Press Summary

18 December 2024

Hirachand (Appellant) v Hirachand and another (Respondent)

[2024] UKSC 43

On appeal from [2021] EWCA Civ 1498

Justices: Lord Lloyd-Jones, Lord Leggatt, Lord Burrows, Lord Stephens and Lord Richards

Background to the Appeal

The issue on this appeal is whether an order for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 (the **"1975 Act"**) may include a sum in respect of a litigation success fee payable by the successful claimant to their solicitors.

A conditional fee arrangement (**"CFA"**) is an agreement entered into between a client and their solicitor that stipulates that the solicitor's fees will only be payable in certain circumstances, typically if the client wins their case. CFAs often provide for the fees payable to solicitors to be increased by a certain percentage of the solicitor's base costs if the client is successful. This percentage increase is known as a success fee.

The successful party in civil litigation proceedings is usually able to recover their reasonable legal costs from the losing party, but provision for payment of a success fee may not be included in a "costs order made in proceedings": s58A(6) of the Courts and Legal Services Act 1990 (the **"1990 Act"**).

The factual background to this appeal is that Navinchandra Dayalal Hirachand (the **"Deceased"**) died, leaving a widow (the **"Widow"**), their daughter (the **"Daughter"**) and their son (the **"Son"**). Under the Deceased's will, the Widow received his entire estate.

The Daughter has severe health problems and does not have sufficient income or assets to support herself. The Daughter issued a claim for financial provision from the Deceased's estate under the 1975 Act, on the ground that "the disposition of the deceased's estate by his will…is not such as to make reasonable financial provision for the applicant" (s1(1) of the 1975 Act). Reasonable financial provision is defined in s1(2)(b) of the 1975 Act as "such financial provision in all the circumstances of the case for the applicant to receive for his maintenance".

The Daughter had entered into a CFA with her solicitors in order to fund her claim. The CFA stipulated that if the Daughter's claim failed, her solicitors and counsel would be not be

entitled to any fees. However, if her claim succeeded, she would be liable to pay their fees as well as an uplift of 72% (the **"Success Fee"**).

The High Court concluded that the Deceased's will did not make reasonable financial provision for the Daughter and awarded the Daughter a sum of £138,918. As the Daughter's claim was successful, she was liable to pay the Success Fee to her solicitors. Because the High Court was precluded by the 1990 Act from including any provision for the Success Fee in any costs order, the judge included a contribution of £16,750 towards the Success Fee as part of the substantive award of £138,918 made under the 1975 Act. He held that, as the Daughter had no choice but to pay the Success Fee to her solicitors, it formed part of her "financial needs" to which the court must have regard in determining the order it should make under the 1975 Act.

The Widow appealed to the Court of Appeal on grounds which included that the court had no power to make provision for the Success Fee in a substantive award under the 1975 Act. The Court of appeal dismissed the appeal and the Widow now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal and excludes from the order made in favour of the Daughter under the 1975 Act any sum for the Success Fee. The Supreme Court finds that in determining the appropriate relief to be awarded in a 1975 Act claim, a judge cannot include directly or indirectly any allowance for a success fee. The reasons for the decision are given in a judgment by Lord Richards, with whom the other Justices agree.

Reasons for the Judgment

Lord Richards begins by dealing with whether the meaning of "maintenance" in s1(2)(b) of the 1975 Act is wide enough to include a sum to meet a liability for litigation costs. The Appellant argued that "maintenance" is restricted to everyday living expenses and could not therefore include litigation costs. Lord Richards rejects this submission, noting that it is well-established that payments to fund legal costs may constitute "maintenance" in proceedings under the Matrimonial Causes Act 1973 (the **"MCA"**) and finding that there are no grounds for excluding the payment of legal costs from the meaning of "maintenance" under s1(2)(b) of the 1975 Act **[23]-[26]**.

Lord Richards provides a background to the rules and principles governing the recovery of costs in civil proceedings. The general rule, established by a consistent line of decided cases over a long period, is that the liability of one party to pay some or all of the costs incurred in the proceedings by another party is treated as a separate matter from the substantive relief sought in the proceedings. In other words, litigation costs can only be recovered by way of a separate costs order, not as part of a substantive award. This basic rule will apply unless a claimant can rely on a separate cause of action against the same respondent to recover costs **[27]-[41]**.

This appeal concerns the recoverability of success fees under CFAs. CFAs have been allowed in all proceedings, other than criminal and family, since 30 July 1998 **[43]** but the approach towards recovery of success fees has varied since then. In 2010, Sir Rupert Jackson published a report identifying CFAs as "the major contributor to disproportionate costs in civil litigation" and recommending that, on public policy grounds, success fees cease to be recoverable. This led to the prohibition on the recovery of success fees by the addition of s58A(6) to the 1990 Act. **[45]-[51]**.

Lord Richards considers the recovery of base costs in proceedings under the 1975 Act. Such proceedings are subject to the costs regime contained in the Civil Procedure Rules (the

"CPR"). The recovery of base costs is dealt with under the CPR by way of an order for costs. It would undermine the costs regime and produce an incoherent result if a party could recover base costs as part of the substantive award **[55]-[60]**.

Lord Richards proceeds to discuss the recovery of success fees in proceedings under the 1975 Act. The logical position, which serves to give effect both to the general principle as to the treatment of costs and to the policy underpinning s58A(6) of the 1990 Act, is to say that success fees are not recoverable as part of a substantive award in any civil proceedings, including those under the 1975 Act **[61-66]**.

This position is supported by a consideration of Part 36 of the CPR. Part 36 is designed to encourage parties to make settlement offers and is based on the proposition that the parties' costs are to be dealt with only through the operation of the costs regime. The provisions of Part 36 are virtually unworkable in accordance with their purpose of achieving settlements if success fees are recoverable as part of the substantive award **[67]-[74]**.

Counsel for the Daughter argued that the prohibition in s58A(6) of the 1990 Act only applies if provision for payment of a success fee is made in "a costs order", leaving it open for such provision to be made as part of the substantive award **[77]-[78]**. The Supreme Court finds that this submission fails for several reasons, including the fact that the order made by the judge in this case was a "costs order", to the extent that it made provision for payment of part of the Daughter's success fee **[80]**.

In its judgment, the Court of Appeal drew an analogy with awards in financial remedy proceedings under the MCA, where a party can recover its legal costs as part of the substantive award, notwithstanding a general rule in such proceedings that the court will not make an order requiring one party to pay the costs of another party. This general rule is known as the 'no order principle' **[86]**.

The Supreme Court does not accept that a valid parallel can be drawn between proceedings under the 1975 Act and financial remedy proceedings under the MCA. The costs regime in civil proceedings governed by the CPR is substantially different from that applicable to financial remedy proceedings.**[93]**. The analogy is also inapplicable as success fees are prohibited in family proceedings **[94]**.

In oral submissions, counsel for the Daughter also made a submission by reference to Schedule 1 of the Children Act 1989. For the avoidance of doubt, the Supreme Court considers this is also a flawed analogy **[95]-[99]**.

References in square brackets are to paragraphs in the judgment.