Hirachand v Hirachand [2021] EWCA Civ 1498

In the landmark decision of *Hirachand v Hirachand* [2021] EWCA Civ 1498, the Court of Appeal has today held that an award under the Inheritance (Provision for Family and Dependants) Act 1975 may include a lump sum to enable the claimant to discharge all or part of a success fee payable under a Conditional Fee Agreement ('CFA').

In a judgment given by Lady Justice King (with whom Lord Justice Singh and Sir Patrick Elias agreed), it was concluded that a success fee, which cannot be recovered by way of a costs order by virtue of section 58A(6) of the Courts and Legal Services Act 1990, is capable of being a debt, the satisfaction of which is in whole or part a 'financial need' within the meaning of section 3(1)(a) of the 1975 Act, for which the court may in its discretion make provision in its needs based calculation.

Lady Justice King went on to stress, however, that it will by no means always be appropriate to make such an order. Her Ladyship indicated that it is unlikely an award will include a sum representing part of a success fee unless the judge is satisfied that the only way in which the claimant had been able to litigate was by entering into a CFA arrangement. Her Ladyship further noted that an order will only be made to the extent necessary in order to ensure reasonable provision is made.

The decision has significant ramifications for claims made under the 1975 Act.

Facts and Procedural Background

The appeal arose from proceedings brought by the Respondent, Sheila Hirachand, for provision from the estate of Navinchandra Hirachand ("the deceased") under the 1975 Act. The Respondent was the estranged adult daughter of the deceased and of the Appellant, Nalini Hirachand, who was the sole beneficiary of the estate of the deceased.

The Appellant, who was in her eighties, was frail and profoundly deaf. She was in poor and deteriorating health. Following the death of the deceased in 2016, the Appellant moved to live in a care home. The deceased left the totality of his modest estate to the Appellant, who was his wife of many years.

On 10 November 2017, the Respondent issued proceedings as a child of the deceased under section 1(1)(c) and 1(2)(b) of the 1975 Act for such financial provision as it would, in all the circumstances of the case, be reasonable for her to receive for her maintenance. The Respondent entered into a CFA on 6 March 2018. By virtue of the terms of the agreement the success fee was 72% which amounted to £48,175.

For whatever reason, the Appellant chose not to co-operate with the proceedings once issued and, notwithstanding appropriate legal advice, she failed to take the critical step of filing a timely acknowledgement of service in response to the claim. As a result, at a directions hearing in November 2019 a declaration was made that the Appellant was debarred from participating in the hearing of the claim pursuant to CPR 8.4 and from relying on any written evidence at the hearing of the claim pursuant to CPR 8.6. Significantly, CPR 8.4 expressly preserved the Appellant's right to 'attend' the hearing of the claim.

On 23 April 2020 the Appellant filed a six-page letter in opposition to the claim. The judge (Mr Justice Cohen) read the letter and took its contents into account notwithstanding that the Appellant was not entitled to file evidence.

The hearing of the claim was conducted entirely remotely. The Appellant attended via Skype, but, being profoundly deaf, was not able to hear anything that was said. She had the assistance of a care home worker who sat with her and passed her notes so that she had at least some idea of what transpired.

Having considered all relevant factors, the judge concluded that the deceased's will did not make reasonable financial provision for the Respondent, and that the award should be calculated by reference to what she 'requires to meet her current financial needs'. It was not, the judge said, a case where the Respondent should 'in effect be set up with a home or

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income fund for life'. The judge proceeded to make a total award of £138,918. Importantly, this award included a sum of £16,750 to meet the Respondent's CFA mark up. This sum was equivalent to a success fee of approximately 25%.

The Decision in the Court of Appeal

The two grounds of appeal in respect of which permission was granted were, first, whether in the circumstances the Court erred in proceeding with a trial by video-link, and, second, whether the Court erred in law when it made an order for financial provision in favour of the Respondent which included a sum of £16,750 as a contribution towards the Respondent's liability to pay a CFA uplift.

