Neutral Citation Number: [2021] EWCA Civ 1498

Case No: B6/2020/1086

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mr Justice Cohen
FD17F00103

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2021

Before:

LADY JUSTICE KING
LORD JUSTICE SINGH
and
SIR PATRICK ELIAS

- -

Between:

NALINI HIRACHAND	**Appellant/ First Defendant**
- and -	
(1) SHEILA HIRACHAND	**First Respondent/ Claimant**
(2) KATAN HIRACHAND	**Second Respondent/ Second Defendant**

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- -

Brie Stevens-Hoare QC and Oliver Ingham (instructed by **Mills & Reeve LLP**) for the **Appellant (appearing *pro bono*)**
Constance McDonnell QC and Sophia Rogers (instructed by **Moore Barlow LLP**) for the **Respondent**

Hearing date: 29 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 9:30am on 15 October 2021.

Lady Justice King:

1. This is an appeal against an order made by Mr Justice Cohen on 7 May 2020 in proceedings brought by Sheila Hirachand ("the Respondent") for provision from the estate of Navinchandra Hirachand ("the Deceased") under the Inheritance (Provision for Family and Dependants) Act 1975 ("the Inheritance Act"). The Respondent is the estranged adult daughter of the Deceased and of Nalini Hirachand ("the Appellant") who was the sole beneficiary of the estate of the Deceased.

2. The judge, having been satisfied that the disposition of the estate effected by the Deceased's will failed to make reasonable financial provision for the maintenance of the Respondent, made an order that the personal representative should pay to her out of the estate, the sum of £138,918.

3. Two issues arise on appeal:

    i) By an un-appealed order of 29 November 2019, it was declared that the Appellant had pursuant to CPR rule 8.4 been debarred from taking part in the hearing. By the same rule she was however permitted to 'attend'. The issue is whether the judge erred in proceeding with the trial in circumstances where the Appellant, who is deaf, attended the hearing conducted remotely on Skype from the care home in which she lives assisted throughout by a care worker.

    ii) In determining the lump sum award payable to the Respondent, the judge included the sum of £16,750 as a contribution towards the Respondent's liability to pay a Conditional Fee Agreement ("CFA") success fee. The issue is whether it is wrong in law for a judge to include such a contribution in an maintenance-based award calculated by reference to the financial needs of a claimant.

Background

4. In 2016 the Deceased died in a house fire. The Appellant, who is in her 80s, is frail and profoundly deaf. She is in deteriorating health and has cancer. Following the death of the Deceased, the Appellant moved to live in a care home where she will remain for the rest of her life. She being no longer able to live independently. The Deceased left the totality of his modest estate to the Appellant, 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 Inheritance Act for such financial provision as it would, in all the circumstances of the case, be reasonable for her to receive for her maintenance.

5. Apart from a short period of time when she was in her early twenties, the Respondent lived at home until 1999 when aged 30, she left to do a post-graduate diploma at university. The only financial assistance given to the Respondent thereafter was between 2007 and 2011 when she undertook an MA programme in Sheffield, during which time her father gave her an allowance of £400 a month. Although there is some dispute as to the precise chronology, there was a substantial breach at the instigation of the Respondent between herself and her parents for many years and total estrangement from 2011 at the latest. The judge recorded that it is a great sadness to the Appellant that she does not see her daughter or grandchildren.

6. In around 2000 the Respondent met her partner. They have been together ever since and have two children. The Respondent has longstanding mental health problems which have become steadily worse over the years and she has not been in employment since the birth of her first child in 2011.

The Proceedings

7. Whilst the Appellant is frail and deaf, she has capacity to litigate. For a substantial period of time she had the benefit of competent legal representation. 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 an acknowledgement of service in response to the claim.

