# Costs remain a nuisance

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**Property analysis: Although the Supreme Court's decision in Coventry v Lawrence provides a degree of comfort to landlords, William Upton, a barrister at Six Pump Court, believes the ability of claimants to get affordable access to the courts remains a troublesome area.**

## Original news

*Coventry v Lawrence* [2014] UKSC 46, [2014] All ER (D) 226 (Jul)

*The Supreme Court ruled on consequential issues arising from its earlier judgment in Coventry and others v Lawrence and another* [2014] UKSC 13, [2014] All ER (D) 245 (Feb) *concerning an action in nuisance brought by the appellant owners and occupiers of a residential bungalow against the respondent occupiers of a nearby stadium and their landlords. The issue as to whether the costs regime under the Access to Justice Act 1999 (AJA 1999), and in particular a claimant's right to recover any success fee and ATE premium from an unsuccessful defendant, infringed the European Convention on Human Rights (ECHR) was adjourned for further hearing.*

## What were the key issues before the Supreme Court?

This judgment deals with two important consequential points from the earlier Supreme Court decision on nuisance law, in *Coventry and others v Lawrence and another*. The Supreme Court's decision to restore the High Court's finding that the defendants were liable in nuisance for the adverse noise effects of their motorsport activities meant that it became necessary for a further hearing to determine whether the landlords were liable as well. The court had also left over the issue of costs from the main hearing, as the defendants were arguing that their liability to pay for the costs uplift due to a conditional fee agreement (CFA) and after the event Insurance (ATE) is contrary to ECHR, art 6. This latter issue has the potential to affect all agreements signed under the pre-April 2013 costs regime introduced by AJA 1999, Pt 2.

## To what extent does the judgment clarify the law relating to the liability of a landlord for his tenant's nuisance?

The court has confirmed that the general principles set out in the old case law remain. A landlord cannot be liable for his tenant's nuisance unless the landlord either authorises or actively participates in the nuisance. That is a high threshold.

To decide that the landlord is liable for having authorised it, the court would have to be satisfied that the nuisance was a 'necessary' or 'highly probable' consequence of the letting. The less stringent tests suggested in *Tetley v Chitty* [1986] 1 All ER 663 that it was 'likely' or 'foreseeable' were not approved where this is the sole basis for attributing responsibility. Moreover, even if the landlord can be said to have authorised the activities that create the nuisance, '[a]uthority to conduct a business is not an authority to conduct it as to create a nuisance, unless the business cannot be conducted without creating nuisance'. So, although it could be said that the intended motorsport uses of the stadium and track were well known to the landlords at the

time of the lettings, and it was known that those uses had in fact at times resulted in nuisance, that was not enough to render the landlords liable in nuisance as a result of the letting.

As for participation, the court must not only look at the terms of the lease, but to what is actually done after the lease is signed, to see the level of the landlord's participation. Simply having the power to stop the nuisance will not be enough. But in this case, the landlords clearly came very close to being held to have directly participated, as the split 3:2 decision demonstrates. However, the majority of the court has at least confirmed that a landlord can seek to defend his own interest in the land without necessarily being held to have become jointly liable for the continuing nuisance.

## How did the Supreme Court approach the issue of costs? And what happens next?

The level of the overall costs incurred both in bringing and defending the case clearly troubled the court. The matter had seemed settled, in the light of the House of Lords decisions in *Callery v Gray* [2002] UKHL 28, [2002] 3 All ER 417, and *Campbell v MGN Ltd* [2005] UKHL 61, [2005] 4 All ER 793, that CFA and ATE premiums were recoverable and that the AJA 1999 costs recovery regime did not infringe the ECHR. The court has decided that it will reconsider this, particularly in the light of the later decision from the European Court of Human Rights in *MGN Ltd v United Kingdom* [2011] All ER (D) 143 (Jan). But it has not made a final decision on this.

One option advanced by the defendants would be to apply the principle of proportionality across all the costs, and to not exclude it from consideration in relation to the recovery of success fee or ATE premium (which otherwise are simply required to be reasonable). But it may yet be right to hold that the losing party's liability for these costs would be inconsistent with their ECHR rights. Another option under consideration by the court is a declaration of incompatibility. This would mean that litigants who have been 'victims' of those provisions could well have a claim for compensation against the government for infringement of their ECHR, art 6 rights. However, the court has decided that it would be wrong to decide the point without the government having had the opportunity to address the court on the point, as well as any other intervening parties that it authorises.

Lord Neuberger did at least acknowledge that the appellants needed the protection of a CFA and a recoverable ATE premium in order to be able to bring their claim in this case. He was also aware from his own knowledge as a former Master of the Rolls how hard it is to ensure that 'a case, particularly one that does not involve a very large sum of money but is potentially complex in terms of fact, law and expertise, such as the present case, is both properly and proportionately litigated'. It is therefore also arguable that, although the outcome in this case would be unattractive, the whole regime is compatible when looked by reference to the generality of the cases to which it applies. A few unfortunate results would therefore be inevitable.

## What are the implications of the judgment for lawyers?

The responsibility of a landlord for his tenant's action remains limited, and the case has provided an additional layer of comfort. It has been confirmed that they do not act as a sort of trustee for their tenant's actions for the benefit of a neighbour.

The issue of the recovery of the costs uplift and ATE premiums under the pre-Jackson regime has been thrown into doubt. It could also affect those areas where CFAs are still in use, such as clinical negligence.

## Are there any patterns or trends emerging in the law in this area? What are your predictions for future developments?

This case has seen the Supreme Court re-evaluate many issues relating to the law of nuisance. It has not been able to provide clear guidance on many of them, which will have to be developed on a case-by-case basis, such as the possible award of damages instead of an injunction. However, the fundamental ability of claimants to get affordable access to the courts to make their claims has been put in question by the problematic cost issues. This remains a troublesome area, even after the new costs regime, particularly in the absence of legal aid or an extension of the concept of one-way costs shifting. The recent Court of Appeal decision to refuse a claimant a protective costs order in *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012, [2014] All ER (D) 199 (Jul) also illustrates the difficulties for claimants in the new regime.

*William Upton specialises in planning, environmental and local government law. As a result, his experience ranges across the civil and criminal courts, as well as planning inquiries. He has a particular interest in the overlap between planning and environmental law, and is a frequent lecturer on both areas. He currently co-chairs the UKELA Planning and Sustainable Development Working Party.*

*Interviewed by Kate Beaumont.*

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