Battle of will

Andrew Hogan examines the broader impact of a ruling on Inheritance Act success fees

At the tail end of the last legal term, the Supreme Court handed down judgment in the case of *Hirachand v Hirachand and Another* [2024] UKSC 43, a decision that should be of interest to an audience far larger than those lawyers who practise in the field of claims under the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 act').

This case addressed whether a success fee under a conditional fee agreement (CFA) could form part of a substantive judgment award under the act made in favour of a claimant, given the prohibition on the recovery of success fees between the parties implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which amended section 58A(6) of the Courts and Legal Services Act 1990.

The decision has broader implications for the costs regime under the Civil Procedure Rules (CPR), clarifying that costs – including success fees – must remain distinct from substantive awards. In this article I shall consider the context and background of the case, the Supreme Court's judgment, and its broader significance for civil litigation.

BACKGROUND

The case arose from the will of Navinchandra Dayalal Hirachand, who passed away in 2016, leaving an estate valued at approximately £554,000. His entire estate was left to his widow, excluding his daughter and son from any inheritance. The daughter, who suffered from severe health issues and had no means to support herself, brought a claim under the 1975 act, seeking reasonable financial provision.

The act provides a mechanism for individuals who have been inadequately provided for under a will or the intestacy rules to apply for financial provision. Section 1(2) defines 'reasonable financial provision' as that which is 'reasonable in all the circumstances of the case for the applicant to receive for his maintenance'. Courts must weigh a range of factors, including the applicant's needs, the estate's size, and any competing claims by other beneficiaries.

The daughter's claim was brought by a CFA, which included a 72% success fee payable upon a favourable outcome. At first instance, Cohen J in the High Court awarded her £138,918, which included £16,750 towards her success fee.

While the estate was small, the judge found that the daughter's severe financial and health needs justified the award. However, the widow, as the estate's sole beneficiary, appealed the inclusion of the success fee. The reason a success fee was included in the substantive award was because the court applied principles familiar in family law, where parties' legal costs can form part of an award of maintenance, and the court drew a broad analogy with family proceedings.

Section 58A(6) states that 'a costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement'. The daughter's argument was that this prohibition applied only to costs orders, not to substantive awards made under a distinct statutory regime such as the 1975 act. Perhaps surprisingly, the Court of Appeal agreed, and upheld the judge: or perhaps not, as the substantive judgment of the Court of Appeal and the decision at first instance were both given by very experienced family law judges. But matters took a different turn in the Supreme Court.

SUPREME COURT

The Supreme Court unanimously allowed the widow's appeal, excluding the success fee from the award. Lord Richards delivered the judgment, which emphasised both statutory interpretation and policy considerations.

The court's primary reasoning focused on the plain meaning and purpose of section 58A(6). Lord Richards interpreted 'a costs order' broadly, finding that it encompassed any order that effectively required one party to pay another's success fees, regardless of whether it was framed as a costs order or substantive relief. Any other interpretation would allow parties to circumvent the clear legislative intent behind section 58A(6), undermining the integrity of the costs regime: before 1 April 2013, success fees would have been recoverable in 1975 act claims, but of course as part of the award of *inter partes* costs. In a sense it would be surprising if success fees having been kicked out of the front door, they could be allowed to climb back in through the window.

This broad interpretation of section 58A(6) was grounded in its legislative history. The provision was introduced following Sir Rupert Jackson's Review of Civil Litigation Costs, which concluded that the recoverability of success fees imposed excessive costs on losing parties and distorted access to justice. Parliament's intent was to make success fees a private matter between claimants and their lawyers, ensuring

they were not transferred to other parties.

The daughter's lawyers argued that inheritance cases are similar to financial remedy cases under family law. In family cases, courts can consider a party's legal costs when making financial awards. The Supreme Court rejected this argument. It explained that family law has a different approach to costs. In family cases, there is a 'no order principle' for costs. This means each party usually pays their own costs. In contrast, inheritance cases follow the Civil Procedure Rules. These rules treat costs separately from damages or financial awards.