8. CPR r.8.4 to 8.6 provide as follows:

> "Consequence of not filing an acknowledgment of service
>
> **8.4**
>
> (1) This rule applies where –
>
> (a) the defendant has failed to file an acknowledgment of service; and
>
> (b) the time period for doing so has expired.
>
> *(2) The defendant may attend the hearing of the claim but may not take part in the hearing unless the court gives permission.*
>
> Filing and serving written evidence
>
> **8.5**
>
> (1) The claimant must file any written evidence on which he intends to rely when he files his claim form.
>
> (2) The claimant's evidence must be served on the defendant with the claim form.
>
> *(3) A defendant who wishes to rely on written evidence must file it when he files his acknowledgment of service.*
>
> (4) If he does so, he must also, at the same time, serve a copy of his evidence on the other parties.
>
> (5) ……
>
> (6) …..
>
> (7) …….
>
> Evidence – general

> **8.6**
>
> (1) No written evidence may be relied on at the hearing of the claim unless –
>
> (a) it has been served in accordance with rule 8.5; or
>
> (b) the court gives permission.
>
> (*My emphasis)*

9. In summary therefore, absent permission having been granted by the court, a defendant who fails to file an acknowledgment of service and simultaneously to file their written evidence may attend the subsequent hearing but cannot take part in the proceedings and may not rely on any written evidence.

10. The Appellant, having declined to file an acknowledgement of service, first became subject to the sanctions imposed by CPR 8.4(2) on 29 March 2018. At a hearing on 18 June 2019 the Appellant was granted relief from sanctions by consent and a new deadline of 22 July 2019 was agreed. That deadline also passed without an acknowledgement of service or evidence being filed. The court was told that at some stage later an acknowledgement was sent, out of time, without evidence and without an application for relief from sanctions.

11. The solicitors representing the Appellant thereafter wrote to her on a number of occasions seeking instructions. Having received no response, in letters sent to her from September 2019 onwards they warned her that absent instructions they would ask the court to remove them from the record. On 21 November 2019 the matter came before Lieven J for directions. Before the court was an application by the Appellant's solicitors to come off the record.

12. Lieven J made the following declaration:

> "It is Declared that the First Defendant is automatically debarred from participating in the hearing of the claim pursuant to CPR rule 8.4 and from relying on any written evidence at the hearing of the claim pursuant to CPR rule 8.6."

13. Lieven J made a further order recording that the Appellant's solicitors were no longer acting for her but requiring them to write to the Appellant to explain the position and also to write to the manager of the care home where the Appellant was living with a request that he or she should speak to her and explain that, as a result of her failure to file an acknowledgement of service as directed by the court, she would be unable to participate in the hearing although she would be able to attend. The Appellant's solicitors subsequently confirmed that they had complied with the order and that they had explained the position to the Appellant and to the care home.

14. The Appellant was no doubt deeply distressed at the turn of events in her life occasioned by the death of her husband in such traumatic circumstances, only to be followed by these proceedings which she described in the letter she wrote to the judge saying 'she [the Respondent] never come home to see us, when her father gone she comes to me via solicitor. It hurts very much'. The Appellant had, however, the benefit of competent

solicitors who had obtained relief from sanctions by consent in June 2019, and she had been told in clear and unequivocal terms that if she failed to comply with the court's order to file an acknowledgement of service and evidence, she would not be able to take part in the proceedings.

15. Following the making of Lieven J's order and the Appellant's solicitors coming off the record, the Respondent's solicitors were assiduous in keeping the Appellant informed and serving her with documents and disclosure. The Appellant made no application for permission to take part in the proceedings or to file evidence. Rather, it was the Respondent's solicitors who discussed the preparations for the trial directly with the care home manager and assisted with arrangements to enable the Appellant to attend the hearing by SKYPE. Although not required by the case management order, a trial bundle was served.

16. On 23 April 2020 the Appellant filed a six-page letter (referred to at [14] above) in opposition to the claim. The judge read the letter and took its contents into account notwithstanding that the Appellant was not entitled to file evidence.

17. At the start of the hearing which, in common with almost all trials at the time, was conducted wholly remotely, the judge spoke directly to the care home worker who was assisting the Appellant. He checked that she would remain with the Appellant throughout and would write down any questions she might have during the hearing.

