Landmark Supreme Court decision has major implications for litigation costs cases

28 July 2015

Related Articles

Recoverability of costs and the ECHR — an impending incompatibility?
2 October 2014

Conditional fees do not contravene human rights, Supreme Court declares
22 July 2015

Costs regime in line with human rights
28 July 2015

Litigation funding – From alternative to mainstream
9 February 2015

A big win for creditors and insolvency practitioners
24 March 2015

A long-awaited Supreme Court decision that CFAs are compatible with human rights legislation has major implications.

In this case, Coventry and others (the claimants), the owners of a Suffolk house, brought an action for nuisance against Lawrence and another (the defendants) who operated a nearby motor sports stadium. They won and obtained damages of £20,750. The defendants were ordered to pay 60 per cent of their costs from the defendants on a standard basis.

Whilst the defendants accepted their liability to pay the claimants' base fees of the action, they challenged their obligation to pay 60 per cent of the claimant's CFA success fee and after-the-event (ATE) premium, arguing that this is incompatible with Article 6 of the ECHR (right to a fair trial) and Article 1 of the First Protocol to the Convention (right to enjoyment of possessions).

The main issues for the Supreme Court to consider were: Could the additional liabilities be proportionate, even if disproportionately high as compared with the damages awarded; whether the Access to Justice Act 1999 (the AJA) scheme, which enabled a successful party to recover the success fee and ATE premium, was a proportionate way of achieving the legitimate aim of providing access to justice; and whether the right of a successful party to additional liabilities, such as the CFA uplift and ATE policy premium disproportionately infringed the paying party's own rights under Article 6 ECHR and Article 1 of the Protocol.

The Supreme Court ruled that the claimants' right to recover the additional liabilities was not incompatible with the ECHR. They held that where the costs and additional liabilities had been necessarily incurred, they would be deemed proportionate even if those costs were disproportionately high to the value of the claim/damages recovered.

The court held that given the purpose of the AJA is to provide access to justice, to rule that the success fee and ATE premium were not recoverable and therefore incompatible with the ECHR would fly in the face of the intention of the AJA and set a dangerous precedent for thousands of cases run under CFAs entered into prior to 1 April 2013, and yet still making their way through the courts.

Lord Mance said that although this was "...an awkward case... it is difficult to conceive of any solution that would cater for such cases, without imperilling the whole system....Litigants and their lawyers have justifiably relied on its validity."

The CFA regime changed in April 2013 with the result that CFA uplifts and ATE premia are no longer recoverable from the losing party, save for the few listed exceptions to that rule, such as insolvency practitioners. This decision therefore affects only those CFAs entered into before 1 April 2013 and those commenced after that date under the exceptions to the new legislation.

However, even with these limitations there are still, according to the Law Society, thousands of active claims to which this decision applies.

There has been much concern as to how this decision could impact dramatically and retrospectively on the position of the claimants who signed up to CFAs and ATE policies in the belief that the uplift and premium was recoverable in the event they won the claim.

If this decision had gone against them, it would have meant that those claimants would suddenly find themselves faced with personal liability to their lawyers and insurers for those additional amounts, which can often be sizeable. Those litigants can now feel relief that the position is unchanged. This was a long-awaited decision from the Supreme Court and one that gives certainty over litigation costs.

The seven-judge Supreme Court decided by majority that the entitlement to recover the uplift is compatible with Article 6 of the ECHR and Article 1 of the First Protocol to the Convention and so is not in breach of the paying party's human rights.

Georgina Squire, head of dispute resolution, Rosling King