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In an Inheritance Act claim, can the court award claimants their success fees under conditional fee agreements?

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This article concerns a short but difficult question concerning claims under the Inheritance (Provision for Family and Dependants) Act 1975 ('**IPFDA**'): can the court award the claimant a sum to cover their liability to pay success fees under a conditional fee agreement ('**CFA**')?

Since 2013, claimants have been unable to recover their success fees in normal costs awards. Payment of them therefore must come out of their awards. This gives rise to a tension. If the substantive award does *not* make provision for the claimant's success fees, this may defeat one of the purposes of IPFDA: that claimants should obtain reasonable financial provision having regard to their needs and resources. However, if it *does* make provision, this arguably defeats the purpose of the costs legislation: that defendants should not have to pay claimants' success fees.

The issue does not appear to have been considered in a published case until last year's decision in Clarke v Allen,[1] in which Deputy Master Linwood refused to award the claimant her success fees. Since then, three more decisions have come out, each stating that the court *can* make such an award (and in two instances doing so). This article reviews these decisions, explains the legal position as it currently stands, and highlights other issues which arise if success fees are to be awarded.

BACKGROUND

IPFDA

When considering whether the will or intestacy rules make 'reasonable financial provision' and (if not) what award to make, s 3(1)(a) IPFDA requires the court to have regard to:

> '(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future.'

This is supplemented by s 3(6) IPFDA:

> 'In considering the financial resources of any person for the purposes of this section the court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this section the court shall take into account his financial obligations and responsibilities.'

[1] Clarke v Allen [2019] EWHC 1193 and 1194 (Ch). The writer was counsel for the claimant.

On a literal reading, s 3(1)(a) IPFDA seems to require the court to have regard to the claimant's success fees. If successful, the claimant will be obliged to pay them, and this will clearly affect their resources moving forward.

The costs legislation

At common law, CFAs in contentious business are thought to savour of maintenance and champerty and are therefore unenforceable.[2] Until relatively recently, therefore, recoverability of success fees was a moot point: there were no success fees to recover. This changed in 1995 when CFAs were legalised in a limited number of cases.[3] From 1 April 2000, they were legalised across a much wider range of contentious cases (including IPFDA claims) by s 27 Access to Justice Act 1999 ('**AJA**').

Initially, however, the question of recovering success fees under IPFDA remained moot. This was because s 27 AJA also introduced s 58A(6) Courts and Legal Services Act 1990 ('**CALSA**') which permitted claimants to recover success fees in *costs* awards (subject to procedural and substantive safeguards).

With the introduction of CFAs, it also became common for claimants to take out after-the-event ('**ATE**') insurance against the risk of losing and having to pay defendants' costs. S 29 AJA permitted claimants to recover ATE insurance premiums in costs awards, so they too raised no special issue for IPFDA claims.

The effect of success fees and ATE insurance premiums being recoverable was that, in many cases, claimants could litigate at zero risk. If they won, the defendant would pay their costs including success fees and premiums. If they lost, their legal fees were not payable, and the insurer would pay the defendants' costs.[4] Meanwhile, massive additional risk was imposed on defendants. This was controversial and was included in Jackson LJ's *Review of Civil Litigation Costs*. Jackson LJ recommended abolishing recoverability of success fees and ATE insurance premiums, citing four problems with it:

- those who could afford to bear the financial risks of litigation were imposing them on defendants;[5]

- claimants had no reason to contain the costs incurred in their names;[6]

[2] See generally Sibthorpe v Southwark LBC [2011] 1 WLR 2111.

[3] S 58 CALSA and Conditional Fee Agreements Regulations 1995 (SI 1995/1675).

[4] The claimant might still be liable to pay the ATE insurance premiums, but even this risk could be removed by providing for the premiums to themselves be a disbursement covered by the ATE insurance.

[5] Jackson LJ, *Review of Civil Litigation Costs: Final Report*, TSO, Jan 2009 Ch 10 at [4.8]

[6] Ibid Ch 10 at [4.13].

