional fee agreements were held to be contrary to public policy and would not be permitted. These contracts were not only unenforceable between the parties but they were also regarded as illegal and unenforceable.

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[4] Champerty is a bargain by which a third party undertakes to carry on the litigation at his own loss and ruin in consideration of receiving , if successful a part of the proceeds or subjects to be recovered. Black’s Law Dictionary 209 (5th ed. 1979) (citing *Schnabel v Taft Broadcasting Co*., 525 S.W.2d 819, 823 (Mo. Ct. App. 1975)).

[5] The Legal Aid, Sentencing and Punishment of Offenders Act 2013 reversed the position where legal aid was available for all civil cases except those specifically excluded by the Access to Justice Act 1999. The new act removes some types of case from the scope of legal aid funding, in civil law such as private family law, such as divorce and custody battles; personal injury and some clinical negligence cases; some employment and education law; immigration where the person is not detained; and some debt, housing and benefit issues. The cases which will continue to be funded include family law cases involving domestic violence, forced marriage or child abduction; mental health cases; all asylum cases; debt and housing matters where someone's home is at immediate risk.

[6] Under the Statute of Westminster I of 1275, c 15, no royal officer “shall maintain pleas “for lands, tenements or other things, for to have part or profit thereof ....”

The movement towards the Contingency Fee Agreements was the Green Paper published by the Lord Chancellor in 1989.[7] Lord Mackay proposed the consideration of financing litigation by entering into contingency agreements. The paper was in favour of a system which does not give the lawyer a stake in the client's damages but instead allows him, if the case is won to receive the usual fees together with the success fee.

There were twin elements which underpinned the development of the law on conditional fee agreements which led to the effective abolition of Legal Aid for personal injury claims and a perception that an increasingly broad spectrum of society, was prevented from obtaining access to justice, by not qualifying for the scheme by reason of entitlement despite lacking the means to fund lawyers to act in litigation**.**

The statutory power contained in section 58 of the Courts and Legal Services Act 1990, was not implemented until the Conditional Fee Agreements Order 1995 which permitted that three particular types of proceedings, namely personal injury claims, insolvency matters and applications under the European Convention on Human Rights to be conducted under Conditional Fee Agreements. The maximum permitted increase on fees would be 100% and a further statutory instrument contained the detailed provisions for implementation of section 58.

The judiciary also began to enforce these agreements which were interpreted in those terms to reflect the concept in the terms of its legality. The approach of the judges can be seen in *Thai Trading (A firm) v Taylor*,[8] where the Court of Appeal held that an agreement between solicitor and client that the solicitor would charge no fee in the event of failure and only his normal fee in the event of success was no longer contrary to public policy. It was not an unlawful agreement despite involving conduct by the solicitor which had been in breach of rule 8 of the then Solicitor's Practice Rules (which forbade conditional fee agreements). As Millett LJ noted:

> Current attitudes to these questions are exemplified by the passage into law of the Courts and Legal Services Act 1990. This shows that the fear that lawyers may be tempted by having a financial incentive in the outcome of litigation to act improperly is exaggerated, and that there is a countervailing public policy in making justice readily accessible to persons of modest means. Legislation was needed to authorize the increase in the lawyers reward over and above his ordinary profit costs. It by no means follows that it was needed to legitimize the long-standing practice of solicitors to act for meritorious clients without means, and it is in the public interest that they should continue to do so**.** [9]

He stated the three preliminary propositions as necessary which were that it was against public policy for a lawyer to have a financial interest in the outcome of litigation that was because of the temptations to which that might expose him. This was because he might lost his objectivity; or he may pervert the course of justice in order to win the case; secondly, it was not contrary to public policy for a lawyer to agree to act for an impecunious but meritorious client who to his knowledge could not pay his costs if the case was lost. However, that "it is in accordance with current notions of the public interest that he should do so". [10]

Finally, if there was a temptation to win at all costs, it was present whether or not there was a formal waiver of fees. It arose from the knowledge that the lawyer would receive any remuneration if the case was lost. This was the basis for the ruling that it was not contrary for the court to decide that it was not against public policy for a lawyer to agree that he was to be paid his normal costs if he wins but not if he loses. The illegality would only arise if the agreement stated that the recovery was more than his normal fee that might make it unlawful. Where the agreement was to pay the entire fee, then the illegality was in the waiver or reduction of fees on the ordinary principles of the law of contract.

