Michaelmas Term
[2024] UKSC 43
On appeal from: [2021] EWCA Civ 1498

JUDGMENT

Hirachand (Appellant) *v* Hirachand and another (Respondents)

before

Lord Lloyd-Jones
Lord Leggatt
Lord Burrows
Lord Stephens
Lord Richards

JUDGMENT GIVEN ON
18 December 2024

Heard on 18 January 2024

Appellant (acting by her litigation friend)
Brie Stevens-Hoare KC
Cameron Stocks
Oliver Ingham
(Instructed by Wright Hassall LLP)

First Respondent
Constance McDonnell KC
Christopher Wagstaffe KC
Sophia Rogers
(Instructed by Moore Barlow LLP (Guildford))

LORD RICHARDS (with whom Lord Lloyd-Jones, Lord Leggatt, Lord Burrows and Lord Stephens agree):

Introduction

1. Parliament has enacted for reasons of public policy that the costs recoverable by one party against another in litigation must not include any success fees payable to lawyers or others. Section 58A(6) of the Courts and Legal Services Act 1990 ("the 1990 Act") provides 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". The issue in this appeal is whether this section prevents a court in proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act") from including the payment of a success fee as part of an order for reasonable financial provision out of a deceased person's estate.

The 1975 Act

2. It is helpful to refer to the relevant provisions of the 1975 Act before summarising the facts and the proceedings.

3. By section 1(1), where a person dies domiciled in England and Wales, specified categories of persons, including a child of the deceased, may apply to the court for an order under section 2 on the ground that "the disposition of the deceased's estate effected by his will … is not such as to make reasonable financial provision for the applicant".

4. "Reasonable financial provision" is defined by section 1(2)(b) to mean, in the case of any applicant other than the spouse or civil partner of the deceased, "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance".

5. Section 2(1) sets out the orders which the court may make, which include the payment out of the estate of a lump sum.

6. Section 3(1) sets out the matters to which the court must have regard in determining whether reasonable financial provision has been made for the applicant and in determining which orders, if any, it should make under section 2(1). Those matters include "the financial resources and financial needs" which the applicant and any beneficiary of the estate has or is likely to have in the foreseeable future, the size of the net estate, and any physical or mental disability of the applicant and any beneficiary.

Section 3(6) provides that in considering the financial needs of any person, "the court shall take into account his financial obligations and responsibilities".

The facts

7. On 6 August 2016, Navinchandra Dayalal Hirachand ("the Deceased") died leaving a widow ("the Widow"), their daughter ("the Daughter") and their son ("the Son").

8. By the Deceased's last will dated 25 June 1998 ("the Will") he appointed the Son as executor and left his entire estate to the Widow if she survived him, but otherwise in equal shares to the Son and the Daughter. As the Widow did survive the Deceased, neither the Daughter nor the Son were beneficiaries of the estate.

9. It is unnecessary to go into the details of the conditions of the Widow and the Daughter, save to say that both have severe health problems and that the Widow lives in a care home and will continue to need residential care for the rest of her life. Save for the award made for her out of the estate in these proceedings, the Daughter had insufficient income or assets to support herself.

The proceedings at first instance

10. The Daughter issued a claim for financial provision from the Deceased's estate under the 1975 Act, which was heard by Cohen J sitting in the Family Division of the High Court. Claims under the 1975 Act issued in the High Court may be heard in the Family Division or the Chancery Division but they are subject to the Civil Procedure Rules 1998 ("the CPR") in both Divisions: CPR r 57.15. The Family Procedure Rules 2010 ("the FPR") do not apply to them, save in very limited and immaterial respects. The respondents to the claim were the Widow and the Son. The application was opposed by the Widow, but the Son has remained neutral and taken no part in the proceedings.

11. It was, on the facts, a difficult case and in a careful judgment Cohen J concluded, having regard to the health and other circumstances of the Daughter and her very limited financial resources, that the Deceased's will did not make reasonable financial provision for her. It was not a large estate and, in determining the financial provision that should be made for her, Cohen J had to balance her needs against those of the Widow who would need to be properly maintained for the rest of her life. He concluded that the award in favour of the Daughter should be calculated by reference to what she required to meet her current financial needs, rather than to be set up with a home or an income fund for life.