- excessive costs burdens were being imposed on losing defendants,[7] potentially to such an extent that they could be 'blackmailed' into settling the case at an early stage;[8] and

- by cherry-picking winning cases, lawyers could inflate their profit margins.[9]

This recommendation was implemented (except in certain proceedings not including IPFDA claims) by s 44 Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('**LASPO**'). From 1 April 2013, s 44 LASPO amended s 58A(6) CALSA into its current form:

> '(6) 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.'

At the same time (again with exceptions not including IPFDA claims), courts were debarred from making costs awards including premiums for ATE insurance by new s 58C CALSA. In addition, a new type of agreement was legalised, the damages-based agreement ('**DBA**'), under which lawyers would be paid a percentage of what was recovered (s 58AA CALSA). Costs incurred under DBAs are subject to the ordinary costs regime (r 44.18 CPR) ie they will only be awarded insofar as they are reasonably incurred and (if assessed on the standard basis) proportionate.

The issue

From 1 April 2013, therefore, there has existed a tension. On the one hand, s 3(1)(a) IPFDA requires the court to have regard to the claimant's needs, with no indication that the need to pay success fees and ATE insurance premiums are excluded. On the other, new ss 58A(6) and 58C CALSA have been enacted to *prevent* those costs from being imposed on defendants. The question is therefore: should the policy embodied in the Jackson reforms affect awards under IPFDA?

THE CASES

Clarke v Allen

The first reported case to consider the question was Clarke v Allen. Clarke was a complicated case in which the success fees were expected to total around £160,000 plus VAT which the claimant asked to court to add to her award. Deputy Master Linwood queried whether he had jurisdiction to do so given the costs legislation. The claimant submitted as follows:[10]

a. s 3(1)(a) IPFDA requires the court to have regard to a claimant's needs and resources. Money paid to her lawyers in success fees would deplete her resources and accordingly increase her needs, and so came within the provision;

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[7] Ibid Ch 10 at [4.15].

[8] Ibid Ch 10 at [4.16].

[9] Ibid Ch 10 at [4.17].

[10] Summarised in Clarke at [195].

b. IPFDA could not be interpreted as incorporating the policy behind s 58A(6) CALSA because it pre-dated that provision by nearly 40 years and because the requirement to have regard to claimants' needs and resources under s 3(1)(a) IPFDA is unqualified;

c. LASPO could not have amended IPFDA since it would have required clear words to do so and, in any case, amended s 58A(6) CALSA expressly only affects costs awards.

Deputy Master Linwood, however, refused to award Mrs Clarke her success fees, holding:[11]

> 'Mr Ng's submissions are ingenious but I do not accept them. In my judgment the responsibility for the Success Fees must remain with the party who entered into the CFA for these reasons:
>
> > (1) The calculation of damages is a matter of procedure carried out before costs are concerned. It has never included an element of or for costs;
> >
> > (2) To permit the interpretation Mr Ng suggests would be contrary to the deliberate policy of the legislature that the losing party should not be responsible for the Success Fee, that policy having been changed from that prior to 19th January 2013 when such fees could be so claimed from the losing party;
> >
> > (3) It would amount to an increase in damages by way of costs;
> >
> > (4) It may put a CFA funded litigant in a better position in terms of negotiations due to the risk of a substantial costs burden. Likewise absent negotiations it could lead to grossly disproportionate costs if a contested claim got to trial and the defending party lost;
> >
> > (5) There is no reason why a claimant seeking reasonable financial provision under the Act should be in a better position than one seeking, for example, damages for personal injury.'

Weisz v Weisz

Six months after judgment in Clarke was handed down, Francis J gave judgment in Weisz v Weisz [2019] EWHC 3101 (Fam). This was an application for interim relief from a £4m estate under s 5 IPFDA. The claimant asked to be paid a sum toward her legal fees in the IPFDA claim itself. The beneficiaries objected on the ground that there was no evidence that she could not find lawyers willing to act for her under a CFA. Francis J rejected this submission on the basis that it was reasonable for the claimant to retain her existing solicitors. Since the claimant's lawyers were *not* acting under a CFA, Francis J did not have to consider any question of success fees (and therefore does not appear to have been referred to Clarke). However, he made the following passing comment:[12]

[11] Clarke at [196].

[12] Weisz v Weisz [2019] EWHC 3101 (Fam) at [52]. Emphasis added.