18. The judge recorded the position of the Appellant at trial as follows:

> "4. C's [the Respondent's] mother was previously represented in the proceedings but was declared to be automatically debarred from participating in the hearing as a result of multiple breaches of orders to file acknowledgement of service and evidence. Her solicitors have come off the record. The order debarred her from relying on any written evidence in response to the claim but the day before the hearing she sent a six page hand-written letter which I have read and which can only be seen as an opposition to the claim. It was accompanied by a short letter from the home manager of the care home where she resides.
>
> 5.C's mother was in attendance throughout this remote hearing. She is profoundly deaf and did not hear anything that was said but had the assistance of a worker in the home who sat with her and passed her notes so that she had at least some idea of what transpired. I did not hear from her during the hearing.
>
> 6. C's brother listened in throughout the hearing and assisted me on matters relating to the administration and size of the estate, his knowledge of his mother's finances and circumstances, and his approach as executor to the litigation."

Basis of the judge's award

19. The judge held that the assets of the Deceased and the Appellant were as follows: the matrimonial home worth £700,000 which had been owned by the Deceased and the

Appellant as joint tenants and which had therefore passed to the Appellant upon his death, joint savings of £127,000 and a further £142,000 in the name of the Deceased held in the executor's account.

20. Given the modest size of the estate, in order to achieve her ambitious claim, which included a mortgage free property of about £450,000, the Respondent had made an application for the court to exercise its power under s9 of the Inheritance Act which would allow the court to treat 'to such an extent as appears to the court to be just in all the circumstances' the Deceased's severable share of the matrimonial home as part of his net estate.

21. The judge held that should that power be exercised, the estate inclusive of the Deceased's interest in the matrimonial home would be £554,000 (£350,000 +£63,000 + £141,000).

22. The judge at [24], having assessed the Respondent's claim for a mortgage free house, therapy, capitalised maintenance and costs, noted that the claim as made would be 'unaffordable' in that it exceeded the maximum value of assets within the estate.

23. The Respondent suffers from Other Specified Dissociative Disorder and severe Obsessive-Compulsive Disorder which have a severe impact on her daily life. She is in receipt of universal benefits. Although her partner spends much of the time with her and their two children, her condition is such that he has to sleep away from the house.

24. The psychiatrist (Dr S) who provided a report to the court was of the view that the Respondent would require weekly psychotherapy for up to three years in order for her to achieve sustained improvement. Whilst she said the Respondent's symptoms may never completely resolve, with treatment they may become manageable and allow her to work.

25. The judge concluded [65] that the 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 income fund for life'. The judge therefore made an award as follows:

    i) £17,000 for therapy

    ii) £48,169 + £32,000 representing income shortfall and loss of universal credit for a period of three years

    iii) £15,000 for white goods/a replacement car

    iv) £10,000 for rental deposit

    v) £16,750 to meet the Respondent's CFA mark up,

    a total award of £138,918.

CFA mark up

26. By section 58A(6) Courts and Legal Services Act 1990 ('CLSA 1990') a costs order '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'. It follows that the Respondent could not recoup the success fee by way of a costs order.

27. 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. It was submitted on behalf of the Respondent that the totality of the £48,175 should fall on the estate as part of the award. This was because it was as a result of the CFA which the Respondent had to enter into in order to fund the litigation that she had incurred the liability; a liability which her solicitors could enforce and which, if the uplift were not to be included in the award, would lead to her needs based award being correspondingly reduced.

28. The question for this court is therefore whether, notwithstanding s58A CLSA 1990, a judge can, in the exercise of his discretion, include as part of the overall award a sum by reference to the success fee where the award is a needs-based award.

29. The judge held that he could. He set out his analysis as follows:

> "55. I accept that it is appropriate for me to consider this liability as part of C's needs. I do so for largely case specific reasons. I am not making a large award (unlike in *Re Clarke).* It is not an award that permits of much elasticity. If I do not make such an allowance one or more of C's primary needs will not be met. The liability cannot be recovered as part of any costs award from other parties. The liability is that of C alone. She had no other means of funding the litigation."