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[7] Contingency Fees, CM 572, 1989.
[8] [1998] QB 781.
[9] At 28.
[10] Ibid.

The next most important decision was in a subsequent case of the Court of Appeal in *Awwad v Geraghty & Co (a firm)*,[11] where the court considered an assertion that a contract for fee sharing with a solicitors firm was unenforceable being in breach of the Solicitors Practice Rules. The court refused to follow Thai Trading and stated that upon the evaluation of the statutes and common law the obvious result was that Parliament did not foresee that were to be parallel judicial developments of law. This was implied by the solicitor who successfully intended the conditional normal fee agreement from being evidenced in writing. Schiemann LJ stated that he would hold that:

> acting for a client in pursuance of a conditional normal fee agreement, in circumstances not sanctioned by the statute, is against public policy. In those circumstances, I would also reject the submission that the Rules were ultra vires, a submission which was premised on the assumption that the Rules sought to forbid what was permitted under the common law.[12]

In the two conflicting CA decisions, *Thai Trading* and *Awwad*, as the latter cannot overturn the former because of the rules of precedent, some exceptions apart, the key point that the court in *Awwad* considered was that the decision in *Thai Trading* was *per incuriam* because it was in conflict with *Swain v Law Society*,[13] a decision of the House of Lords.

The effect of the judgment was to preclude the common law from contributing in the development of Conditional Fee Agreements. These were to arise solely under the powers of a statute. This was a prelude to the enactment of the Access to Justice Act 1999. This process began when the Government published a consultation paper under Lord Irvine, the Lord Chancellor in March 1998 which was intended that there will be an (a) extension of the scope of Conditional Fee Agreements to all types of civil proceedings (excluding family cases) to remove Legal Aid from all personal injury claims (excluding medical negligence) and to introduce recoverability; the proposal that success fees and after-the-event insurance premiums would be recoverable from the losing side to litigation which meant repealing the prohibition contained in s 58(8).[14]

These recommendations include the notion that success fees should be recoverable from the losing side that was unsuccessful was made a part of the Access to Justice Act 1999, which drastically amended the Courts and Legal Services Act 1990. The most pertinent reforms were implemented under the revised s 58A. This was contained in the Conditional Fee Agreements Order 2000, the Conditional Fee Agreements Regulations 2000, the Access to Justice (Membership Organisations) Regulations 2000 and the Collective Conditional Fee Agreements Regulations 2000.

New test in damages awards

In *Coventry v Lawrence* the Supreme Court held that the conditional free agreements can be accepted when the damages are awarded in lieu of an injunction. Their Lordships refused to declare the system of recoverability of additional liabilities as invalid in civil litigation and held it to be compatible with Article 6 ECHR and Article 1 to the First Protocol.

The Claimant had moved into their accommodation in 2006 in a bungalow (called “Fenland”), less than a kilometre from the stadium and the track, and half a mile from any other residence. They began to complain the same year to the local authority in relation to the noise from the track and Noise Abatement notices were served, requiring noise mitigation works to be carried out at the defendants’ land which were carried out in 2009.

However, the same year the Claimants brought a claim in the High Court in private nuisance for damages and injunctive relief against the Defendants, (who were various owners and operators of the track connected with the alleged nuisance). In 2010 “Fenland” suffered a catastrophic fire and was not reconstructed until after the judgment).

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[11] [1999] EWCA Civ 3002.

[12] At 23.

[13] [1983] 1 AC 589.

[14] *Modernising Justice: the Government’s plans for reforming legal services and the courts* - Lord Chancellor’s Department, Cm 4155, December 1998, para 3.18https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/250884/5107.pdf.

