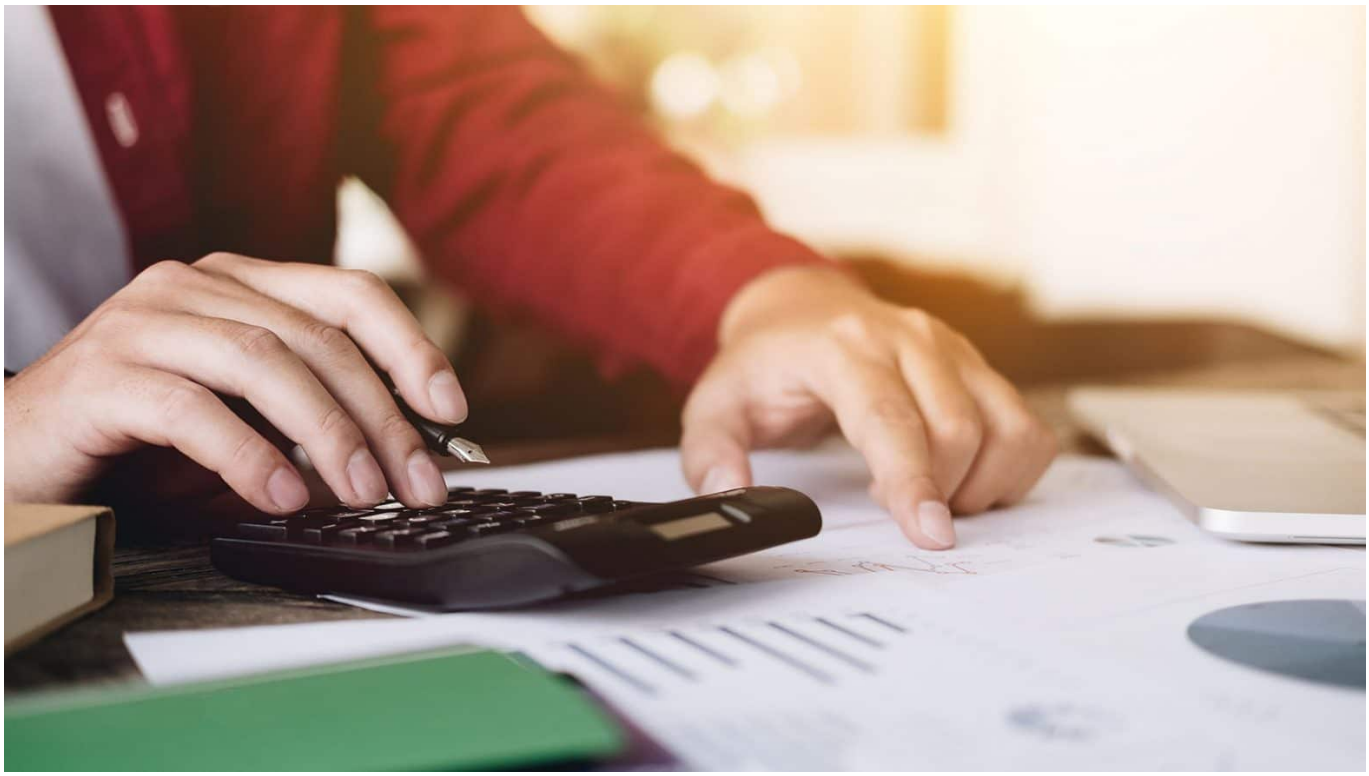
Hirachand v Hirachand to be reconsidered by Supreme Court



This article discusses the Court of Appeal's ruling in Hirachand v Hirachand, whereby a success fee under a CFA was considered and formed part of an award granted in a case brought under the Inheritance (Provision for Family and Dependents) Act 1975. The position seemed settled, but on the 25 August 2022, the Supreme Court gave permission to appeal, meaning the case will proceed to a full hearing in that Court, most likely this year.

What does this mean for claimants under the Inheritance Act 1975?

This ruling could have adverse consequences for those who seek to recover their success fees using the reasoning set out by the Court of Appeal. Whilst claimants may have been more comfortable signing a CFA knowing that their a success fee was likely to be recoverable if they succeeded with their claim (following Hirachand v Hirachand), they will have to consider the possibility that the legal position might change in the near future, a point that will have to be taken into account when assessing their litigation risk and the cost-risk proportionality associated with various strategies.

Background of the case

This issue had previously been approached in conflicting ways by the High Court.

It is not unusual for claimants under the 1975 Act to lack the financial resources to personally fund a claim against a deceased's estate. By the very nature of such claims, those claimants tend to have a serious need for financial provision and the deceased's estate failed to make reasonable financial provision for them.

One way that 1975 Act claimants may be able to fund such a claim however, is through a Conditional Fee Agreement with their solicitor. These arrangements are more commonly referred to as 'no win no fee' agreements. While the terms often stipulate that there will be no fee if the claim is unsuccessful, they also state that if the claim is successful, there will be an uplift on the solicitor's fees (referred to as the 'success fee').

While the general rule on cost shifting is such that the losing party in civil litigation claims must pay the winning party's legal fees, this didn't generally include the success fee as, following a review into costs in civil litigation in 2010, Parliament passed legislation stating 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' (s.58A(6) Courts and Legal Services Act 1990). This was intended to stop the perennial problem of the costs of litigation growing out of proportion to the issues in dispute. In other words, while the losing party is required to pay the winning party's costs they wouldn't be required to pay the success fee element of those costs.

Nevertheless, the Court of Appeal in Hirachand v Hirachand has ordered that, while a success fee 'cannot be recovered by way of a costs order by virtue of the Courts and Legal Services Act 1990, [the success fee] 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'. The court did go on to say that it will by no means always be appropriate to make such an order, adding that it is unlikely that such an order will be made unless the judge is satisfied that the 'only way in which the claimant had been able to litigate was by entering into a conditional fee agreement' and stating that consideration will be given to the extent to which the claimant has 'succeeded' in their claim.

Two possible problems have arisen with this approach. Firstly, there will be disputes on the point of whether entering into a conditional fee agreement was truly the only way in which the claimant could fund their litigation. As with any question of fact, it will turn on hotly contested evidence, and risk dragging out matters further. Additionally, there is a complex interplay with settlement offers. It is possible that the Court could award a claimant their award, as well as their fees payable under the conditional fee agreement, despite the claimant's failure to beat a part 36 or Calderbank offer. Such offers are only brought to the Court's attention when costs are decided, after the award is made, with adverse costs consequences for a party that fails to beat an offer made by another. This would of course undermine part of the purpose of the costs consequences attached to settlement offers, namely to incentivise parties to settle early, saving time and cost.

Whilst it is not possible to predict the outcome of any litigation, it may be that the Supreme Court has agreed to reconsider the case on the basis of the possible problems outlined above, which may well be cited in argument to claim the decision of the Court of Appeal could undermine the overriding objective, namely that litigation be conducted justly, and at proportionate cost.

While it is always important to explore different funding arrangements with 1975 Act claimants, it is now even more important to explore whether there are any other forms of funding potentially available to the claimant in order to consider their chances of being able to recover the success fee element of their conditional fee agreement as this will now no doubt play a large part in any settlement discussions, particularly as the litigation progresses.

How we can help

Our team closely monitor the changing state of the law, and are available to advise on inheritance disputes. If you believe you have a claim under the Inheritance Act 1975, get in touch with our team.

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