12. The judge found that the value of the Deceased's estate, including his half-share in the matrimonial home, was £554,000. He awarded the Daughter a sum of £138,918, broken down into six elements. One of those elements was a sum of £16,750 "to meet what I regard as a reasonable CFA mark-up". He also ordered the Widow to pay the Daughter's costs, summarily assessed at £80,000 (inclusive of VAT). The effect in practice was that the Widow was ordered to pay, directly, costs of £80,000 to the Daughter and indirectly, out of the estate of which she was the sole beneficiary, £16,750 towards the Daughter's success fee.

13. The evidence before the judge showed that the Daughter had entered into a conditional fee agreement ("CFA") with her solicitors for all legal expenses incurred after 6 March 2018. If her claim failed, her solicitors and counsel would be entitled to no fees but, if she succeeded, she would be liable to pay their fees with an uplift of 72%. She would expect to be able to recover the base fees assessed on the standard basis but, as the judge acknowledged, she would not be able to recover the uplift by way of an order for costs by reason of section 58A(6) of the 1990 Act. The uplift amounted to £48,175.

14. The issue therefore arose whether the whole or part of the uplift could be included in the award under the 1975 Act. The judge was referred to two first instance decisions, one of a Deputy Master of the Chancery Division and the other in the County Court, in which opposite positions had been taken on this issue. He held that, as the Daughter was under an enforceable liability to pay the uplift, it formed part of her "financial needs" to which, under section 3(1) of the 1975 Act, the court must have regard in determining the amount of the award. On that basis, he considered that he should make some provision for it, explaining that he did so "largely for case specific reasons" and that: "If I do not make such an allowance one or more of [the Daughter'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 [the Daughter] alone. She had no other means of funding the litigation" (para 55). He fixed the amount awarded at £16,750 as being approximately a 25% uplift which, he considered, fairly reflected the relatively high prospect of success in the proceedings.

15. In determining the appropriate amount, Cohen J was faced with the practical difficulty that he did not know what, if any, settlement offers had been made by either party under CPR Pt 36. The costs and other consequences to a party of failing to accept a Part 36 offer, followed by a worse result for that party in the court's final order, are very significant, as later discussed in this judgment.

16. He recognised that there was a risk of injustice to the estate, particularly if an appropriate Part 36 offer had been made by the estate. One injustice would occur if the definition of "success" in the CFA was such that no success fee was payable, in which case provision would have been made in the award for a liability which did not exist. In that case, Cohen J said that he would revisit this element of his award. Another injustice

would occur if, by reason of a Part 36 offer made by the estate, either no order would be made against the estate as regards costs incurred after the expiry of 21 days from the date of the offer or a costs order would be made against the Daughter. It is not clear from the judgment whether the judge would then revisit the provision made in his award, although it appears that he did not envisage doing so but sought to mitigate this injustice by taking a cautious approach to the amount of the award.

The judgment of the Court of Appeal

17. The Widow appealed on two grounds, one procedural and the other concerning the inclusion in the total award of a sum towards the success fee. The Court of Appeal dismissed the appeal on both grounds, but it is only the latter with which the present appeal is concerned. The ground was confined to whether it was wrong in law for a judge to include a contribution towards a success fee in an award under the 1975 Act. There was no appeal against the amount which the judge had included in his award, assuming that he was permitted as a matter of law to do so.

18. In her judgment (with which Singh LJ and Sir Patrick Elias agreed), King LJ identified the question for the court as being "whether, notwithstanding section 58A [of the 1990 Act], 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" (para 28).

19. King LJ observed that a succession of cases had emphasised that "maintenance" in the definition of "reasonable financial provision" in section 1(2)(b) as "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance" should not be interpreted too prescriptively and that the payment of debts may form a legitimate part of a maintenance award: see *In re Dennis, decd* [1981] 2 All ER 140, 145-146, per Browne-Wilkinson J, cited with approval by Lord Hughes in *Ilott v The Blue Cross (No 2)* [2017] UKSC 17, [2018] AC 545, para 14.