At the conclusion of the trial in the High Court in 2011, Judge Richard Seymour QC (sitting as a deputy judge of the High Court) granted an injunction preventing activities producing noise above particular levels. The Court of Appeal[15] overturned the decision, holding that it had not been established that there was a nuisance. The critical issue for the Court was the effect, if any, that the grant of planning permission and the certificate of lawful use had on the character of the locality. The Claimant was successful and was awarded 60% of their costs, however significant concerns were raised regarding the amount of the same. The costs claimed were slightly over £1,000.000 elastically divided into £398,000 base costs, £319,000 success fee and £350,000 for the ATE premium.
Jackson LJ, who gave the main judgment at the appeal with which Mummery and Lewison LJJ agreed, held that the judge had erred in holding that the actual use of the Stadium and the Track over a number of years, with planning permission, could not be taken into account when assessing the character of the locality for the purpose of determining whether an activity is a nuisance. It was an error to take into account the difference in noise levels in the locality where there was racing, and when there was not motor sport in assessing whether or not the noise constituted a nuisance. The increase in noise levels on race days was a part of the locality and this meant that the injunction was not sustainable.[16]

In those circumstances, it was unnecessary for the Court to consider any other issue, although Lewison LJ expressed a provisional view that, contrary to the judge's conclusion, it is possible to obtain by prescription a right to commit what would otherwise be a nuisance.[17] Mummery LJ deliberated if there were factors which persuaded the court to grant an injunction.[18] He held that

> although it is not possible to specify all the circumstances relevant to the exercise of the discretion or to lay down rules for its process he indicated that it was relevant to consider the following issues : whether the injury to the claimant's legal rights was minimal; whether the injury could be estimated in money; whether it could be adequately compensated by a minor monetary payment; whether it would be oppressive or against human rights to the defendant to grant an injunction; whether the claimant had shown that he only wanted money; whether the conduct of the claimant rendered it unjust to give him more than monetary relief; and whether there were any other circumstances which justified the refusal of an injunction'.[19]

While the base costs of approximately £400,000 were described as 'regrettable' and 'disturbing' the consideration was in relation to the additional liabilities. The respondent's argument was that the significant amount of the additional liabilities represented a barrier to his access to justice, right to a fair trial enshrined under Article 6, and right to Privacy and Private Life protected under the Article 8 of the European Convention on Human Rights.

The matter then reached the Supreme Court in *Coventry v Lawrence*, where the sum was increased by £20,000 in damages for the Claimant/Appellant and an order that the Respondents pay 60% of their costs assessed on the standard basis. The issue as to costs being referred to a further hearing which took place before a panel of seven justices.

In terms of calculation of damages in lieu of an injunction which may have an impact on the access to justice provisions and, therefore, the possibility of an infringement of Article 6 it may be worth relating the attempt at an evaluation of the compensation formula. The recent case law suggests that there is an approach to the calculation of damages in lieu based on the "wayleave" or "negotiating"

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[15] [2012] EWCA Civ 26.

[16] Parad 74 and 76.

[17] At 88-91.

[18] He applied the guidelines formulated in *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287 by A L Smith LJ who ruled that " (1) A claimant is prima facie entitled to an injunction against a person committing a wrongful act, such as continuing nuisance, which invades the claimant's legal right. (2) The wrongdoer is not entitled to ask the court to sanction his wrongdoing by purchasing the claimant's rights on payment of damages assessed by the court. (3) The court has jurisdiction to award damages instead of an injunction, even in cases of a continuing nuisance; but the jurisdiction does not mean that the court is "a tribunal for legalising wrongful acts" by a defendant, who is able and willing to pay damages". Pages 288-90.

[19] At 37.

basis. [20] This is considered a just substitute for a mandatory injunction that would be such sum of money as might reasonably have been demanded by the plaintiffs from the public property owner for conceding on the covenant”. This measure has been contrasted with damages based on the diminution of value of the wronged party’s property on the assumption that the latter is a significantly lesser sum than the former.

However, the propriety of awarding negotiated damages in lieu of an injunction in nuisance cases was doubted (albeit obiter) by several of their Lordships in the *Coventry* case. Lord Carnwath made the point most decisively by stating that: “… without much fuller argument than we have heard, I would be reluctant to open up the possibility of assessment of damages on the basis of a share of the benefit to the defendants”.[21]

His approach emanates from his vast experience of planning law as claims for what is known as injurious affection following exercise by a local authority of powers under s 237 of the Town and Country Planning Act 1990 or compulsory purchase under se 68 of the Land Clauses Consolidation Act 1845 and section 109 of the Compulsory Purchase Act 1965 are calculated on the basis of diminution in value and not on a negotiating damages basis.