The Appeal

30. The two grounds of appeal in respect of which permission was granted are:

> "Ground One: the Court erred in proceeding with a trial by video-link, when by reason of the First Defendant's disability (profound deafness) and residence in a care home (closed to outside visitors due to the Covid-19 Crisis), the First Defendant was effectively denied access to the trial of a claim where her home and a substantial portion of her capital assets was at risk".
>
> "Ground Two: the Court erred in law when it made an order for financial provision in favour of the Claimant which included a sum of £16,750 as a contribution towards the Claimant's liability to pay a CFA uplift. The exercise of discretion under section 9 of the Act to facilitate this aspect of the award was also therefore unlawful".

31. Permission to appeal was refused in relation to a further five proposed grounds of appeal which related to the judge's finding that the Respondent was entitled to an award, the amount of the award and its computation. There was no appeal against the

judge's order for the Appellant to pay costs summarily assessed at £80,000. It follows therefore that the two outstanding grounds of appeal need to be considered against the following backdrop:

i) The Appellant has capacity to litigate. Notwithstanding that she had legal advice, she failed to comply with CPR 8.4 and 8.6. No application was made for permission to participate in the hearing or to file evidence, although the judge in the exercise of his discretion read the lengthy letter filed by the Appellant shortly before trial.

ii) The trial was conducted by Skype. It follows that all parties attended remotely.

iii) The claimant had a legitimate claim. The outcome (save potentially as to the sum of £16,750, the subject of Ground 2) is not susceptible to appeal.

iv) The award was a strictly needs-based award, assessed at a significantly lower figure than that which had been sought.

Ground One: Was there procedural irregularity?

32. It is submitted on behalf of the Appellant that the judge should have adjourned the hearing to some future date when there could be an 'in court' hearing and the Appellant could be provided with some support additional to that which the member of staff at the care home had been able to provide for her.

33. Although the Appellant had been debarred from participating, Ms Stevens-Hoare QC on behalf of the Appellant submits that she was still entitled to attend and that her attendance must be 'meaningful'. In any event, Ms Stevens-Hoare says the Appellant should have been invited to participate to the limited extent of making submissions in respect of the order for costs made against her by the judge at the conclusion of the hearing. She says that, at the very least, there should be a retrial of the issues as to costs and the CFA.

34. Ms McDonnell QC on behalf of the Respondent submits that the situation where a person has disqualified herself from the right to participate in the proceedings is wholly different from the duty to ensure effective participation by litigants who have engaged in the proceedings. Ms McDonnell refers to various provisions such as CPR PD 1A – Participation of Vulnerable Parties and the approach set out in the Equal Treatment Bench Book. Both the Respondent's solicitors and the judge were conscious of the situation in which the Appellant had placed herself and the Respondent's solicitors were punctilious in ensuring that disclosure, witness statements and the trial bundle were served on the Appellant.

35. Further, the firm liaised with the care home manager in the lead up to the trial in order to ensure that the Appellant was aware of the dates of the trial and was able to attend remotely. Careful arrangements were made by the solicitors directly with the court to arrange for a Skype invitation to be sent so that the Appellant could attend the hearing notwithstanding that she was not entitled to participate in the hearing and had made no independent request or approached the court either herself or through the care home in order to make arrangements to enable her to attend the hearing.

36. It is common ground that at the start of the trial the judge spoke directly to the care worker to ensure that she was available to remain with the Appellant throughout the day to assist her and to write down any questions that she might have.

37. Deputy High Court Judge Edwin Johnson QC sitting in the Business and Property Court in *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWHC 3732 (Ch) *("Times Travel")* had to consider what part a defendant could play in proceedings from which it had been debarred. At [55] the deputy judge summarised the proper approach, emphasising that the overriding principle is that debarring orders should 'mean what they say' and that parties should not be allowed to 'escape from the consequences of a debarring order when the trial of the relevant proceedings takes place', the deputy judge suggested that a defendant should be able to address the court as to the form of the order and said, without deciding it, that it struck him that the debarred defendant ought to be able to address the court on the question of costs.

38. Dealing with that last point, so far as addressing the court in relation to costs is concerned, that is not a matter before this court. The judge made a separate decision in respect of costs and whilst the Appellant objects to its terms, that part of the order is not the subject of this appeal.