20. King LJ referred to section 25(2)(b) of the Matrimonial Causes Act 1973 ("the MCA") which requires the court, when deciding whether to make, and if so the terms of, an order for ancillary relief, 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 foreseeable future". King LJ also referred to the general rule as to costs in financial remedy proceedings that, subject to certain specified exceptions, "the court will not make an order requiring one party to pay the costs of another party": FPR r 28.3(5). In *Azarmi-Movafagh v Bassiri-Dezfouli* [2021] EWCA Civ 1184, [2022] 1 FLR 157, the Court of Appeal held that it was open to the judge to include in an award a sum referable to a party's liability for their legal costs of the proceedings.

21. Just as a party's liability for their own costs which cannot otherwise be recovered as a consequence of the "no order principle" in family proceedings is capable of being a financial need under the MCA, so, King LJ held, the liability to pay a success fee, which cannot be recovered by way of a costs order by reason of section 58A(6) of the 1990 Act, is capable of being a financial need for which the court may make provision under the 1975 Act. She rejected a submission that a success fee could not be the subject of an award because it was not a recurring expense. King LJ made clear that a judge would need to have regard to a number of factors in deciding whether to include any provision for the liability for a success fee and, if so, its amount. There were no grounds for interfering with the decision of Cohen J to include a sum in respect of the success fee or with its amount, and the appeal was accordingly dismissed.

22. King LJ discussed the potential injustice of awarding a sum in respect of a success fee when the court did not know whether the claimant had done better than a Part 36 offer. She considered that the judge was right to deal with this problem by taking a cautious approach to the amount of the award.

The scope of reasonable financial provision for maintenance under section 1(2)(b) of the 1975 Act

23. Before dealing with what, in my view, are the central issues in this appeal, it is convenient here to note a submission made on behalf of the Widow that an award of reasonable financial provision for the maintenance of the claimant under section 1(2)(b) could not, as a matter of construction of the 1975 Act, include a sum to meet a liability for litigation costs. Like King LJ, but for different reasons, Ms Stevens-Hoare KC, appearing for the Widow, referred to *Ilott v The Blue Cross (No 2)* and *In re Dennis, decd*. In the former, Lord Hughes, with whom the other six members of the Supreme Court agreed, said at para 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."

24. In the passage from the judgment in *In re Dennis, decd* quoted with approval by Lord Hughes, Browne-Wilkinson J said:

> "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 him to continue to carry on a profit-making business or profession may well be for his maintenance."

25. While Ms Stevens-Hoare accepted that a lump sum could be awarded to pay a debt incurred to pay living expenses or to acquire an asset which would produce an income or reduce living expenses, she submitted that litigation costs were not everyday living expenses and, even if incurred in order to obtain provision for such expenses, were too remote from them to be properly described as being for the claimant's maintenance.

26. I do not accept this submission. It has been well established, certainly since the decision of Holman J in *A v A (Maintenance Pending Suit: Payment of Legal Fees)* [2001] 1 WLR 605 which has been applied in many cases by courts including the Court of Appeal (see, for example, *Currey v Currey* [2006] EWCA Civ 1338, [2007] 1 FLR 946), that payments to fund legal costs may constitute "maintenance" for the purposes of section 22 of the MCA. No challenge to these decisions was made by Ms Stevens-Hoare and I can see no grounds for excluding the payment of accrued (or future) legal costs from the meaning of the word "maintenance" under section 1(2)(b) of the 1975 Act.

The recovery of costs in civil proceedings

27. The incidence of the costs of civil proceedings, and the powers of the court in respect of costs, are the subject of detailed rules and a substantial body of case law.

28. The foundation of the court's jurisdiction as regards costs is section 51 of the Senior Courts Act 1981. Section 51(1) provides that the costs of and incidental to all proceedings in, among other courts, the High Court and the family court "shall be in the discretion of the court". Section 51(3) provides that the court "shall have full power to determine by whom and to what extent the costs are to be paid".