> ‘Perhaps he [counsel for the beneficiaries] should be careful what he wishes for, because if he ends up losing this litigation there could of course be an enhancement of the fees that Mrs. Weisz would have to pay, but in those circumstances the estate themselves might be ordered to pay’.

Bullock v Denton

The first case of which the author is aware in which success fees were actually awarded under IPFDA was Bullock v Denton, an unreported decision of HHJ Gosnell sitting in the county court at Leeds.[13] The claimant had instructed previous lawyers under a DBA, and later instructed her current lawyers under a CFA including a 50% success fee. She submitted that her need to pay under these agreements was ‘part of her financial needs which she is likely to have in the foreseeable future’. The defendant, meanwhile pointed out that, following the Jackson reforms, success fees could not be recovered and submitted ‘that it would be wrong to award them as damages against the estate “by the back door”.’[14]

HHJ Gosnell stated that ‘[n]either counsel produced any binding authority on this issue, perhaps because it has not been specifically considered before’.[15] He therefore did not consider Clarke or Weisz. Instead, he referred to passages from two judgments of Briggs J in the case of Lilleyman v Lilleyman:

a. first, during the substantive judgment in Lilleyman, Briggs J said that his summary of the estate ‘ignores the contingent liability for the costs of these proceedings… 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 be.’[16]

b. secondly, in the costs judgment in Lilleyman, in finding that the normal consequences of a Part 36 offer applied, Briggs J expressed regret at the disparity between IPFDA claims and family proceedings (in which the lack of costs shifting rules meant that provision for the costs could be taken into account at the substantive stage).[17]

HHJ Gosnell felt that he was bound by Lilleyman to disregard the possibility that there was a Part 36 offer in the background. However, he went on:[18]

> ‘In my judgment, however, the Claimant’s additional liabilities fall into another category. I know that she is going to succeed in her claim, perhaps not as extensively as she hoped, but this will trigger her obligation to pay additional liabilities to her lawyers. She will not

[13] Bullock v Denton CC unrep 15 April 2020, case no D03LS916.

[14] Bullock at [90]

[15] Bullock at [91].

[16] Lilleyman v Lilleyman [2013] Ch 225 at [71].

[17] Lilleyman v Lilleyman [2012] 1 WLR 2801 at [26]-[27].

[18] Bullock at [93]-[94]

> recover them from the Defendant as part of her costs, so they are a debt she has incurred since the death of the deceased and are part of her future financial needs.
>
> 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 under the Act 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 I have to look at the reality of the situation or as Briggs J. put it *"in the real world"*. If I make no award under this head of claim the Claimant will have a substantial debt that she could only pay out of the other lump sum awards I have made. There may be very little left in the light of the fact that I have only awarded a life interest in her accommodation. When assessing what would amount to reasonable financial provision for her maintenance, I felt she was entitled to have her accommodation needs met and for her to be placed in a situation where she could manage afterwards an independent yet modest lifestyle. If no award at all is made this overall aim is placed in jeopardy.'

Bullock J did, however, leave the DBA out of account since there were issues about whether it was enforceable, and it was unfair for the claimant to impose *two* uplifts on the defendants by reason of conflicting funding arrangements.[19]

Bullock J did not have an up-to-date figure for the likely success fees. Rather than award an open-ended indemnity, he therefore chose £25,000 as a 'reasonable contribution' to them.[20] This led to a total award of a life interest in property worth £140,000 and a further lump sum of £70,000 which included the contribution toward success fees.

Re H

The final case is re H,[21] a claim by an estranged child in which the estate was worth around £554,000. Her solicitors had acted on a CFA which included a 72% success fee of £48,175. After considering both Clarke and Bullock, Cohen J held:[22]

> 'I accept that it is appropriate for me to consider this liability as part of C's needs. I do so largely for case specific reasons. I am not making a large award (unlike in re Clarke).[23] 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 the other parties. The liability is that of C alone. She had no other means of funding the litigation.'

[19] Bullock at [95].

[20] Bullock at [96].

[21] Re H [2020] EWHC 1134 (Fam).

[22] Re H at [55].

[23] The total award, including success fees, was £138,918 from an estate worth around £554,175 (re H at [17] and [66]).

