RE H – A NEW DAWN FOR 75 ACT CLAIMS?

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Claims under the Inheritance (Provision for Family and Dependants) Act 1975 (the Act) focus on financial provision for the beneficiaries and claimant(s) to an estate. Although the Act requires the balancing of a number of factors in considering any claim including the relationships between the parties and the moral obligations which might have arisen between the deceased and the beneficiaries/claimant, a primary focus for the Court in determining such claims is the financial provision made for the claimant (if any) and the parties' respective financial needs and resources. This enables the Court to deal with whether reasonable financial provision has been made for the claimant already, and if not to determine what the claimant should receive. It also enables the Court to be the subject of colourful headlines around rewriting a person's will, but that is a topic for a different article.

Success Fee Recovery

In April 2013, when the Legal Aid and Punishment of Offenders Act 2012 abolished the recovery of success fees under conditional fee agreements (CFAs) from the losing party to litigation, the move was generally seen as a positive step – an end to unmeritorious claims being pursued and defendants being compelled to settle them in order to avoid the risk of a substantial costs award against them in due course if the claim was worth more than £0. That applied too to claims under the Inheritance (Provision for Family and Dependants) Act 1975 (the 1975 Act), where the previous rules had allowed a large number of claims (predominantly those by adult children, but not exclusively) to be pursued at no cost and at very little risk to the putative claimant – after all, why wouldn't you litigate when you had to pay nothing for your legal fees at all if you didn't win, and would recover most of those fees from your opponent or the estate if you did? Of course it was also a significant incentive to the defendant/estate to settle your claim early too – if the estate was faced with potentially paying out double the claimant's costs bill if the claim succeeded, that risk needed to be bought off as early as possible.

Unfortunately, however, the loss of the ability to recover success fees from the losing party had an unwelcome effect on claims under the Act too – it meant that genuinely financially impecunious claimants with good claims often had no means of funding their claim without resorting to a CFA which would in turn then reduce the amount of their award when they had to pay their success fee to their solicitors. Briggs J (as he then was) identified this tension (although on a different question of costs) when he wrote in his judgment Lilleyman that the detailed and careful analysis of the trial judge to ensure that reasonable provision was made for a claimant was "undermined" by the later application of the costs rules or (in the case of a CFA success fee) by the recovery of that fee from the successful claimant. After all, when the role of the Court is to order such financial provision as is reasonable for the claimant to receive, how can the Court be expected to do that fairly when an unknown liability falls onto the claimant after the event, which could significantly change the claimant's true financial position?

Sea Change & Re H

That question has been discussed by the Courts a great deal of late – in three decisions: Clarke v Allen , Bullock v Denton and Re H . The position now is that the door is ajar for claimants to argue that they should be allowed to recover their success fee (or part of it) from the estate on their claim as it is required to help meet their financial need. Such a sea-change is a significant development for claims under the Act.

In Clarke, the judge was addressed on exactly this point – it was submitted that the claimant there should be allowed to include her success fee payable to her solicitors as part of her

claim for financial provision. The Judge dismissed that argument as being “contrary to the deliberate policy of the legislature that the losing party should not be responsible for the success fee” and because allowing such recovery would “put a CFA funded litigant in a better position in terms of negotiations due to the risk of a substantial costs burden”. That was a clear statement of the law as it then stood and, one might have thought, the obvious answer – why, after all, should claims under the Act be the only claims which could ignore the otherwise-applicable legislation? If Parliament had intended to do this, it plainly could have.

However, that position was then challenged in April 2020 in Bullock v Denton. The judge in that case found that he was entitled to take the claimant’s obligation to pay her success fee to her solicitors as part of her financial need. He said that if he “[made] no award under this head of claim, the Claimant will have a substantial debt that she could only pay out of [her award]…” and that for this not to happen would place the overall aim of the Court to provide for the claimant’s reasonable financial needs as “in jeopardy”.

So it was that these two entirely conflicting authorities came before the High Court in Re H in May 2020. The judge was addressed on both Clarke and Bullock and decided that he should give the claimant some of her success fee as part of her award. The judge said that this was for case-specific reasons which focussed on the fact that the award made to the claimant was small and that failing to help her with her success fee would mean that her “primary needs will not be met”. The judge held that “it would not be fair…for me to ignore completely [the claimant’s] liability to her solicitors”. The judge then went on to award the claimant 25% of her success fee as a contribution to her liability.

Points to Note

Being a judgment of the High Court (and subject to any interference with that decision by the Court of Appeal), the decision is binding on lower courts and likely to be followed in the High Court itself. That represents a major change to the way in which a good claim under the Act can now be put – a claimant’s inability to fund his or her claim no longer means that they need to sacrifice so much of their award to pay their solicitors a success fee, although the cautious should note that the Courts may be reluctant to apply the same reasoning in “bigger” money cases. The judge felt able to award the claimant part of her success fee in H because not to have done so would have made a significant dent in the claimant’s financial award – that will not always be the case, but it is easy to imagine that arguments will ensue in larger cases when the success fee is proportionately larger that the same reasoning should apply.

Good news for access to justice and financial provision for genuinely needy claimants – bad news for defendant estates and beneficiaries who will want to reflect carefully on whether it is worth buying off the risk of having to pay part of a claimant’s success fee early on.

[1] *2012 EWHC 1056 (Ch)*

[2] *2019 EWHC 1193*

[3] *Unreported*

[4] *2020 EWHC 1134 (Fam)*