29. Detailed provision is made as regards costs in civil proceedings in CPR Pts 44 to 48. Costs in family proceedings are the subject of the FPR and the costs provisions of the CPR apply to them only to the extent that the FPR so provide.

30. CPR Pt 44 contains general rules about costs. CPR r 44.2(1) reiterates the court's discretion as to costs, while CPR r 44.2(2) provides that, "if the court decides to make an order about costs", the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. In deciding "what order (if any) to make about costs", the court will have regard to all the circumstances, including the conduct of the parties, whether a party has succeeded on part of their case and any admissible settlement offer: CPR r 44.2(4). The range of possible orders as to costs is wide and includes seven possible orders listed in CPR r 44.2(6). Detailed provision is made in CPR r 44.3 and elsewhere about the bases upon which the amount of recoverable costs will be assessed and the procedure for the assessment of costs.

31. These rules give effect to important principles and policy considerations. While the court retains a wide discretion as to the orders for costs (if any) which it will make, the rules provide presumptions and requirements which are designed to produce consistent and just outcomes. As to the quantum of recoverable costs, the principles applicable to the assessment of costs are designed to keep some control over the costs of litigation and to facilitate, or at least to prevent further barriers to, access to justice for all parties, defendants as well as claimants. These rules are a vital and integral part of the administration of justice in civil proceedings.

32. In the context of civil proceedings generally, the liability (if any) of one party to pay some or all of the costs incurred in the proceedings by another party is treated as a separate matter from the substantive relief sought in the proceedings, and the costs of the proceedings will not be recoverable as part of any substantive relief. The Court of Appeal so held in *Cockburn v Edwards* (1881) 18 Ch D 449, in which Cotton LJ said at p 463-64:

> "… I am of opinion that the difference between solicitor and client costs and party and party costs in an action cannot be given by way of damages in the same action, the latter costs being all that the Plaintiff is entitled to. Costs in another action stand on quite a different footing."

33. This principle applies notwithstanding that in many cases where damages are sought in tort or for breach of contract or breach of statutory duty, or where equitable compensation is claimed, the loss suffered by the claimant could properly be said to

include the costs incurred in pursuing the claim. In *Seavision Investment SA v Evennett (The Tiburon)* [1992] 2 Lloyd's Rep 26, 34, Scott LJ said:

> "It is often the case that the costs of litigation would, if ordinary principles governing the recoverability of damages were applicable, represent recoverable damages. This is so not only in contract cases but also in tort cases. If A sues B on a negligence claim, whether in contract or in tort, the incurring by A of the costs of and incidental to the action will often, perhaps usually, be a foreseeable consequence of the negligent act. But it is, I believe, well settled that the recovery by A from B must be by way of an order for costs made in exercise of the section 51(1) discretionary power."

34. The same is true where A seeks to obtain in a further action against B any costs in excess of those awarded in the first action. As it is put in *McGregor on Damages*, 22nd ed (2024) ("*McGregor*"), para 22-003: "It would make nonsense of the rules about costs if the successful party in an action who has been awarded costs could automatically claim in a further action by way of damages the amount by which the costs awarded to them fell short of the costs actually incurred by them".

35. In *Barnett v Eccles Corpn* [1900] 2 QB 423, a successful respondent to a complaint by a local authority under the Public Health Act 1875 was awarded his costs of the proceedings in an amount to be assessed by the court. The assessed amount was, as is usually the case, less than the costs actually incurred and for which the respondent was liable to his solicitors. He claimed the difference from the local authority under section 308 of the Public Health Act 1875 by way of "full compensation" for damage caused by the exercise of powers under that Act. The Court of Appeal upheld the dismissal of the claim. A.L. Smith LJ said at p 427 that the question was whether, under the words "full compensation":

> "the appellant is entitled to recover what the law does not allow as well as that which it does allow, that is the difference between his taxed costs of the proceedings in question, which the law allows, and the amount of the expenses actually incurred by him in those proceedings, which it does not allow. The Court below held that he was not so entitled; that he was entitled only to the compensation which the law gives him in respect of costs, namely, the taxed costs recoverable as between party and party. I am of opinion that their decision was clearly right …"

36. These statements have been couched in terms that, where an order for costs has been made in favour of a party (A), A cannot recover from the paying party (B) as damages or otherwise the difference between the assessed costs and the actual costs payable to A's own solicitors. However, the principle equally applies where the court has decided to make no order in favour of A, although A is the successful party. In *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 ("*Quartz Hill*") at p 690, Bowen LJ said:

> "… the only costs which the law recognises, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action."