39. Ms Stevens-Hoare QC drew the attention of the court to *In re C (A Child) (Care Proceedings: Deaf Parent) Practice Note* [2014] EWCA Civ 128 ("*In re C*"), a case in which McFarlane LJ (as he then was) gave detailed guidance as to the management of cases where a parent in care proceedings was profoundly deaf. He discussed the type of sophisticated special measures [18] – [27] which should be implemented in relation to deaf parents in care proceedings. The emphasis in that case was upon those unfortunate individuals who (usually) have been profoundly deaf from birth and whose method of communication is by way of one of the forms of sign language which are commonly used in this country. Further, the guidance relates to the full participation of a parent at every stage of the proceedings including the conduct of parenting assessments in preparation for trial. The present situation is very different. Not only is the Appellant not entitled to take part in the proceedings, but as she does not use sign language she has to rely on a person who will use notes to help her to follow court proceedings regardless of whether that person is a support worker from the care home or from the PSU or appointed by the court.

Discussion: Ground One

40. In my judgment there is no merit in that part of the ground which complains that the Appellant attended by video link. In that respect, the Appellant was in no worse a position than thousands of other people who, unlike the Appellant, were entitled to participate in their litigation and had to conduct their cases remotely. Those representing the Appellant were in error when they referred in their written grounds to the Appellant having been denied access to the trial of a claim 'where her home was at risk'. At the time of the trial, the Appellant's former home was on the market and there is, and was, no question of her ever being well enough to live other than in a care home.

41. The question is therefore whether in all the circumstances of the case the judge was wrong to allow the trial to proceed given that the Appellant is profoundly deaf. In my judgment he was not. I agree with DHJ Johnson that debarring orders should mean what they say and that 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. In my judgment 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, for example as suggested by DHJ Johnson in relation to the form of any order.

42. The Appellant had instructed solicitors in the past and could have again. She made no application to the court for an adjournment or for relief from sanctions. She was however proactive to the extent of writing a letter to the judge expressing her views in relation to her daughter's claim. The judge could have declined to read the letter. He did not. Similarly, the Respondent's solicitors did far more than could reasonably have been expected of them to ensure that the Appellant had access to all the relevant material and was able to attend the trial by Skype.

43. An adjournment would have meant a significant delay in proceedings which had already been going on for several years. Costs would have been incurred which could be ill afforded from this modest estate and at the end of the day it might be thought that the best which could have been achieved would have been for the Appellant to have been provided with a different person to make notes for her assistance during the trial.

Ground Two: CFA

44. The judge was referred to two cases: *Re Clarke* [2019] EWHC 1193 *(Re Clarke),* a decision of Deputy Master Linwood sitting in the Chancery Division in an Inheritance Act case where he declined to include the success fee in the award, and *Bullock v Denton* [2020] Lexis Citation 191 *(Bullock),* an unreported decision of HHJ Gosnell in which he made such provision.

45. Deputy Master Linwood in *Re Clarke,* in declining to make any provision for a success fee in his award, held that to do so would be contrary to legislative policy and would put a CFA claimant in a better position in terms of negotiation, due to the risk of a substantial costs burden, and in a better position than a claimant in a personal injuries claim.

46. In *Bullock* HHJ Gosnell approached the matter somewhat differently. He took the view [93] that the 'additional liabilities' including the success fee fall into a different category from the costs incurred by both sides. Because he, as the judge, had no knowledge of any Part 36 offers, it followed that in calculating quantum he had no way of knowing who was the successful party in Part 36 terms [93]. In contrast, he held that by making an award at all, the judge has decided that no reasonable provision has been made and he therefore knows that the Claimant is succeeding to a greater or lesser extent in the claim and that that 'success' will trigger an obligation to pay additional liabilities to the lawyers under the terms of any CFA. HHJ Gosnell went on:

> "[94] In my view, I am entitled to take them into account both because they fall within the Claimant's financial needs under section 3(1)(a) and because they are debts incurred since the death and the court is enjoined to make the assessment at the date of trial not the date of death (section 3(5)). I am sympathetic to

> the Defendant's argument that these are not costs that could in law be awarded against the Defendant, but I think that I have to look at the reality of the situation or as Briggs J put it "in the real world"……
>
> "[95] The current issue is different to the one Briggs J wrestled with. In this case I know for sure that the Claimant will have these additional liabilities to pay. In [*Lilleyman]* the Judge could not know who was paying the costs until after he had handed judgment down. This does not, however, mean that the Defendants have to indemnify the Claimant in relation to all her additional liabilities…."