This approach seems at variance with that regarded by Parliament as fair and appropriate in relation to injurious affection arising from procedures carried out under statutory authority. Lord Neuberger agreed with this view when he held:

> It seems to me at least arguable that, where a claimant has a prima facie right to an injunction to restrain a nuisance, and the court decides to award damages instead, those damages should not always be limited to the value of the consequent reduction in the value of the claimant's property.[22]

His Lordship clarified further by stating

> While double counting must be avoided, the damages might well, at least where it was appropriate, also include the loss of the claimant's ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction.[23]

Lord Clarke held that the calculation of damages was an open ended matter which he would leave open the question:

> whether it may in some circumstances be appropriate to award what have been called gain-based damages in lieu of an injunction…it does seem to me that, where a claimant is seeking an injunction to restrain the noise which has been held to amount to a nuisance, it is at least arguable that there is no reason in principle why a court considering whether or not to award damages in lieu of an injunction should not be able to award damages on a more generous basis than the diminution in value caused by the nuisance, including, for example, an award which represented a reasonable price for a licence to commit the nuisance…If that can be done in trespass I do not at present see why it should not in principle be done in nuisance in a case like this, where a similar payment would give the respondents the right to commit what would otherwise be a nuisance by noise. Moreover…there may be scope for assessing the claimant's loss by reference to the benefit to the defendant of not suffering an injunction.[24]

In determining the question of damages their Lordships balanced the arguments between the support for an award on that based for trespass or breach of a restrictive covenant, and rights of light which is difficult to readily transfer to claims for nuisance such as that relating to interference with the enjoyment of land, where the injury is less specific. The appropriate costs claim that was deferred would have been less easy to assess, particularly in a case where the nuisance affects a large number of

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[20] See, *Regan v Paul Properties* [2007] EWHC (Ch) 2052 HC [2007] Ch 135; *Watson Croft Promo Sport* [2009] EWCA Civ 15; and *HK Ruk II v Heaney* [2010] 3 EGLR.
[21] At 248.
[22] At 128.
[23] At 131.
[24] At 171.

people. The question is the price that is placed upon the distraction that a private home has to suffer when placed next to a site which is emanating the nuisance their property.

The questions for which it had to find an answer were as whether the significant amount of the additional liabilities represented a barrier to the respondent's access to justice, right to a fair trial enshrined under Article 6, and right to Privacy and Private Life protected under the Article 8 of the European Convention on Human Rights.

There was speculation that there may be result that causes 3 main results which are as follows that it is, firstly, that the Defendant's argument is fundamentally correct and the Court may be left with little option but to declare the now outdated Courts and Legal Services Act 1990 and Access to Justice Act 1999 acts as incompatible with Article 6 of the Human Rights Act. This would have resulted in the Court having to effectively overturn the sections of the acts which allowed for the recovery of additional liabilities and an outcome along these lines would not impact on the recoverability of additional liabilities between parties.

However, if a ruling was made on this basis, parties who had paid additional liabilities, such as the claimant initially, he would potentially be in a position to seek remedy from the Government. This was effectively for wrongly interpreting the legislation and allowing the legal remedy of transpiring the burden to the public exchequer. Secondly, it was possible that the Court may deem additional liabilities to be unrecoverable, and provide that incorrectly claimed additional liabilities within a case is justification for the reopening of the matter *inter partes*.

This would have resulted in a financial imbroglio because much of the case law regarding the possibility of reopening concluded matters is contradictory to the principle that the cases will be reopened simply because a different Court has come to a different decision to that which has been previously made. The Court will only allow a case to be reheard in 'exceptional circumstance,' such as on an infringement of an article in the Human Rights Act. If the Court's judgment is in accordance with this reasoning then finally, the client's costs are their own and depending on the terms of the Client's Conditional Fee Agreement or After the Event premium, the individual, the firm or the insurer will have to bear the burden of any repayment.

The final possible result of the rehearing is that the Court finds that additional liabilities were correctly recoverable, and the arguments as to why the Court should not retrospectively disallow the recoverability of additional liabilities are based upon either the injustice this would cause to the Claimants. This would be a breach of their own human rights or are premised around the impracticality of a finding to the contrary.