Cohen J also referred to the 'regrets' expressed by Briggs J in Lilleyman before noting the risk that there might be an injustice if a Part 36 offer had been made, or if the success fee had not been triggered. He therefore stated that if the success fee was *not* triggered, he would revisit this element of the award. As to the potential for a Part 36 offer, he stated that he would mitigate the potential injustice by taking a 'cautious approach'.[24] In terms of quantum, he therefore stated:[25]

> 'Bearing that approach in mind and knowing what I do of the case, I cannot envisage how it could 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.'

THE POSITION MOVING FORWARD

The need for an appellate decision

Several difficulties are presented by the reasoning in these cases:

a. while Deputy Master Linwood in Clarke was correct to say that the policies he mentioned weigh against awarding success fees, he did not explain why they overcame the mandatory wording of s 3(1)(a) IPFDA;

b. unlike claims for compensation for a particular injury, s 3 IPFDA requires the court to make a holistic assessment of the claimant's financial position. It is *this* feature of IPFDA claims which creates the tension with the costs regime. By drawing an analogy with damages, Deputy Master Linwood arguably failed to fully engage with this tension;

c. since Deputy Master Linwood seemed to envisage a complete bar on awarding IPFDA claimants their success fees, and explicitly rejected the submission that the fees came within s 3(1)(a), the county court's decision in Bullock nominally appears to be *per incurium* the High Court's decision in Clarke. In addition, despite referring to Lilleyman, HHJ Gosnell did not engage with the fact that Briggs J appeared to share counsels' unanimous view (also shared by Deputy Master Linwood) that costs needed to be treated separately from the substantive award (though Briggs J regretted the resulting disparity with family cases);

d. it is unclear what 'case specific' reasons were relied on by Cohen J in re H. His sole ground for distinguishing Clarke was that Mrs Clarke received a large award, while the award in re H was 'inelastic'. Putting aside questions of whether the award in Clarke was in fact 'elastic',[26] and whether the £120,000 award in re H was not 'large', and the difficulty of drawing a line between elastic and inelastic awards, no part of Deputy Master Linwood's reasoning turned on this. Moreover, Deputy Master Linwood appeared to envisage a blanket ban on awards and had expressly rejected a submission that success fees came

[24] Re H at [59].

[25] Re H at [60].

[26] The bulk of Mrs Clarke's award represented her projected nursing home fees.

within s 3(1)(a) IPFDA. In addition, since Weisz concerned a £4m estate, it seems doubtful that Francis J envisaged any limitation to 'small' awards;

e. Cohen J's decision to take a 'cautious' approach to assessment due to the theoretical possibility of a Part 36 offer is hard to understand. If his concern was that those failing to beat Part 36 offers should be punished, this was surely a matter for costs. If his concern was that the success fees might turn out to not be payable,[27] then this was already covered by his decision to revisit the award in that event; and

f. neither Weisz nor re H engage with Deputy Master Linwood's concern about undermining the Jackson reforms. HHJ Gosnell acknowledged the point in Bullock, but it is hard to understand how he overcame it. His claim that he needed to take account of 'the real world' begs the question as to whether the need to meet the claimant's real-world needs should overcome the policy behind amended s 58A(6) CALSA.

There is therefore considerable uncertainty over whether success fees (and ATE insurance premiums) can be awarded, and if so when. This is not a purely academic concern. Success fees are often considerable and whether they can be recovered will make a big difference to whether some cases can be economically pursued, and whether a given settlement figures is appropriate. It must therefore be hoped that the issue is resolved by the Court of Appeal as soon as possible.

Until such a case is heard, it is very difficult to predict how the Court of Appeal would decide the point. The reasons behind the Jackson reforms apply with equal force against awarding success fees in IPFDA claims – there is a risk of inflated costs, claimants have a reduced incentive to contain them, there is a danger of unfair burdens being imposed on defendants (who might feel compelled to settle), and lawyers can cherry-pick cases to inflate their profits. The fact that Deputy Master Linwood did not expressly identify the legal basis for treating these concerns as overriding the wording of s 3(1)(a) IPFDA is not necessarily fatal to his conclusion. It could, for instance, be argued that a claim for success fees is an abuse of process, or that the re H interpretation offends Art 6 European Convention on Human Rights (see below). On the other hand, the wording of s 3(1)(a) IPFDA is clear, and many judges are clearly reluctant to leave claimants with a shortfall (though as Deputy Master Linwood pointed out, other types of claimant are in a similar position).

