



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MGN LIMITED v. THE UNITED KINGDOM

(Application no. 39401/04)

JUDGMENT
(Just satisfaction)

STRASBOURG

12 June 2012

FINAL

24/07/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of MGN Limited v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President*,

David Thór Björgvinsson,

Nicolas Bratza,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 22 May 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 39401/04) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British company, MGN Limited (“the applicant”), on 18 October 2004.

2. In its judgment, which became final on 18 April 2011 (“the principal judgment”), the Court found that there had been a violation of Article 10 of the Convention as regards the success fees payable by the applicant, the Court ruling on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

3. Under Article 41 of the Convention the applicant claimed reimbursement of the success fees paid following the two appeals to the House of Lords, the money paid by it in settlement of the base costs in the second appeal to the House of Lords as well as the legal costs of the application to this Court in respect of the success fees’ issue.

4. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the Government and the applicant to submit, by 20 June 2011, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (*ibid.*, p. 58, point 4 of the operative provisions).

5. Further to one extension of the time-limit, the applicant and the Government each filed observations on just satisfaction, which were then exchanged. The Government were allowed to file a response to the applicant and the applicant, in turn, responded thereto on 7 November 2011.

THE LAW

6. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Pecuniary Damage

7. The applicant claimed reimbursement of the success fees paid as part of the settlement of the claimant’s costs of the first appeal to the House of Lords. It underlined that the only part of the costs order against it which was negotiable was the base costs (disbursements apart) since those base costs risked being reduced on taxation. The percentages, by which the success fees were calculated on the basis of those base costs, could not, despite the Government’s suggestion, to the contrary, have been reduced given the costs orders and the court rules: those percentages were not open to negotiation. Consequently, the only conclusion to be drawn from the global settlement sum was that both parties had compromised: the claimant accepted that her base costs were susceptible to be significantly reduced on taxation and the applicant accepted that the claimant’s lawyers could still recover success fees calculated at 95% (as regards solicitors) and 100% (as regards counsel) of those reduced base costs.

8. Accordingly, the applicant submitted that the success fees on the first appeal (at 95% and 100%) amounted to 47% of the total appeal costs billed and, consequently, 47% of the global settlement figure. This amounted to 164,500 pounds sterling (GBP), which figure the applicant claimed as pecuniary loss. The Government’s final proposed figure of GBP 36,000 was unreal as it assumed that the applicant paid all base costs without negotiation (whereas that was the only negotiable element) and because they reduced the small remaining sum which they considered represented the success fee by an unexplained percentage of 60% so that the settlement of the first appeal included, according to the Government, a success fee of 13% (when the claimant was entitled to 95% and 100%).

9. The applicant described the negotiation process, submitting detailed affidavits of a solicitor and specialist costs lawyer who represented it during the negotiations. The Government’s suggestion that its claim was unsubstantiated was therefore incorrect and, indeed, the applicant noted that the Government’s own submissions lacked any substantiation.

10. The Government did not dispute that there had been some pecuniary loss but considered the sums claimed excessive.

11. As to the claim in respect of the success fees for the first appeal, the Government underlined that, while the principal judgment found the 95%

and 100% success fees to be disproportionate, it had not found that a materially lower success fee would be unacceptable. The Government therefore argued that there was no causal link between the violation found and all of the pecuniary loss claimed and suggested that an acceptable success fee would be calculated at 60% of the base costs.

12. The Government also considered unsubstantiated that 47% of the settlement sum represented success fees. The affidavits submitted by the applicant did not prove this on the balance of probabilities: a global sum was agreed, the costs settlement did not specify an amount paid in respect of a success fee and the overwhelming inference was that the bulk of the costs paid were base costs. This was consistent with the applicant's opposition to success fees and there was no reason to assume that the claimant would have negotiated down her base costs. Accordingly, the Government deducted from the sum paid by the applicant (GBP 350,000) the base costs originally billed (GBP 288,468.00) leaving GBP 61,532.00 to which the above-noted 60% multiplier was applied leaving GBP 36,919.20. Alternatively, even if the Court accepted that 47% of the global settlement figure represented success fees (namely, GBP 164,500), the proposed 60% multiplier would have to be applied to that sum also.

13. The Court has considered the applicant's claim for reimbursement of the success fees for the first appeal as a claim for pecuniary damages, in respect of which a causal connection must be shown between the violation established and the loss claimed.

14. In this respect, and as to what element of the global settlement figure represented success fees, the Court notes its conclusion in paragraph 218 of the principal judgment:

"On the other hand, ... the total costs billed by the claimant, as regards the two appeals to the House of Lords alone, amounted to GBP 850,000.00, of which GBP 365,077.13 represented success fees. It is true that the applicant, in the end, reached a settlement of the costs of both appeals paying the total sum of GBP 500,000.00 (base costs and success fees). However, given the findings of the House of Lords and of the Judicial Taxing Officers in the second appeal (paragraphs 70 and 80, respectively) as well as in the similar above-cited case of *Designer's Guild Limited*, success fees were clearly recoverable against the applicant and, further, at the rates of 95% and 100% in the first appeal and 95% for the solicitors' costs in the second appeal."

The Court went on to find therefore that, even if it was not possible to quantify with certainty the precise amounts paid by the applicant which could be attributed to success fees, "it was evident that the negotiated costs settlements reflected the obligation on the applicant to discharge substantial success fees" which domestic law fixed at 95% (for solicitors) and 100% (for counsel) of base costs.