37. An exception of uncertain limits exists where A incurs costs in proceedings brought by or against B, and A can rely on a separate cause of action against B to recover costs incurred in the first proceedings. Examples include an action for malicious prosecution where the claimant's costs incurred in prior criminal proceedings may be recoverable as damages (*Berry v British Transport Commission* [1962] 1 QB 306 (CA) ("*Berry*"), distinguishing *Quartz Hill* on the basis that it concerned costs incurred in prior civil proceedings) and a claim for breach of contract where the claimant's costs incurred in foreign proceedings brought by the other party in breach of an exclusive jurisdiction clause were recoverable as damages (*Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517).

38. In her analysis of these exceptional authorities in *Costs as Damages* (2009) 125 LQR 468, Professor Louise Merrett summarised the present state of the law as follows, at p 480: "Provided, therefore, the claimant can rely on a separate cause of action, he can claim damages relating to the costs of foreign proceedings, or even earlier English proceedings, provided those proceedings were not subject to the ordinary rules for the recovery of costs in civil cases". The decision in *Quartz Hill* has long been criticised in cases where a second claim for malicious prosecution is brought: see *Berry* at p 338 (per Danckwerts LJ), p 317 (per Ormerod LJ) and p 325-326 (per Devlin LJ) and *McGregor* at paras 22-018 to 22-022. However, the important point for present purposes is that the general irrecoverability of costs as part of a substantive award was (and remains) the state of the law when the 1975 Act was enacted and when the 1990 Act was amended to include section 58A(6).

39. Professor Merrett persuasively argues that the restrictions on the recovery of costs between the same parties, whether recovery is sought in the proceedings in which the

costs were incurred or in subsequent proceedings, is based on policy considerations, namely that such recovery would undermine the costs regime.

40. By contrast, in a case where A has, as a result of the actionable wrong of B, incurred costs in proceedings with C, these policy considerations do not in principle apply so as to prevent A from recovering such costs as damages from B. Although there is debate about the amount of such costs that may be recovered (see *McGregor* at paras 22-003 to 22-012 and the cases there cited), the principle is well-established: see, for example, *British Racing Drivers' Club Ltd v Hextall Erskine & Co* [1996] 3 All ER 667.

41. Thus, as Professor Merrett put it, at p 468, "[t]he basic rule of English law is that, unless the claimant can rely on a separate cause of action, litigation costs can only be recovered as costs, and not as damages".

Success fees

42. At common law, conditional fee agreements, and agreements to pay success fees, were unenforceable as being contrary to public policy. However, with the restriction of legal aid in civil cases, both CFAs and provision for success fees as compensation to lawyers for taking on cases under CFAs came to be seen as beneficial in the public interest as a means of enabling meritorious claims to be brought. A "success fee" is a percentage of the "base costs", payable if the claim succeeds through a judgment or settlement. "Success" for these purposes will be defined by the terms of the CFA in question. "Base costs" are a party's own legal fees which would be payable if their solicitors and/or counsel were not engaged under a CFA.

43. Section 58 of the 1990 Act for the first time permitted CFAs to be used for advocacy and litigation services. Section 58 originally permitted CFAs to be used only in such proceedings as the Lord Chancellor might by order specify, which were at first a very limited class. However, they became permissible in all proceedings, other than criminal and family proceedings, with effect from 30 July 1998 by virtue of the Conditional Fee Agreements Order 1998 (SI 1998/1860). That remains the position by virtue of section 58 as replaced and section 58A as inserted by the Access to Justice Act 1999.

44. Under section 58(10) as originally enacted, and currently under section 58A(1), CFAs cannot be used in criminal proceedings or in family proceedings, which are defined to include proceedings under the MCA and under relevant parts of the Children Act 1989 ("the CA 1989").