These matters at the second Supreme Court hearing set out the computation as follows: (a) the Appellants' base costs up to the point of the judge's order were £307,642; (b) a success fee under a CFA was in the sum of £215,007; and (c) an ATE premium was in the region of £305,000.
The Respondents argued in relation to (b) and (c) that it would infringe their rights under article 6 of the European Convention on Human Rights and/or article 1 of the First Protocol to the Convention ("A1P1") if they were liable for those sums. The Court did not deliver its ruling on this matter and decided that it was proper to determine that issue without hearing argument from the Secretary of State or other appropriate agencies and the further hearing was necessary.

There were three judgments in the final Supreme Court hearing at which the leading judgments were of Lord Neuberger and Lord Dyson (with whom Lord Sumption and Lord Carnwath agreed), the judgment of Lord Mance (with whom Lord Carnwath agreed) and the dissenting judgment of Lord Clarke (with whom Lady Hale agreed).

Lords Neuberger provided a comprehensive review of the origins of the legislative schemes that have existed in response to the removal of civil legal aid and the provision for the recoverability of additional liabilities from the paying party within the Access to Justice Act 1999. They referred to the four "flaws" of the system identified in the Costs Practice Direction ("CPD") which had been set out by Jackson LJ in his Review of Civil Litigation.[25]

[25] At 51.

His Lordship also distinguished the ECtHR ruling in *MGN v United Kingdom*[26] that had been critical of huge costs awards based on a breach of the Right of Privacy.

> But in our judgment the balancing of the article 6 rights of appellants against those of respondents is an exercise of a wholly different character. There is no basis for concluding that it was implicit in the reasoning of the court that it would have held that the scheme violated the article 6 rights of the respondents in that case. We reject the submission that the decision in *MGN v United Kingdom* requires us to hold that the 1999 Act scheme is incompatible with article 6.[27]

His Lordship focused upon the "blackmail" or "chilling" effect of the regime which drove parties to early settlement despite good prospects of a defence, this being the 'flaw' which they considered could materially affect a party's Art 6 or Protocol 1 Article 1 (AP1P). This was the unnecessary imposition of a "costs order" on the on the other party. [28]

The question was whether this flaw rendered the 1999 Act scheme incompatible with article 6 or A1P1 and their Lord Neuberger ships defined the 1999 Act as a general measure which "(i) was justified by the need to widen access to justice to all litigants following the withdrawal of legal aid; (ii) was made following wide consultation; and (iii) was well within the wide area of discretionary judgment of the legislature".[29]

The perspective of his Lordship was that there was no ideal solution to the problem of how best to enhance access to justice following the withdrawal of legal aid for most civil cases. They did not consider the Respondent's alternative "less intrusive schemes" viable, namely a surcharge on all adverse costs payments (which would be speculative, unknown in effect, and would require primary legislation); and a limit of application to prosperous litigants (which was considered uncertain, arbitrary and likely to give rise to extensive satellite litigation to determine the extent of a particular litigant's means).[30]

Their Lordships accepted that the 1999 Act scheme had the potential to place defendants under considerable pressure to settle given the potential level of costs, as per the third flaw in *MGN*. This might interfere with a particular defendant's right of access to justice, but considered as a whole the scheme was a rational and coherent means of providing access to justice to those to whom it would probably otherwise be denied. The history of the government's attempt to provide for a scheme since the removal of civil legal aid shows how difficult it was to come up with a solution which would meet with universal approval. Accordingly, they held that the scheme was compatible with Art 6 and A1P1.[31]

Lord Mance (with whom Lord Carnwath agreed) accepted that this was an "awkward case" raising the problem of an individual or small undertaking carrying on a modest business without insurance who faces one off litigation causing "large costs exposure". [32] However, he agreed with Lord Neuberger and Lord Dyson that the position must be considered in a rounded manner. In particular, he considered that

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[26] In *MGN Limited v United Kingdom* (2011) 53 EHRR 5, the issue was the alleged defamation of Naomi Campbell who sued for libel and the House of Lords, gave massive costs award. The losing newspaper took the UK to Strasbourg, on the basis that recovery of the success fee violated their right of expression under Article 10. The European Human Right Court held that the trial did not strike a fair balance between the paper's Article 10 rights and Naomi Campbell's Article 6 rights. The effect of the costs regime in defamation and privacy cases under Article 8, are balanced in favour of a legitimate public concern which means additional weight to the right of freedom of expression. (At 211-215) The ruling was that " in such circumstances, the court considers that the requirement that the applicant pay success fees to the claimant was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to the Government in such matters" (at 219).

