Searching for a signpost to Coventry?

In *Caliendo and another v Mishcon de Reya (A Firm) and another* [2014] EWHC 3414 (Ch), the High Court was asked to consider the impact of *Coventry and others v Lawrence and another (No 2)* [2014] UKSC 46 in relation to an application for relief from sanction under the principles set down in *Denton*.

Coventry has questioned whether the recoverability of additional liabilities under CFAs and ATE premiums under the Access to Justice Act 1999 breach a defendant’s right to a fair trial.

In *Caliendo*, the claimant’s solicitors had failed to notify the defendants within 7 days that the claimant had entered into a CFA and ATE policy, as required by the old CPR rule 44.15(2) and Paragraph 9.3 of the Practice Direction for Pre-Action Conduct. The sanction, automatically applied, for failing to notify on time, precluded the defaulting party from recovering any uplift on costs incurred before the funding arrangement was notified, or any insurance premium, unless the Court ordered otherwise (CPR rule 44.3B (1)(c) and (e)).

The claimant applied for relief from sanction under CPR 3.9(1). The application was adjourned pending the appeal of *Mitchell* but was not decided until after *Denton & Ors v TH White Ltd & Ors* [2014] EWCA Civ 906. Lord Justice Hildyard considered the three stage test outlined in *Denton*. In relation to stage one: the seriousness and significance of the breach, the defendants submitted that the existence of funding arrangements can change the entire dynamic of a case before and after proceedings are issued. Whilst acknowledging the serious consequences of ATE/CFA funding arrangements on litigation generally, LJ Hildyard reaffirmed that stage one of the test in Denton considers the significance of the breach and not the consequences to the defendants in granting relief.

The claimant had acknowledged there was no good reason for the breach (the second test in Denton) so the judge moved on to consider stage three. The interesting point is that the defendant submitted that the Court should
consider Lord Neuberger's comments in the Supreme Court's decision in Coventry when "considering all the circumstances of the case" – the third test in Denton. The defendant's Counsel had conceded, in March 2013, that the claimant's funding arrangements were legitimate but, following Lord Neuberger's comments in Coventry, sought to argue that the CFA and ATE funding arrangements, which were allowed under the Access to Justice Act 1999, infringed its right to a fair trial and that this was a "circumstance" that the Court should take into account when assessing "all of the circumstances".

LJ Hildyard acknowledged the grave consequences that a defendant faces when a claimant is supported by the CFA and ATE funding arrangements which were permitted before 1 April 2013. However he declined to consider the defendant's Human Rights argument as a result of Lord Neuberger's conclusion that "it would be wrong even for the court to decide the point without HM Government having had the opportunity to address the court on the issue." If the respondent in Coventry maintains its argument that the funding arrangements under the Access to Justice Act 1999 breached its right to a fair trial, the Supreme Court will give notice to HM Government and the matter will be relisted for a further hearing.

LJ Hildyard concluded that, whilst the breach was serious, in that it breached a rule which imposed an automatic sanction, it did not adversely affect the litigation and it would be unjust to refuse relief from the sanction.

This appears to be only one of the few judgments to consider the impact of Lord Neuberger's comments in Coventry. In another, Marley v Rawlings & another (Costs) [2014] UKSC 41, Lord Neuberger persuaded Counsel to waive their entitlement to a success fee based, in part, on his comments in Coventry and the unsatisfactory aspects of the CFA and ATE funding arrangements before April 2013.

As another example of the Court granting relief from sanction, Caliendo will give hope to those seeking relief from sanctions in a post Mitchell/Denton era. However the big question of whether pre April 2013 CFA and ATE funding arrangements are in breach of the European Convention on Human Rights remains unanswered. Coventry has created much uncertainty and further clarification is required.

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