45. As originally enacted, success fees were not recoverable from other parties to the proceedings. Section 58(8) provided:

> "Where a party to any proceedings has entered into a conditional fee agreement and a costs order is made in those proceedings in his favour, the costs payable to him shall not include any element which takes account of any percentage increase payable under the agreement."

46. A change in the policy towards the recovery of success fees was proposed by the Government in *Modernising Justice, The Government's plans for reforming legal services and the courts* (Cm 4155) published in December 1998. It was said that the recovery of success fees would make "conditional fees more attractive and fairer" and would expand access to justice (para 2.44). By the Access to Justice Act 1999, section 58 of the 1990 Act, as originally enacted, was repealed and replaced by new sections 58 and 58A. A "success fee" was defined by section 58(2)(b) as the percentage increase in fees for which a CFA may provide. Section 58A(6)-(7) made provision for the recovery of success fees from other parties in the relevant litigation:

> "(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.
>
> (7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee)."

47. Experience of success fees and their recovery from other parties led Sir Rupert Jackson in his Review of Civil Litigation Costs to take a very different view of the public interest in the recovery of success fees. In his Final Report (December 2009), he concluded that CFAs, with success fees and after-the-event insurance as the "key drivers", had been "the major contributor to disproportionate costs in civil litigation in England and Wales" (para 2.1, Executive Summary). He found that "litigants with CFAs have little interest in controlling the costs which are being incurred on their behalf" (para 3.1(ix), Chapter 4) and that the costs burden on opposing parties who were ordered to pay success fees was "excessive and sometimes amounts to a denial of justice" (para 4.15, Chapter 10). He observed at para 4.16 of Chapter 10 that:

> "If the opposing party contests a case to trial (possibly quite reasonably) and then loses, its costs liability becomes grossly

> disproportionate. Indeed the costs consequences of the recoverability rules can be so extreme as to drive opposing parties to settle at an early stage, despite having good prospects of a successful defence. This effect is sometimes described as 'blackmail', even though the claimant is using the recoverability rules in a perfectly lawful way."

48. Sir Rupert Jackson accordingly recommended that, while CFAs and success fees should remain available, success fees "should cease to be recoverable from unsuccessful opponents" (para 2.2, Executive Summary).

49. This recommendation was accepted by the Government. In its response to the Final Report (Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response, March 2011, Cm 8041), it was stated that:

> "The Government intends to: Abolish the general recoverability of the CFA success fee from the losing side. In future any CFA success fee will be paid by the CFA funded party, rather than the other side. Crucially, this would give individual CFA claimants a financial interest in controlling the costs incurred on their behalf. It returns the position to when CFAs were first allowed in civil litigation in England and Wales in the 1990s."

50. The intention that any success fee would be payable by the CFA-funded party and not by the losing side could not have been more clearly expressed. The non-recoverability of success fees from the losing side or other parties was enacted by the addition of a new section 58A(6) to the 1990 Act, introduced by section 44(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO 2012"). Section 58A(6) is quoted in paragraph 1 of this judgment.

51. In both his Preliminary Report (May 2009) and in his Final Report, Sir Rupert Jackson discussed Chancery litigation, including proceedings under the 1975 Act. He noted in his Preliminary Report at para 4.1(ii) of Chapter 33 that in such proceedings the normal rule was that the costs followed the event under CPR r 44.3 (now CPR r 44.2) and that the principes as to the incidence of costs were always subject to any Part 36 or "*Calderbank* offers" which are "invariably made in these claims". He added that "some litigants mistakenly believe that all parties' costs will come out of the estate of the deceased, whatever the outcome of the claim".

52. Sir Rupert made clear his concerns about the level of costs in proceedings under the 1975 Act which could all too easily exceed the value of the deceased's estate (Preliminary Report para 5.8 of Chapter 33). He discussed costs-capping and other means by which costs might be kept under control. At no point in his Reports did Sir Rupert suggest that, as an exception to his recommended prohibition on the recovery of success fees, such fees should be recoverable in claims under the 1975 Act. Given his reasons for recommending the prohibition and his concerns about the level of costs in such claims, it would have been illogical to suggest any exception.