As to the first ground, Lady Justice King concluded that there was no merit in that part of it which complained that the Appellant attended the hearing by video-link. Her Ladyship noted that in that respect, the Appellant was in no worse a position than thousands of others who, unlike the Appellant, were entitled to participate in their litigation and had to conduct their cases remotely. Her Ladyship thus reasoned that the question was whether, in all of the circumstances of the case, the judge was wrong to allow the trial to proceed given that the Appellant was profoundly deaf. Lady Justice King concluded that the judge did not so err. Her Ladyship held that debarring orders should mean what they say, and that a litigant who is debarred as a consequence of his or her own failure to comply with the rules cannot expect nevertheless to be entitled to have made available to him or her all the proper and carefully developed protections which have been put in place to ensure that a participating party can put his or her case effectively. Her Ladyship concluded that there is no obligation on a court proactively to manage the attendance of a debarred party, although it is a matter for a judge whether or not to grant any request from an attending party either for special measures or to address the court.

As to the second ground, Lady Justice King noted that Mr Justice Cohen had been referred to two cases: *Re Clarke* [2019] EWHC 1193, a decision of Deputy Master Linwood in a 1975 Act case in which he declined to include the success fee in the award, and *Bullock v Denton* [2020] Lexis Citation 191, an unreported decision of HHJ Gosnell in which he made such provision. It was the latter decision which Mr Justice Cohen had preferred.

The second ground of appeal

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gave rise to a difficult question of principle. On the one hand, by virtue of section 58A(6) of the Courts and Legal Services Act 1990, a success fee cannot be recovered by way of a costs order. On the other, it is clearly the case that a claimant's liability for a success fee will impact upon his or her financial needs.

Having considered the question in light of the relevant authorities, Lady Justice King concluded that a success fee is capable of being a debt, the satisfaction of which is in whole or part a 'financial need' within the meaning of section 3(1)(a) of the 1975 Act, for which the court may in its discretion make provision in its needs based calculation.

Lady Justice King went on to stress, however, that it will by no means always be appropriate to make such an order. Her Ladyship indicated that it is unlikely an award will include a sum representing part of a success fee unless the judge is satisfied that the only way in which the claimant had been able to litigate was by entering into a CFA arrangement. Her Ladyship further noted that an order will only be made to the extent necessary in order to ensure reasonable provision is made.

Lady Justice King added that she was conscious of the difficulty identified by Briggs J in *Lilleyman v Lilleyman* [2012] 3 WLR 754, namely that of the potential for undisclosed negotiations to undermine a judge's efforts to make appropriate provision under the 1975 Act. Her Ladyship explained that under the civil litigation costs regime there is the potential for a situation where a claimant is awarded a contribution to her CFA uplift but is subsequently ordered to pay the defendant's costs of the claim (where, for example, the claimant won overall but failed to beat a Part 36 offer). Her Ladyship noted, however, that this is likely to be less of a risk than might at first thought to be the case, given that under many CFAs the claimant is obliged to accept any reasonable settlement offer or an offer above a specified threshold or risk the solicitors withdrawing from the CFA. Conversely, a success fee is frequently not payable in the event that the claimant, on advice, rejects a Part 36 offer or other relevant settlement offer but subsequently fails to beat that offer at trial.

Conclusion

The Court of Appeal's decision resolves an important unsettled question in respect of claims made under the 1975 Act pursuant to CFA arrangements. The decision is likely to focus defendants' minds more sharply on applications under s 5 of the 1975 Act for interim relief which can (as is now settled law) include provision for funding legal costs, so as to mitigate the risk of any eventual award being increased by success fees. It nonetheless gives rise to a number of further questions. What will be the effect of a failure to inform a defendant promptly about a CFA? Need a claimant disclose the percentage uplift (or, indeed, the entire CFA)? While the Court of Appeal's decision provides a good deal of welcome clarification, the full extent of its ramifications remains to be seen.

Written by: John Eldridge
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Constance McDonnell QC represented the successful respondent in the Court of Appeal.