The court stressed that allowing success fees to be included in substantive awards would create an incoherent costs regime. Costs and substantive relief are treated as distinct matters under the CPR, and this separation has been regarded as critical to ensuring predictability, fairness, and consistency in litigation. Allowing success fees to form part of substantive awards would blur this distinction, leading to unpredictable outcomes and undermining settlement negotiations. If success fees could be recovered as part of the substantive award, in this context, there would be no principled reason they could not be recovered in other contexts such as contractual disputes, or personal injury claims.

Lord Richards also highlighted the practical difficulties that would arise if success fees were recoverable as substantive relief. For instance, the inclusion of success fees in an award would complicate the operation of Part 36 offers under the CPR, which are designed to encourage settlements. A claimant's liability for a success fee is contingent on the outcome of the case and the agreed terms of the CFA. This uncertainty would make it difficult for parties to assess the value of settlement offers and could distort negotiations.

IMPLICATIONS

The Supreme Court's decision restores orthodoxy in the costs of 1975 act claims, as the first instance decision was conceptually flawed, and it was surprising that the first instance decision was upheld by the Court of Appeal. It clarifies that success fees, even if arising from the claimant's financial needs, cannot be recovered as part of an award.

The judgment will however have implications for other types of claims where the distinction between costs and substantive relief is likely to prove controversial: in motor fraud cases for example, insurers often seek to recover investigative costs as damages in fraud cases under the tort of deceit. The *Hirachand* decision might be used to argue that such costs cannot be included in substantive awards of damages for the tort of deceit.

Further in professional negligence claims, clients sometimes seek to recover legal costs of rectifying the professional's error as damages. The Supreme Court's emphasis on maintaining the integrity of the costs regime could arguably have an effect on limiting such claims, ensuring that only direct losses are recoverable as damages.

The decision could influence how courts treat litigation funding agreements in cases involving complex funding arrangements. Success fees or other funding-related costs are likely to remain irrecoverable from defendants, preserving the principle that these costs are a matter of private contract between the claimant and their funders. In this respect the decision in *Essar Oilfields Services Limited v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) that the cost of litigation funding can be recovered in arbitration proceedings (and potentially ATE insurance and success fees) might be thought to be increasingly out of step with the policy considerations enunciated by the Supreme Court.

The court has preserved the integrity of the CPR costs regime

CONCLUSIONS

The Supreme Court's decision in *Hirachand v Hirachand* represents a welcome clarification of some basic principles governing awards of costs, and to what extent they overlap with substantive awards under the 1975 act. By excluding success fees from substantive awards, the court has preserved the integrity of the CPR costs regime and upheld the policy objectives behind section 58A(6) of the 1990 Act. While the judgment provides clarity and consistency, it also highlights challenges for claimants relying on CFAs, raising broader questions about access to justice in civil litigation.

This ruling is likely to influence not only inheritance disputes but also other areas of law where the boundaries between costs and substantive relief are contested. It serves as a reminder of the critical role that costs rules play in ensuring fairness, predictability, and efficiency in the civil justice system.

But the judgment also raises broader questions about access to justice. CFAs are an essential means of funding for many claimants who simply cannot afford to pay lawyers privately, out of their own resources for legal advice and representation. The role of CFAs in a post legal aid world is to enable people without resources to bring claims they otherwise could not afford.

Excluding success fees from awards may discourage some claimants from pursuing their rights, or more realistically affect whether lawyers are prepared to take on claims – especially if the risks of a particular case are high. This could have a disproportionate effect on vulnerable individuals, such as those bringing 1975 act claims.

The case also comes at a very apposite time when the recent Civil Justice Council consultation on litigation funding is looking at broad issues in relation to litigation funding in England and Wales; but not the elephant-in-the-room, the issue of whether the cost of litigation funding should be recoverable as an inter partes cost. In this sense, the decision in *Hirachand* reflects the orthodoxy that additional liabilities, which are in one way or another, species of funding costs, should not be recoverable as a result of policy decisions implemented in 2013. However, there is still a debate to be had as to whether this switch away from a 'polluter pays' approach is the best or fairest way to allocate the funding costs of litigation, which in the end have to be borne by one of the parties to a dispute.

For now, however, a window that was briefly opened to permit the recovery of additional liabilities has been very firmly closed.

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