47. In the present case the judge preferred the approach of HHJ Gosnell saying:

> "58. I think that it would not be fair on C for me to ignore completely her liability to her solicitors. But, I recognise that there is a risk of injustice to the estate, in particular if an appropriate Part 36 offer had been made, of which I am necessarily unaware at this stage of the proceedings. In addition, I flag up that I do not know the precise terms of the agreement and what is the definition of 'success'. If my award does not bring about the operation of the uplift, I will revisit this element of the award.
>
> 59. I cannot see how I can avoid some potential (and it is only potential) injustice to either C or the estate. All I can do is mitigate the potential by taking a cautious approach to this liability.
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> 60. Bearing that approach in mind and knowing what I do of the case, I cannot envisage how it could be reasonably be thought that the chance of failure was a high chance. I propose to allow the figure, as part of C's needs, of £16,750, which approximates to a 25% uplift."

48. The claim is for reasonable financial provision (section 1). Here the applicant is a child of the Deceased and so reasonable financial provision means such financial provision as it 'would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance' (section 1(2)(b)).

49. A succession of cases have emphasised not only that maintenance should not be defined too prescriptively for the purposes of the Inheritance Act, but also that the payment of debts may form a legitimate part of a maintenance award. Most recently, Lord Hughes discussed the concept of maintenance in *Ilott v Blue Cross and Others (No 2)* [2018] A.C. 545 *(Ilott)*:

> "14. The concept of maintenance is no doubt broad, but the distinction made by the differing paragraphs of section 1(2) shows that it cannot extend to any or every thing which it would be desirable for the claimant to have. It must import provision to

> meet the everyday expenses of living. *In re Jennings, Deceased* [1994] Ch 286 was an example of a case where no need for maintenance existed. The claimant was a married adult son living with his family in comfortable circumstances, on a good income from two businesses. The proposition that it would be reasonable provision for his maintenance to pay off his mortgage was, correctly, firmly rejected - see in particular at 298F. The summary of Browne-Wilkinson J in *In re Dennis, Deceased* [1981] 2 All ER 140 at 145-146 is helpful and has often been cited with approval:
>
> > "The applicant has to show that the will fails to make provision for his maintenance: see *In re Coventry (Deceased)* … [1980] Ch 461. In that case both Oliver J at first instance and Goff LJ in the Court of Appeal disapproved of the decision in *In re Christie (Deceased)* … [1979] Ch 168, in which the judge had treated maintenance as being equivalent to providing for the well-being or benefit of the applicant. The word 'maintenance' is not as wide as that. The court has, up until now, declined to define the exact meaning of the word 'maintenance' and I am certainly not going to depart from that approach. But in my judgment the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. *The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature.* This does not mean that the provision need be by way of income payments. The provision can be by way of a lump sum, for example, to buy a house in which the applicant can be housed, thereby relieving him pro tanto of income expenditure. *Nor am I suggesting that there may not be cases in which payment of existing debts may not be appropriate as a maintenance payment;* for example, to pay the debts of an applicant in order to enable a him to continue to carry on a profit-making business or profession may well be for his maintenance.
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> (*my emphasis)*

50. Having determined that no reasonable provision for maintenance has been made by the Deceased, the judge, in deciding whether to and in what manner to exercise his powers to make orders under section 2 of the Inheritance Act, is required inter alia by section 3(1)(a) of the Inheritance Act to "have regard to…. the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future". The term 'financial needs' is unqualified and unlimited, and given the Supreme Court's endorsement in *Ilott* that the payment of debts can form part of a maintenance award, it must undoubtedly be the case that a claimant's financial need can include the payment of a debt or debts.