The writer has previously suggested that a balance might be struck by finding that 'needs' under s 3(1)(a) IPFDA include the need to pay success fees, but that the policy behind the Jackson reforms is itself a factor which the court may take into account under s 3(1)(g) IPFDA as 'any other matter… which in the circumstances of the case the court may consider relevant'.[28] As a factor it might then have varying weight depending, for instance, on the size of the burden sought to be imposed on the defendants, the reasonableness of entering the CFA, whether the CFA was disclosed promptly, and the effect of refusing the award on the claimant's means (ie their 'elasticity'). This has the advantage of reconciling the outcome in Clarke with those in re H and Bullock. It also reconciles the literal wording of s 3(1)(a) IPFDA with the policy concerns which are in play. However, whether this is the right approach can only be confirmed by the Court of

[27] eg because CFAs frequently deprive lawyers of their success fees where they have advised their client to reject a Part 36 offer which is not been beaten.

[28] Ng, (2019) 210 TELTJ 17.

Appeal. It does not appear to be what Deputy Master Linwood intended since he said that success fees 'must' be borne by the contracting party and he rejected Mrs Clarke's submission that success fees fell within s 3(1)(a) IPFDA.

The law absent a Court of Appeal decision

Until the position is clarified by the Court of Appeal, the law needs to be derived from Clarke and re H, being decisions of the High Court.[29] The problem is that they appear inconsistent. Deputy Master Linwood rejected a submission that s 3(1)(a) IPFDA required the court to have regard to the claimant's need to pay success fees. Cohen J found that he *could* have regard to that need.

Since they are inconsistent, re H should prevail as a later decision of a court of co-ordinate jurisdiction which has fully considered the earlier decision. The law is as stated by Nourse J in Colchester Estates (Cardiff) v Carlton Industries plc:

> 'There must come a time when a point is normally to be treated as having been settled at first instance. I think that that should be when the earlier decision has been fully considered, but not followed, in a later one… I would make an exception only in the case, which must be rare, where the third judge is convinced that the second was wrong in not following the first. An obvious example is where some binding or persuasive authority has not been cited in either of the first two cases.'[30]

Cohen J fully considered the judgment in Clarke and felt that it could be distinguished as concerning a 'large' award. Given that re H applies the literal wording of s 3(1)(a) IPFDA, and that there is (as far as the writer knows) no binding or persuasive authority which it overlooked, it will be difficult for a judge to be 'convinced' that it is wrong. It is therefore likely to be followed in preference to Clarke.[31] On this basis, it is tentatively submitted that the following propositions represent the law up to and included High Court level:

a. the *ratio decidendi* of re H is that s 3(1)(a) IPFDA *does* extend to a claimant's 'need' to pay their success fees and that the policy behind s 58A(6) CALSA does not *always require* a refusal to award them;

b. Clarke is authority for the proposition that the policy behind the Jackson reforms is at least a *relevant factor* capable of justifying a refusal to award success fees, which the court may (and possibly must) have regard to, probably under s 3(1)(g) IPFDA but possibly by

[29] Briggs J's decision in Lilleyman [2013] Ch 225 was also heard in the High Court. However, his decision to proceed by disregarding costs in the substantive hearing is not binding because the point was agreed between the parties and was assumed rather than reasoned to be correct (Barrs v Bethell [1982] Ch 294, 308).

[30] Colchester Estates (Cardiff) v Carlton Industries plc [1986] Ch 80, 85. While doubts have been raised about this statement, it was approved by Neuberger LJ in the Court of Appeal decision in re Lune Metal Products Ltd [2007] Bus LR 589 at [9].

