Costs Law Update
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- The Defendant Costs Specialists

MGN Limited v United Kingdom – The end of success fees?

Last week the European Court of Human Rights (ECHR) handed down judgment in a decision that may turn out to be the most important costs case of the last decade. Commentators and costs experts are furiously trying to determine the precise significance of the case. One thing, however, is clear beyond doubt: defendants and insurers need to make an immediate decision as to how to respond.

The case of *MGN Limited v United Kingdom* (Application No. 39401/04) was a case involving the supermodel Naomi Campbell's right to privacy versus a newspaper's right to freedom of expression. The House of Lords, as it then was, approved Campbell's claim for damages. The claim had been funded, in the House of Lords, by Conditional Fee Agreements (CFAs) with 95% and 100% success fees.

MGN argued before the House of Lords that it should not be liable to pay the success fees as it was so disproportionate as to amount to a breach of its right to freedom of expression under Article 10 of the European Convention on Human Rights. Article 10 provides, so far as relevant:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence,..."

The House of Lords held that the recoverable success fees were compatible with Article 10 and that passing the cost of successful litigation onto unsuccessful defendants was a proportionate measure to provide litigants with access to justice. Further, such a funding scheme was equally open to wealthy litigants such as Campbell.

MGN took the matter to the ECHR. Their complaint as to whether there had been a breach as a result of the decision to award damages for the publication was dismissed. The more interesting question, so far as we are concerned, was whether the award of costs, including the success fees, constituted a disproportionate interference with MGNs right to freedom of expression.

The ECHR accepted many of the criticisms of the current CFA regime highlighted by Lord Justice Jackson in his *Review of Civil Litigation Costs*. The Court found that that the requirement to pay the success fees in this case constituted an interference with the applicant's right to freedom of expression under Article 10. The Court concluded that the requirement to 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. It was therefore held that there had been a breach of Article 10.

Important though this decision clearly is for publication claims, what impact does it have for wider litigation?

The first observation is that this is almost certainly the final nail in the coffin for recoverable success fees and ATE premiums. The Government had already placed itself firmly behind Jackson LJ's proposals for ending recoverability. This judgment is the last word on the subject. The claimant lobby can save their breath. Further pleading on the subject is pointless. Jackson will be implemented.

What about existing litigation? Will this decision have an immediate impact even without primary legislation changing the current system?

Horwich Farrelly chief executive, Anthony Hughes, was quoted in *Insurance Times* adopting the cautious approach:

> "Although this case is purely focused on media law, we are interested to see what the implication is for CFAs in general"

At the other end of the spectrum, also in *Insurance Times*, specialist costs counsel Dr Mark Friston was reported as saying that even though the judgment is not binding, losing parties can use this case to argue for a slashing in success fee costs, with a very high chance of success and the case should translate across to personal injury. Losing parties will possibly be able to slash success fee payments by between 80% and 90%. Friston said:

> "For liability insurers it is staggeringly important, and it's likely to have a dramatic impact. If I'm right, it will have a dramatic effect on what they are paying out."

Rosalind English, writing on the *UK Human Right Blog*, expressed the view that:

> "This judgment has serious practical implications not just for publication cases but for any civil case not covered by legal aid, and although the ruling is only binding on the government, not on the courts, the potential for its immediate domestic impact cannot be ignored. Defendants challenging costs orders will have this judgment at the head of their arsenal from today; the practical resonances of the case are imminent."

It is important to recognise that this decision concerned a breach of Article 10. Outside of publication litigation, the argument would have to be advanced on a different basis.