[27] At 52.

[28] At 53.

[29] At 53.

[30] At 60.

[31] At 64.

[32] At 107.

litigants and lawyers would have a legitimate expectation that the legal system would apply certainty and consistency, all militated in favour of maintaining the approach under the 1999 Act and the CPD.

Lord Clarke's dissenting judgment (with which Lady Hale agreed) held that the ECtHR's reasoning in *MGN* required the court to hold that the system was also incompatible with Art 6 and A1P1. He viewed the major distinction in the manner in which some classes of defendant were treated differently from others, such that they could be burdened with costs which vastly exceeded the fair and reasonable costs incurred by the claimant. This could not be justified by the need to encourage legal representatives to act for other claimants against other defendants.

The difference between the majority and the dissenting view of Lord Clarke was the extent to which they were prepared to consider the potential hardship suffered by a particular class of defendants within the entire objective of the scheme to provide an alternative to legal aid. His Lordship stated:

> To my mind, so far as it applies to the class of defendant concerned in this case, the scheme is discriminatory and disproportionate and disregards their rights. So far as I can see, the Government at no stage considered the plight of respondents such as these.[33]

The decision has avoided a potential opening of the floodgates of litigation for parties who have CFEs and they would be not be inclined to risk bringing claims against the public utilities. The Conditional Fee Agreement system, under which claimants could recover incremental rise on their costs and their insurance premiums from defendants, has managed to survive intact despite the potential threat to the access to justice rights of the party on the receiving end of a costs order that includes an exorbitant CDA. It sustained an ultimately unsuccessful challenge that the denial would be a breach of their Article 6 Rights to a fair trial under the Human Rights Act.

Conclusion

The issue of access to justice and costs awards becomes significant because of the consideration of the potential billions of pounds that are in jeopardy in litigation. This is of particular relevance in civil claims where damages are deemed an effective substitute for an injunction. It will often be the case of an action to prevent a public utility by a private landlord who wants to prevent an exercise of a right by the utility.

The claimant will be able to bring the action and if this is part of a conditional fee agreement then they will be effective under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 . This will govern all cases that concluded this agreement that invoke the post April 2013 period. It will not impact on the access to justice and will meet the criteria under Article 6.1 of the Human Rights Act. The decision in *Coventry v Lawrence* is significant because it has highlighted very significant issues that have been on the cutting edge of the recent legal debate and this has resulted in the framework for a recoverability of damages which comprise the three costs elements initially borne by the claimants. This was arrived after the initial ruling of the Supreme Court failed to reach a decision that settled the issue apportioning liability in the compensation award.

It is now possible to determine the cases upholding the workability of the costs recovery scheme under the Access to Justice Act 1999 as a whole, irrespective of the extraordinary level of costs which could be incurred by claimants and transferred shifted onto defendants in difficult cases such as this. The statement that the court can only award damages in lieu in an "exceptional" case has been strongly disapproved and the case has established that there need to flexibility in the calculation of damages.

The concept of equality of arms does not influence the effect the application of the rules relating to the Conditional Fee Agreements. An individual defendant without the benefit of such an agreement could be in a worse position than the claimant with an agreement because he is exposed to the hazard of having to pay as much as twice the claimant's reasonable and proportionate costs.

The way in which the no win no fee is determined compounds the inequality and the unfairness because of the scale of the 'reasonable' success fee is in inverse proportion to the arguments in the

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[33] At 129.

claimant’s case. The more hazard the claimant’s case, the greater would be the likelihood of that their lawyer will charge as the success fee. This implies that the stronger the defendant’s prospect of success the more he will reason to insist on his Article 6 Right to a fair trial because the more he would have to pay the claimant by way of success fee, in the event that he loses the case.

The most cogent evidence in support of the likelihood of this happening is the action of insurers themselves who cover the After the Event loss in a failed claim. They are presently unwilling to depend upon any Coventry based argument on the flexibility of damages recovery in lieu of a grant of an injunction. The effect of this will be to restore the previously applied rules albeit at the expense of a greater degree of uncertainty in support of the recovery of damages.