51. In a financial remedy case, the rule as to costs is found in Family Procedure Rules 2010, r.28.3(5) ('FPR') which provides that save in certain specified exceptions, the general rule is that 'the court will not make an order requiring one party to pay the costs of another party'.

52. As a consequence, when a court is determining quantum in a 'needs case' under the Matrimonial Causes Act 1973, the court knows with precision the amount of costs incurred by both sides. That is not the case in a claim made under the Inheritance Act where costs follow the event and where CPR Part 36 provides in broad terms (see CPR 36.17) for the claimant to pay the costs of the defendant where he/she fails to obtain a judgment more advantageous than the defendant's Part 36 offer. The court does not know what (if any) Part 36 offers have been made until after judgment.

53. In *Lilleyman v Lilleyman* [2012] 3 WLR 754, a case in which there were no CFA contracts, Briggs J (as he then was) had to consider how to deal with the parties' contingent liabilities (contingent in the sense that the judge could not know during the trial itself who would be paying the other side's costs). Briggs J said:

> "71. The above summary of the net estate ignores the parties' agreement that the four legacies of £25,000 each should be paid to Mr Lilleyman's grandchildren (as at the date of his death) regardless of the outcome of these proceedings. It also ignores the contingent liability for the costs of these proceedings, which I am unable either to quantify or to guess as to their likely incidence, as between the estate and Mrs Lilleyman. Counsel were united in submitting that I have no alternative but to leave the contingent costs liabilities entirely out of account, however unrealistic in the real world that might prove to be".

54. Briggs J revisited the issue in his separate costs judgment *Lilleyman v Lilleyman (No 2)* [2012] 1 WLR 2801*(Lilleyman No 2)*:

> "26. I must in concluding express a real sense of unease at the remarkable disparity between the costs regimes enforced, on the one hand for Inheritance Act cases (whether in the Chancery or Family Divisions) and, on the other hand, in financial relief proceedings arising from divorce. In the latter, my understanding is that the emphasis is all on the making of open offers, and that there is limited scope for costs shifting, so that the court is enabled to make financial provision which properly takes into account the parties' costs liabilities. In sharp contrast, the modern emphasis in Inheritance Act claims, like other ordinary civil litigation, is to encourage without prejudice negotiation and to provide for very substantial costs shifting in favour of the successful party. Yet at their root, both types of proceedings (at least where the claimant is a surviving spouse under the Inheritance Act) are directed towards the same fundamental goal, albeit that the relevant considerations are different, and that

> there is the important difference that one of the spouses has died, so that his estate stands in his (or her) shoes.
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> 27. I express no view on which of those fundamentally divergent approaches to costs is better calculated to serve the ends of justice, and in particular to promote compromise. I merely observe that the potential for undisclosed negotiations to undermine a judge's attempt under the Inheritance Act to make appropriate provision for a surviving spouse is a possible disadvantage of the civil litigation costs regime currently applied to such claims, by comparison with the regime applicable to financial provision on divorce. I consider that those fundamental differences in approach to proceedings having the same underlying objective deserve careful and anxious thought."

55. A similar provision to that in section 3(1)(a) is to be found at s25(2)(b) of the Matrimonial Causes Act 1973 which requires the court to have regard to "the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the future."

56. Recently in *Azarmi-Movafagh v Bassiri-Dezfouli* [2021] EWCA Civ 1184 (*Bassiri-Dezfouli)* the Court of Appeal had to consider [3] the appropriate treatment of outstanding costs incurred by the recipient of a needs award in circumstances where the 'no order' principle which applies in financial remedy cases would otherwise have meant that the recipient would have to satisfy their outstanding bill for costs from their needs award.

57. The Court of Appeal considered the proper approach to costs in needs cases at [46] onwards. This included an analysis of those cases where first instance judges had to determine the financial needs of a party and thereafter to decide whether to include in an award a sum referable to those debts which related exclusively to the costs of the litigation. At [50] the Court of Appeal held that it was in the discretion of the judge to include such provision and noted that even where parties had behaved unreasonably, the courts had in a number of cases nevertheless ordered an additional sum referable to costs in order to ameliorate the impact on the assessed needs of the recipient.

