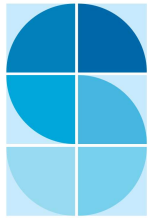
Hirachand v Hirachand

(previously ***Re H***)

Court of Appeal, 15 October 2021

Constance McDonnell QC



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The issues

- Appeal from decision of Cohen J (Fam Div), 7 May 2020
- 2 (out of 7) grounds of appeal permitted:

(1) Whether J had been wrong to proceed with a remote hearing, knowing that D1 could not hear what was going on and had only limited assistance from careworker, in circumstances where D1 had been debarred from participating in the hearing

(2) Whether award under 1975 Act could include a lump sum to enable C to discharge all/part of a success fee payable under a CFA

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Facts

- C is daughter of D1 and deceased
- C '*cut herself off*' from family 10-20 years ago, no financial support from them except short period 2007-2011
- C had psychiatric illness and unable to work, but should be able to return to work in 3 years with c.£20,000 therapy
- C is '*in a position of real need*', living on benefits with two children (7 & 10)
- D1 living in care home for last few years, and unable to live in the jointly-owned matrimonial home for the rest of her life
- Estate = £554,000 (including jointly owned assets re s.9)

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The trial

- **Award** = £138,918 (if necessary, to be implemented using s.9), to cover 3 years' income shortfall during therapy, plus costs of therapy
  - It was appropriate to consider C's liability for success fee as part of 'needs' as if allowance not made, C would be unable to meet one or more of her primary needs. She had no other means of funding costs
  - 72% success fee, but J only awarded £16,750 equivalent to 25%
  - J considered *Re Clarke* and *Bullock v Denton* (neither binding)
- D1 wrote letter to J shortly before trial, which he took into account
- No evidence as to D1's financial position, but her son (Executor) gave some information to court

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The appeal

- D1's appeal heard in person on 29 June 2021 by King LJ, Singh LJ and Sir Patrick Elias
- Result: **appeal dismissed** unanimously by all three LLJs
- Lead judgment given by King LJ
- No application [yet] for permission to appeal to the Supreme Court

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Ground 1: equal treatment

- D1 debarred from participating or giving evidence pursuant to CPR 8.4 and 8.6, and no application for relief from sanctions (even when represented by solicitors and counsel)
- ***Issue***: does a party who is debarred from participating in a hearing nonetheless have the right to reasonable adjustments being made so that they can 'meaningfully attend'?
  - if so, is the nature/extent of such adjustments different for such a party from what would have been required for a party entitled to participate?
  - is a party debarred from participating in a hearing nonetheless entitled to participate in arguments about costs? Or are costs part of 'the hearing'?
  - does disabled party need to have taken steps themselves to inform court of what adjustments are required?

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Ground 1: points made in argument

- Equal Treatment Bench Book
- New: CPR Part 1A 'Participation of Vulnerable Parties or Witnesses'
  - encouragement to identify vulnerabilities at earliest possible stage so that Court can order appropriate provisions to be made to further overriding objective
- Costs are part of the 'claim': *Michael v Phillips*, 2017
  - CA did not express a view on this because no appeal from costs order
- What could D1 have done?
  - suggest she could have asked Executor to defend claim substantively rather than be neutral, with appropriate indemnity re his costs

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Ground 1 result: no merit in appeal

- Appellant in no worse a position than thousands of other litigants in 2020 who had to conduct trials remotely
- '*Debarring orders should mean what they say*' (approving of statement in *Times Travel*)
  - '*a litigant who is debarred as a consequence of their 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 over the years to ensure that a participating party can put their case effectively*'
- Court under no obligation proactively to manage the attendance of a debarred party

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Ground 2: CFA success fee

- Tension between irrecoverability of CFA success fees as part of costs, and reality that a claimant's liability for success fee will impact upon their financial needs
- Respondent's arguments:
  - no circumvention of the CLSA 1990 because award was not 'costs order'
  - starting point has to be the unrestricted wording of the Act, and the Court has always been reluctant to imply words into the Act which are not there
  - s.5 applications for interim relief are another example of the Court being prepared to give relief to fund legal representation (but not always possible, as where estate is illiquid as in *Clarke*)
  - [Sir Patrick Elias – why don't claimants include all of their legal costs as part of their financial needs? Cf. Andrew Francis' book on 1975 Act claims]
  - Court will always be able to consider reasonableness of success fee, in the same way it scrutinises other financial needs/liabilities of a claimant

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Ground 2: appeal dismissed

- Well established that payment of debts can form legitimate part of payment for 'maintenance'
- Term 'financial needs' in s.3(1)(a) is unqualified and unlimited
- Cf. s.25(2)(b) MCA 1973 which requires the Court to have regard to each spouse's 'financial needs, obligations and responsibilities'
  - King LJ cited her own recent decision in *Azarmi-Movafagh v Bassiri-Dezfouli* [2021] EWCA Civ 1184 re proper approach to costs in needs cases, stating that the CA had held that it was in the discretion of the judge to include an additional sum referable to costs in such provision, even where parties had behaved unreasonably
  - in a financial remedy case, irrecoverable costs could be a debt, repayment of which was a 'financial need' pursuant to s.25(2)(b)
- A CFA success fee is equally capable of being a debt, satisfaction of which is a 'financial need' pursuant to s.3(1)(a)

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Ground 2: appeal dismissed

- BUT not always appropriate to award sum for success fee
  - such an award unlikely unless judge is satisfied that the only way in which C had been able to litigate had been by entering into a CFA [Evidence!]
  - consideration will no doubt be given of the extent to which C has 'succeeded'
  - order will only be made to the extent necessary in order to ensure reasonable provision is made
  - it does not mean that there can be no impact whatsoever on C's standard of living (*Bazziri-Dezfouli*)

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Ground 2: appeal dismissed

- King LJ noted the potential for a situation where C is awarded a contribution towards success fee but ends up having to pay D's costs, e.g. because of having failed to beat a Part 36 offer
  - but under many CFAs C would be required to accept reasonable offer or risk lawyers withdrawing, or success fee may not be payable if lawyers get advice wrong as to whether an offer is reasonable
- Judge's '*cautious approach*' to avoid potential injustice to either party '*cannot be faulted*'
- This case highlights
  - the '*imperative*' of '*full engagement*' in the CPR Part 36 process
  - The importance of parties making '*realistic*' offers to settle

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Comment: Impact on ADR

- CFA-funded litigant on either side may have slight advantage if success fee is part of their 'needs'
- But beneficiaries funded from estate also have advantage against impecunious claimant
- CFA terms usually entitle lawyers to cease acting if client refuses a reasonable settlement offer
- Success fee is usually a very small part of overall figures, and is up for negotiation just as much as costs are
- Most bad claims should not have lawyers acting on a CFA (and if they did, could have early neutral evaluation)

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Comment: Where are we left?

- Briggs J's '*real sense of unease*' re general impact of costs orders (*Lilleyman*) can only be remedied by Parliament
- Always open to defendants to challenge quantum of success fee
- A greater focus on s.5 applications where merits suffice?
  - resisting a s.5 application for interim relief might result in more expense to estate if Claimant recovers costs + success fee (as noted in *Weisz*)
- Effect of any failure to inform defendants promptly about CFA?
- Does Claimant need to disclose % uplift, or indeed entire CFA?
- Impact on DBAs and/or ATE insurance premiums?
- Any success fee awarded is likely to be modest (as awards in *Bullock* and *Re H* were)