

Costs and CFAs in 1975 Act claims

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serle court



Themes

1. How are costs dealt with in 1975 Act claims?
2. Funding options for impecunious claimants
3. Pending: the success fee debate



Costs in 1975 Act claims

- Briggs J in *Lilleyman* (2013): the court is not able at the point of giving judgment to quantify or even guess at the likely incidence of the contingent liability of the costs of the proceedings as between a claimant and the estate
- However, the court in such claims is necessarily required to include within its assessment under s.3(1)(a) and s.3(5) any known liability for legal fees at the date of trial, and will often have before it evidence of the totality of the costs incurred as part of a claimant's evidence (e.g. *Baynes v Hedger*, 2008)
- Standard practice: omit costs from award, but
 - *Jassal v Shah*, 2021
 - *Re Bala*, 2023



The challenges of funding a 1975 Act claim

- Double whammy in April 2013
 - Legal aid no longer available for 1975 Act claimants
 - CFA success fees/insurance premiums no longer recoverable by costs order
- Options for claimant?
 - Interim distribution from estate? (unlikely even if already a beneficiary)
 - Loan
 - Application for interim relief under s.5 of the 1975 Act – can be for legal costs, but:
 - Pointless unless there is liquidity in the estate plus obvious merit in the claim
 - Claim must have been issued
 - Unlikely to succeed if there are other funding options (circling back to CFAs and success fees)



The success fee debate in *Hirachand*

- Hearing in SC on 18 Jan 2024 – judgment awaited
- s.58A(6) Courts and Legal Services Act 1990 (as from 1 April 2013 following Jackson reforms):

“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 appellant:
 - A CFA success fee = costs
 - A costs order = any order which includes provision for costs
 - Therefore a 1975 Act award which includes a sum for a CFA success fee is a costs order
 - And policy issues



Understanding the Jackson reforms

- Package (took with one hand, gave with the other)
- Jackson Final Report urged '*vital necessity*' of no further cutbacks in legal aid [but there were]
- The reforms themselves proposed relief be granted which was referable to a success fee, namely that general damages be increased by 10% so as to enable a claimant to discharge a success fee, plus enhanced reward for beating a claimant's Part 36 offer



Implementation: *Simmons v Castle*, 2012

- Issue: should the 10% increase in general damages apply?
- The Lord Chief Justice, the Master of the Rolls, and the Vice-President of the Court of Appeal
- Submissions from the Association of British Insurers, the PI Bar Association, and the Association of PI lawyers
- Decision: 10% increase to be applied to all non-pecuniary damages, unless the claimant has a pre-1 April 2013 CFA
- Followed in *Summers v Bundy*, 2016
 - A case in which Jackson LJ gave permission to appeal, saying that the appeal was 'bound to succeed' and that the appellant did not need to appear at, or make submissions for, the hearing of the appeal



The success fee debate in *Hirachand*

- The respondent:
 - An award under the 1975 Act is not a 'costs order', but is calculated so as to enable a claimant (in maintenance-based claims) to discharge the costs of daily living/education/training
 - even if a lump sum is calculated so as to include a figure to enable claimant to discharge a debt referable to costs/success fee
 - Consider non-monetary forms of relief under the 1975 Act
 - Consider the word 'payment' in s.58A
 - Statutory interpretation points
 - Historical resistance of courts to embellish/restrict 1975 Act wording



Policy and reality

- Access to justice
- Cf. costs in Family proceedings and the importance of consistency of approach
- Part 36 offers
- The role of success fees in ADR

**Any
questions?**

