SQUIRE PATTON BOGGS

# COVENTRY V LAWRENCE:

## Does the Pre-Jackson Costs Regime Breach Article 6?

### Introduction

The recent Supreme Court decision in *Coventry v Lawrence (No.2)* [2014] UKSC 46 raised an important issue concerning the pre-Jackson costs regime: can an order for costs (which includes a success fee under a conditional fee agreement (**"CFA"**) or an ATE premium) infringe Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the **"Convention"**)?

A unanimous Supreme Court decided that the respondents' liability for costs *may* be inconsistent with their Convention rights. Due to the potential impact of such a ruling, it was decided that it would be inappropriate to come to a conclusion without giving time for further submissions. The question of whether such a costs order infringed Article 6 is therefore, for now, left open.

### Facts

The appellants brought a successful claim in the Supreme Court in private nuisance against the occupiers of a speedway track. The respondents were ordered to pay £10,350 each in damages, and 60% of the appellants' costs.

The appellants' costs totalled £1,067,000, which were comprised of the following:

- Base costs: £398,000
- Success fee: £319,000
- ATE insurance premium: £350,000.

The respondents were therefore responsible for around £640,000 of costs (subject to arguments on proportionality and reasonableness). This figure did not include the costs of the appeals.

### The Issues

The respondents argued that their requirement to pay the success fee and the ATE premium (under the Courts and Legal Services Act 1990 and as amended by Part II of the Access to Justice Act 1999 (the **"1999 Act"**)) was in breach of:

1. Their right to a fair trial under Article 6 of the Convention; and/or
2. Their right to protection of property under Article 1 of the Protocol to the Convention.

### 'Decision'

The Supreme Court did not reach a decision. Instead, Lord Neuberger decided that it was open to the court to reconsider the issue, in particular the recoverability of success fees and the ATE premium under the 1999 Act.

Directions have therefore been given for the hearing to be re-listed after notice had been given to the Attorney-General and the Secretary of State for Justice. Lord Neuberger acknowledged that (a) a determination by a UK court that the provisions of the 1999 Act infringed Article 6 of the Convention could have *"very serious consequences for the government"* and (b) it would be *"wrong"* for the Court to decide the point without the Government having had the opportunity to address wider policy considerations first.

### Comment

The case has raised a question which may affect the recoverability from paying parties of ATE premiums for policies entered into before 1 April 2013 and success fees under CFAs entered into before 1 April 2013. Alternatively, those parties who have paid out these costs may be able to seek compensation from the Government.

Lord Neuberger acknowledged that although the Strasbourg court would not be bound by the determination of a UK court, it would be likely to agree or accept that conclusion, so that those litigants who had been *"victims"* of the costs provisions in question could well have a claim for compensation against the government. Potential compensation payments could be (given the number of claims involving one or more parties using CFAs and ATE) significant. We therefore expect the Government will robustly challenge Lord Neuberger's initial conclusions.

The previous regime for recovery of ATE premiums and success fees has come in for plenty of criticism. It is interesting to note Lord Neuberger's warning that the costs claim in *Coventry* are *"very disturbing"* and give *"rise to grave concern"*. More recently, the newly appointed Senior Costs Judge, Master Gordon-Saker in his first public speech in the role condemned the old system.

The case is listed for a further hearing on 9-11 February 2015.



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