[31] It is also possible that re H should prevail because Cohen J sat as a High Court Judge while Deputy Master Linwood sat as a master, but whether this is correct is unclear – see Lau, Kwan Ho, "precedent within the high court", (2020) Legal Studies 1-22, Research Collection School of Law: https://ink.library.smu.edu.sg/sol_research/3118. [Accessed 16 June 2020].

implication from s 44 LASPO or due to overriding policy concerns. It is notable that there is no suggestion in re H that the outcome in Clarke is wrong, or that Deputy Master Linwood was not right to rely on the factors he did;

c. re H demonstrates that it *can* be an appropriate to award success fees where the award is not 'large' (with £120,000 regarded as 'not large' for this purpose as at May 2020), where it is 'inelastic', and where the claimant has no other means of funding the litigation (though this was also the case with Mrs Clarke);

d. re H also shows that the court can (and possibly should) revisit the order if it turns out that the success fee has not in fact been triggered (presumably under r 3.1(7) CPR on the basis that the court was misinformed), and that some element of deduction can (and possibly should) be included to reflect the possibility of a Part 36 offer affecting the position;

e. since Cohen J did not criticise Bullock, and indeed explicitly said he was adopting the same approach,[32] the outcome in Bullock should probably be regarded as having been within the court's discretion. Unless the point was overlooked, it therefore appears that it is not *necessary* for the court to find that there was no viable alternative to a CFA before awarding a claimant their success fees;

f. any award is discretionary, and claimants should not expect a full indemnity for success fees, even if successful. In Bullock, the £25,000 figure was made in the context that £24,000 had already been incurred *up to trial* and was therefore a considerable underestimate.[33] In re H, the claimant received just over a third of her success fee. In absolute terms, the £25,000 and £16,750 awards were relatively modest. It may well be harder to persuade a court to make a larger award (cf the success fees of £192,000 sought in Clarke). It is, however, likely that claimants will improve their position if they can prove that using a CFA was necessary to pursue their claim and that the effect of the success fees on their ability to meet their needs will be significant; and

g. Francis J's warning in Weisz needs to be heeded by defendants tempted to oppose applications under s 5 IPFDA made to secure funding for legal help. If the claimant is forced to a use a CFA, their claim may end up depleting the estate by even more. The corollary is that, even if the claimant lacks the personal funds to hire lawyers on a conventional retainer, they may need to explain why they could/did not seek an interim award under s 5 IPFDA to do so.

Other issues

If success fees *are* awarded in IPFDA claims, a plethora of sub-issues arise, including:

a. if the claimant is a spouse, does spousal exemption from IHT apply to the amount awarded in respect of success fees? It is thought that the answer is 'yes' – s 19 IPFDA prescribes

[32] Re H at [58].

[33] Bullock at [96].

that when an order is made under IPFDA, the will/law of intestacy are deemed to have had effect from the date of death subject to the provisions of the order for all purposes, including capital transfer tax purposes.[34] Awards are therefore legally treated as legacies,[35] and a legacy to a spouse attracts the spousal exemption.[36] It is submitted that there is no statutory reason for treating an award designed to cover success fees any differently;

b. are there alternatives to summarily assessing quantum based on estimates from the claimant (as happened in re H and Bullock)? If the court does not wish to award a full or partial indemnity, arguably consideration should be given to carrying out a full assessment as part of the trial (though this might be a disproportionate use of court resources), or to making alternative orders to apply depending on different costs outcomes.[37] The summary process used in re H and Bullock might be more practical, but it carries a real risk of misstating the claimants' reasonable and proportionate success fees;

c. what role is to be played by the right to a fair trial in Art 6 European Convention on Human Rights? In recommending his reforms, Jackson LJ was concerned that recoverability of success fees meant that defendants could be pressurised to concede by the threat of a crushing costs burden. Deputy Master Linwood shared this concern in Clarke. On any view, awarding success fees creates potential inequality of arms. Moreover, unless they are applied by analogy (see below) defendants in IPFDA claims do not enjoy the procedural safeguards which were in place for pre-April 2013 agreements. Defendants might therefore argue that awards need to be limited or denied in order to comply with Art 6. In the meantime, claimants should be prepared for judges carefully to scrutinise claimed success fees to ensure that they are reasonably incurred and that entering a CFA was necessary for the claimants to obtain access to justice (having regard to circumstances when the CFA was executed);[38]

d. will failure to promptly inform the defendants about the CFA make a difference? Claimants with pre-April 2013 CFAs and ATE insurance needed to serve the other parties with information about them with the claim form (or if the CFA post-dated the proceedings, within seven days of it). Costs sanctions were imposed in default.[39] A defendant might ask the court to impose similar sanctions by analogy;

e. will failure to disclose the CFA *itself* make a difference? In re H, it is understood that Cohen J was not shown a copy of the CFA but instead relied on a summary of its terms from the

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[34] Deemed to be a reference to IHT by s 100(1)(b) Finance Act 1986.