Discussion: Ground 2

58. In a financial remedy case, outstanding costs which could not otherwise be recovered as a consequence of the 'no order principle' are capable of being a debt, the repayment of which is a 'financial need' pursuant to s25(2)(b) MCA 1973. In my judgment a success fee, which cannot be recovered by way of a costs order by virtue of section 58A(6) CLSA 1990, is equally capable of being a debt, the satisfaction of which is in whole or part a 'financial need' for which the court may in its discretion make provision in its needs based calculation.

59. Having said that I should make it clear that it will by no means always be appropriate to make such an order. It is unlikely that an award will include a sum representing part of the 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 and consideration will no doubt be given of the extent to which the claimant has 'succeeded' in his or her claim. Further, an 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 upon the standard of living that the applicant would otherwise be afforded by the maintenance award. In *Bassiri-Dezfouli* the Court of Appeal considered between paragraphs [55] – [59] a number of first instance cases where the impact of debts in the form of outstanding costs was ameliorated but not removed entirely by the inclusion of a sum representing part but not all of the outstanding debt.

60. It is submitted on behalf of the Appellant that the inclusion in the award of all or part of the debt which is represented by the success fee cannot be regarded as "provision that is to be made to meet recurring expenses, being expenses of living of an income nature" as approved by Lord Hughes in *Ilott* (see [43] above). Ms McDonnell submits that contrary to the Appellant's argument, the inclusion of the award of £16,750 towards part of the Respondent's success fee was 'directed at meeting day to day living expenses'. This, she says, is obvious from the context of the Respondent's financial circumstances as found by the judge; she has no other means to discharge her debt other than from her income which, on any view, is and will remain very modest. Moreover, Ms McDonnell submits the judge expressly held that if he did not make such an allowance 'one or more of C's primary needs will not be met'.

61. I agree with the analysis of Ms McDonnell, but in any event in my judgment, the Appellant's argument that a success fee is not a recurring expense falls at the first hurdle as when one reads on from the passage relied upon by Ms Stevens-Hoare taken from the passage *In re Dennis* incorporated into his judgment by Lord Hughes and highlighted at [43] above, it is quite clear that payment of a debt can form part of a maintenance payment.

62. It follows that, in my judgment, the judge was right in concluding that an order for maintenance could contain an element referable to a success fee. As already noted, on the facts of this case, the judge concluded that without such a contribution 'one or more of the claimant's primary needs would not be met'. As Lord Hughes re-emphasised in *Ilott* at [24]: 'The order made by the judge ought to be upset only if he has erred in principle or law'. In my judgment the judge did neither. The judge was entitled to regard the success fee as a debt capable of inclusion in a maintenance award. That being the case, it would be wrong for this court to interfere with the judge's individual value judgment.

63. I am conscious, as was the judge, of the difficulty identified by Briggs J in *Lilleyman*, namely of the potential for undisclosed negotiations to undermine a judge's efforts to make appropriate provision under the Inheritance Act. The civil litigation costs regime, unlike the approach in financial remedy cases, means that 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. I note however that this is likely to be less of a risk than might be thought at first blush 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.

64. The judge was alive to this tension and commented that he could not avoid some potential injustice to one side or the other. The judge therefore mitigated that potential injustice by taking a cautious approach towards the success fee liability and made an order which resulted in only a modest contribution of 25% towards payment of the success fee. In my view the judge's cautious approach to this difficult aspect of maintenance cases where the claim is made on the back of a CFA contract cannot be faulted and only serves to highlight the imperative of the full engagement in the Part 36 process and the importance of the parties making realistic offers in order to settle these difficult and distressing cases.

Conclusion

65. It follows that if my Lords agree I would dismiss both grounds of appeal.

LORD JUSTICE SINGH:

66. I agree.

SIR PATRICK ELIAS:

67. I also agree.