15. While the success fees were calculated as a percentage of the base costs, the base costs of the first appeal were not reviewed by the Judicial Taxing Officers given the intervening settlement motivated by the applicant's desire to avoid accruing interest. In addition, the applicant

submitted to this Court only part of the bill of costs of the claimant and even that material vouched the base costs only in general terms. There is therefore a large element of uncertainty as to the reasonableness of the base costs of the first appeal and, consequently, of the success fees calculated thereon.

16. The Government argued that the principal judgment did not exclude that a lower success fee might be proportionate, the argument being that the applicant did not have to be reimbursed for all of the success fees but only that part that could be considered disproportionate. However, the Court's findings concerned the circumstances of the present case in which success fees at 95% and 100% were chargeable so that it would be speculative to assume the level, if any, at which a success fee could be considered proportionate.

17. Taking all of the above into account, the Court awards the applicant EUR 97,600 in respect of pecuniary damage as regards the success fees paid by it following the first appeal to the House of Lords.

2. Costs of the second appeal to the House of Lords

18. Secondly, the applicants also claimed reimbursement of the costs of the second appeal to the House of Lords relying on the same reasons as set out above. It claimed GBP 50,000 as regards the success fee which amounted to 33% of the total costs paid by it: the overall percentage was lower than for the first appeal because only the solicitors' fees were subject to a success fee of 95%. The remaining GBP 100,000 were base costs (inclusive of interest and taxation costs). The Government's proposals were even less convincing when applied to the second appeal costs since that would amount to arguing that the applicant settled the second appeal costs on the basis that the claimant had sacrificed the entire success fee of 95% which was, in law, the only costs element to which she was entitled in full.

19. The Government relied on their submissions above and proposed an overall costs' figure (including base costs and the success fee) for the costs of the second appeal of GBP 75,000.

20. As noted above, the negotiated costs settlement reflected the applicant's obligation to discharge substantial success fees which domestic law fixed at 95% for solicitors. Moreover, the position as regards the base costs of the second appeal, on which the success fee would have been calculated, is more certain than for the first appeal. The claimant billed the applicant a total sum of GBP 255,535.60 which included base costs and a 95% success fee as regards the solicitors' costs. The applicant brought the matter before the Judicial Taxing Officers who decided certain preliminary matters of principle: they approved a success fee at 95% and reduced the hourly rates chargeable by the claimant's solicitors and counsel. While the actual re-assessment does not appear to have been carried out by the Taxing Officers, this was because the applicant settled the costs of the second

appeal obtaining a significant reduction in the costs bill and benefitting directly from the rate reductions ordered by the Taxing Officers. In sum, while the absence of a finished taxation procedure means that some uncertainty remains as to the costs of the second appeal, the Court considers that it can be said that a significant part of the costs paid by the applicant in settlement of the costs order are recoverable as pecuniary damages incurred in proceedings to contest the award of success fees found by the Court to have been in violation of Article 10 of the Convention.

21. Taking all of the above into account, the Court awards the applicant EUR 158,600 as regards the costs (including base costs and a success fee) paid by it to the claimant following the second appeal to the House of Lords.

B. Costs and expenses of the Convention proceedings

22. The applicant claimed GBP 41,258.00 for the separate application on the costs issue submitted to the Court in June 2006; GBP 52,349.00 for work done on both the breach of confidence and costs issues until the adoption of the principal judgment; and a further GBP 14,493.00 for legal work done since the principal judgment. Vouchers were submitted for all costs claimed.

23. The Government made detailed submissions to the effect that those costs were excessive and proposed a total Convention costs award of GBP 20,000.

24. It is recalled, that only legal costs and expenses found to have been actually and necessarily incurred as regards the violations established and which are reasonable as to quantum are recoverable under Article 41 of the Convention.

25. The Court consider as excessive the claim made (GBP 41,258.00 comprising solicitors' fees of GBP 32,108.00 and GBP 9150 for counsel) solely for the preparation of the application to this Court on the costs issue. While the issue was of some complexity, it had already been pleaded in some detail in the domestic courts. The claim includes over 100 hours of the time of a partner in the solicitors' firm billed at GBP 270 per hour as well as work by the assistant solicitors (at GBP 165-180 per hour) and by trainee solicitors. Moreover, a Queen's Counsel and another barrister also worked on the application, charging GBP 300 and GBP 150 per hour, respectively and spending in the region of 20 hours and 30 hours, respectively.

26. The work completed post-application and until the date of the principal judgment essentially comprised the preparation of one set of observations. However, the bills of costs and vouchers submitted by the applicant concerned, and did not distinguish between, the privacy and costs issues, although admittedly the post-application work on the costs issue was more significant. In addition, the Court considers excessive the number of

hours of work and the rates charged by solicitors and counsel after communication of the case even taking into account that it included both privacy and costs issues (in the region of 250 hours work).

27. Finally, the Court does not consider reasonable the costs billed for the two sets of observations since the principal judgment on the subject of just satisfaction, which claim comprised over 48 hours work by a partner in a law firm charged at GBP 270 per hour, not least having regard to the similarity of the contentions on just satisfaction made prior to and after the delivery of the principal judgment.

28. Having regard to the above factors, the Court awards the applicant a total sum of EUR 30,500 in costs and expenses as regards the Convention proceedings about recoverable success fees, exclusive of any tax that may be chargeable to the applicant.

C. Default interest

29. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable on the date of settlement:

(i) EUR 97,600 (ninety-seven thousand six hundred euros) in respect of pecuniary damage as regards the success fees paid by it following the first appeal to the House of Lords;

(ii) EUR 158,600 (one hundred and fifty-eight thousand six hundred euros) in respect of pecuniary damage as regards the costs paid by it to the claimant following the second appeal to the House of Lords; and

(iii) EUR 30,500 (thirty thousand five hundred euros), plus any tax that may be chargeable, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

2. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President