[35] see re Jennery [1967] Ch 280.

[36] S 18 Inheritance Tax Act 1984.

[37] Judges might consider giving reserving judgment on this part of the award until the exact liability is known (or giving liberty to apply to vary it), but this risks creating an impossible position in which parties do not know if a Part 36 offer has been beaten when it comes to assessing costs (or indeed whether the CFA success fee has been triggered).

[38] For Art 6 based concerns about recoverability of success fees and ATE insurance premiums in costs awards, see Gallser and Ashby (2005) 24 CJQ 130.

[39] See the pre-1 April 2013 versions of r 44.3B and Costs Practice Direction para 19 and Supperstone v Hurst [2008] 4 Costs LR 572.

claimant. This, however, was in the context of the only defendant having been debarred from participating.[40] In costs assessments, paying parties can apply for the receiving party to be put to an election as to whether to disclose the (possibly redacted) CFA or to prove his entitlement to his costs by some other means.[41] It remains to be seen whether a similar procedure can be invoked if an IPFDA claimant claims their success fees without disclosing the CFA;

f. does the reasoning in re H apply to ATE insurance premiums? Given the similarity of the legislation, it might be argued that the same approach should apply. However, a judge may well think it unreasonable for claimants to incur expenditure to insulate themselves from the risk of litigation, or to expect defendants to pay the cost of insuring against the risk of the claim *failing*.[42] The courts might also be reluctant to create a paradoxical system in which the stronger the defendants' position, the higher the premium they will have to fund;

g. does the reasoning in re H apply to irrecoverable sums owing under DBAs? HHJ Gosnell had no principled objection to the claimant in Bullock pursuing the irrecoverable element of her DBA liability. There is, indeed, an obvious analogy with success fees. However, unlike success fees, there is no statutory bar to claiming sums owing under a DBA in a costs award (r 44.18 CPR). If a costs award leaves the claimant out of pocket, this will be because they have been disallowed on assessment (as to which see the issue below); and

h. does the reasoning in re H apply to costs which have been disallowed on assessment or ordered to be paid by the claimant? Briggs J's approach in Lilleyman was to entirely disregard costs in considering the award under IPFDA. It might be questioned, however, whether this is correct, and whether *all* costs liabilities constitute 'needs' under s 3(1)(a) IPFDA. The issue was conceded in Lilleyman, so Briggs J's approach is not binding (though Deputy Master Linwood clearly thought it was right). Regardless, it is suggested that costs disallowed on assessment or ordered to be paid by the claimant *cannot* be awarded under IPFDA. Costs are disallowed or ordered against claimants because they are unreasonably or disproportionately incurred, or because the court feels it would be unjust for the defendants and the estate to bear them. It is therefore hard to see how they could amount to 'reasonable financial provision' from the estate. An exception might be costs which are disallowed due to Part 36 CPR, but since Part 36 offers are made without prejudice save as to costs, they cannot be considered in the substantive hearing.

CONCLUSIONS

It is hoped that the Court of Appeal addresses these issues soon so that the position can be clarified. In the meantime, the recoverability of success fees is a point which should be (and is being) taken by claimants using CFAs. All parties need to be alive to it at an early stage, since it alters the costs

[40] Re H at [4].

[41] Hollins v Russell [2003] 1 WLR 2487 at [80].

[42] A counterargument is that defendants also benefit from ATE insurance because it enables them to recover their costs even if the claimant is impecunious – see Zuckerman, *Zuckerman on Civil Procedure: Principles and Practice* 3rd ed p1398 fn 380.

landscape and the balance of risk in IPFDA litigation. However, those advising claimants should not be overly optimistic. Awards to date have been very modest and are likely to be appealable.

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