53. Counsel for the Daughter in their submissions drew attention to the counterbalancing measures recommended by Sir Rupert for an across the board increase by 10% of general damages for pain, suffering and loss of amenity in personal injury cases and of general damages for nuisance, defamation and any other tort which causes suffering to individuals. While such increases might be seen as a windfall to those claimants who were not funded by CFAs, Sir Rupert pointed out that the level of general damages in England and Wales was not high. These increases in general damages were introduced by a decision of the Court of Appeal in *Simmons v Castle* [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239, in a form which was extended to include general damages in all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit and mental distress.

54. Counsel observed that, given that claimants bringing claims under the 1975 Act are "often in necessitous circumstances, it is arguable that equivalent counterbalancing measures should have been applied, and were perhaps all the more required, in these types of claim". The significant point is that no equivalent measures were recommended or made in respect of claims under the 1975 Act, or indeed in respect of any claims for financial loss, whatever the circumstances of the claimant. A clear line was drawn, restricting the counterbalancing measures to claims by individuals for general damages for non-financial loss.

The recovery of base costs in proceedings under the 1975 Act

55. As earlier mentioned, claims under the 1975 Act are civil proceedings subject to the CPR, even if brought in the Family Division of the High Court: CPR r 57.15. They are subject to the costs regime contained in the CPR. In the usual case, the losing party will be ordered to pay the successful party's costs.

56. Leaving aside success fees, there has never been any suggestion, save in one case referred to below, that the general principle whereby costs are dealt with in accordance with the CPR and are not recovered by means of the substantive relief, does not apply to claims under the 1975 Act. Nor is there any reason in principle why that principle should not apply. If the court orders the claimant's costs to be paid by an unsuccessful defendant,

such costs to be assessed on the standard basis, it would, to adopt *McGregor* at para 22-003, "make nonsense of the rules about costs" if the successful party could recover by way of the substantive award the amount by which the assessed costs fell short of the costs payable on a solicitor and client basis. The same is true if, in the light of special circumstances, the court has decided to make no order as to costs or even, exceptionally, to order the successful claimant to pay costs to the defendant. As Bowen LJ said in *Quartz Hill* in the passage quoted above, "[i]f the judge refuses to give him costs, it is because he does not deserve them".

57. In my judgment, while claims under the 1975 Act remain civil proceedings subject in the usual way to the costs regime in the CPR, it would undermine the costs regime and produce an incoherent result if a party could recover base costs not under that regime but by way of the substantive award.

58. As the authorities cited above demonstrate, the principles applicable to the recovery of costs in civil proceedings have been well established since the 19th Century, and the 1975 Act was enacted with those principles as part of the legal background. It is a principle of statutory construction that Parliament is assumed to know the relevant existing law when legislating (see, for example, *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, 460-461, per Viscount Simonds) and there is no indication in the 1975 Act that those principles were not to apply.

59. Counsel were able to identify only one case in which the issue of including base costs in the substantive award has arisen. In *Jassal v Shah* [2021] EWHC 3552 (Ch), a Chancery Deputy Master included a figure of £140,000 for the claimant's liability to her solicitors for costs incurred in the proceedings, but without any discussion of the basis for doing so. No separate order for costs was made and the order stated that costs had been dealt with as part of the lump sum award: see the judgment of James Pickering KC on appeal ([2024] EWHC 2214 (Ch)) at para 15.

60. The defendants' appeal against that part of the Deputy Master's order was allowed by James Pickering KC, sitting as a Deputy High Court Judge. The Deputy Judge identified at para 1 the "important issue" raised by the appeal: "should litigation costs always be dealt with separately from and subsequently to the grant of substantive relief in accordance with the usual practice under the CPR; or is it ever permissible for the court to award a claimant their costs as part of the substantive relief?" He held that where costs were governed by the CPR, they fell to be dealt with under that regime and could not be included in the substantive relief. He distinguished the decision of the Court of Appeal in the present case, which was of course binding on him, on the basis that it dealt with an irrecoverable success fee and on the basis that King LJ had not suggested that, given the application of the CPR costs regime to proceedings under the 1975 Act, provision for base costs could be made in an award under section 2. I agree with the Deputy Judge's

decision in the case and his reasoning, which is consistent with the principles set out above.