In an article on the judgment from Four New Square, the position is explained further:

> "It seems inevitable that paying parties in non-defamation/privacy civil cases will want to develop the arguments considered in this case in a wider context but there will be considerable difficulty in doing so where the right to freedom of expression in Article 10 (which was competing with the Article 6 right underlying the CFA system) is not in play. Given the acknowledged 'ransom' or 'chilling' effect of success fees being recoverable against the unsuccessful party, it may be possible to argue that litigants have competing Article 6 rights which need to be balanced against one another. Limitations on the right of access to court do also involve considerations of proportionality"

Rosalind English expands:

> "It is open to any unsuccessful litigant in a non-media case to make a case for transposition of this Article 10 solution/change by analogy; after all, the Jackson proposals – without which this aspect of the Campbell case may never have seen the light of day – apply to a very wide collection of cases. … So in any given civil case a defendant could reasonably argue that their right to a fair trial under Article 6 is being infringed by a punitive costs regime which is forcing them to settle and thereby depriving them of access to court."

Article 6, so far as relevant, reads:

> "In the determination of his civil rights and obligations…, everyone is entitled to a fair … hearing"

This argument would tie in nicely with Jackson LJ's view that defendants are equally entitled to access to justice as claimants are and that the current CFA regime does not achieve this.

Although MGN had not argued that it was unreasonable that they should have to pay an ATE premium, there is no reason to suppose that similar arguments could not be mounted against ATE premiums. It will be interesting to see if the judiciary is prepared to start to take a more robust approach to ATE premiums, something it has been incredibly reluctant to do in the past.

The ECHR was mindful of the fact that in this case the claimant was wealthy and not in the category of persons considered excluded from access to justice for financial reasons. Although this does not appear to have been a decisive issue, it does leave open the scope for fresh arguments as to the circumstances in which it is "reasonable or proportionate" to enter into a CFA or take out ATE cover. The obvious categories where such challenges might be made would include:

- The small number of cases where the claimant is a wealthy individual.

- Commercial disputes where the claimant does not "need" to fund a claim with a CFA or ATE policy.

- Subrogated claims brought by insurers under CFAs (see *Sousa v London Borough of Waltham Forest* [2010] EW Misc 1 (EWCC) (12 January 2010)).

- Claims funded by trade unions through CCFAs and notional insurance premiums. Such claims were funded by trade unions prior to the current regime being introduced and there is no reason to suppose that such claims "need" recoverable additional liabilities.

In addition to direct attacks on recovery of success fees or ATE premiums, this decision does arguably re-open the whole issue of "proportionality". Since the Jackson Report was published, some commentators have been anticipating an attack on the courts' current approach to proportionality (see *Home Office v Lownds* [2002] EWCA Civ 365). This ECHR judgment makes such a challenge that much more likely. The Four New Square article comments:

> "Paying parties are also likely to try to develop the arguments in favour of purely discretionary arguments as to reasonableness and proportionality in costs assessments. However, it will have to be kept clearly in mind that 'proportionality' for the purposes of the CPR (concerned with whether expenditure on litigation is proportionate to the amount at stake) is a different concept to proportionality for the purpose of the European Convention where the issue is whether a particular measure is proportionate to the legitimate aim to be achieved, having regard to the effect on competing (here Article 10) rights"

Defendants and insurers need to make immediate decisions as to how to respond to this judgment. Should they look to withdraw all current costs offers that include offers for success fee and/or ATE premiums? Should they make offers for these elements in future cases or make significantly reduced offers? Millions of pounds are at stake. Running novel arguments based on this decision will be expensive but there is probably too much to gain for the opportunity to be missed. If challenges are brought, the likelihood is that this will produce a logjam of cases with everything involving a success fee or ATE premium being stayed pending resolution by the higher courts.

This decision will throw the industry back into the confusion and uncertainty that existed with the introduction of recoverability and that led to the *Callery v Gray* test litigation. The irony is that this new period of uncertainty arises at exactly the same time we know that the current regime is likely to be scrapped.

Contact

If you wish to discuss the contents of this update in more detail contact:

Simon Gibbs
Tel: 020-7096-0937
Email: simon.gibbs@gwslaw.co.uk
Address: Gibbs Wyatt Stone, 68 Clarendon Drive, London SW15 1AH
DX: 142502 Enfield 7
Website: www.gwslaw.co.uk
Legal Costs Blog: www.gwslaw.co.uk/blog

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