The recovery of success fees in proceedings under the 1975 Act

61. It is against that background that the recovery of success fees in proceedings under the 1975 Act falls to be considered.

62. There is nothing in the 1975 Act which displaces expressly or by necessary implication the principle that, in civil proceedings which are subject to the costs regime now contained in the CPR, costs between parties are to be dealt with exclusively under that regime. Success fees payable by a party form part of the costs incurred by them in the proceedings. The fact that because, under the overall regime governing costs, success fees are not recoverable from other parties does not mean that they cease to be part of the costs of the proceedings. In those circumstances, I can see no reason why the above principle should not apply to irrecoverable success fees just as it applies to any other costs of the proceedings.

63. If it were right that a success fee was recoverable in an award under section 2 of the 1975 Act, it is difficult to see why, in principle, the excess of the claimant's liability for base costs over the amount allowed on assessment, or their entirety if no order for costs was made, would not also be recoverable. However, as counsel for the Daughter acknowledged in their written case, "the practice of judges … has generally and unsurprisingly, been to exclude any such liability on the part of a claimant for costs in the calculation of an award under the 1975 Act in a non-spousal claim".

64. During the period between the introduction of section 58A(6)-(7) into the 1990 Act by the Access to Justice Act 1999 and the repeal of section 55A(6) by LASPO 2012, success fees in proceedings under the 1975 Act were recoverable as part of a successful claimant's costs and no doubt in many cases the whole or part of success fees were ordered to be paid.

65. The Daughter's case on this appeal would have the result that during the period when success fees were recoverable, the court would be entitled to award as part of its substantive order a sum towards the success fee even though it decided that the circumstances were such that, rather than applying the general rule that costs follow the event, the successful claimant should recover only part of their costs or recover no costs at all. This would be a clear case where a substantive order would undermine the costs regime. The Court was not referred to any case in which this had been done.

66. It would be incoherent if the principle that costs of proceedings are not recoverable as part of a substantive order in those proceedings ceased to apply when Parliament enacted that success fees should not be recoverable costs in any civil proceedings. The logical position, which serves to give effect both to the general principle as to the treatment of costs and to the policy underpinning section 58A(6), is to say that success fees are not recoverable as part of a substantive award in any civil proceedings, including those under the 1975 Act.

67. An important feature of the regime as to costs in civil proceedings is CPR Pt 36, which provides significant incentives to parties to make settlement offers. As earlier noted, Sir Rupert Jackson found that Part 36 or other offers were "invariably made" in proceedings under the 1975 Act. Typically, an offer may be made by either or both sides for payment of a specified amount by the deceased's estate. If the offer is accepted within 21 days or such longer period as stated in the offer ("the relevant period"), the claimant will be entitled to "the costs of the proceedings (including their recoverable pre-action costs)" up to the date of acceptance, to be assessed on the standard basis, if not agreed by the parties: CPR r 36.13. Such costs do not, of course, include any success fee.

68. The costs consequences following judgment where a Part 36 offer has been made but not accepted are set out in CPR r 36.17. If the claimant does not accept an offer made by the defendant, and the claimant does not obtain a judgment for more than the offer, the defendant is entitled to costs from the expiry of the relevant period and interest on those costs. If the defendant does not accept an offer made by the claimant, and the claimant obtains a judgment for a sum equal to or more than the offer, the claimant is entitled to interest on the whole or part of the award at a rate not exceeding 10% above base rate for some or all of the time since the expiry of the relevant period, costs on the indemnity basis from the expiry of the relevant period and interest on those costs at a rate not exceeding 10% above base rate, and an additional sum not exceeding £75,000 calculated by reference to the amount of the award. The court has power to exclude or modify these consequences if it considers them unjust.

69. Importantly, Part 36 offers are treated as "without prejudice except as to costs" and must not be disclosed to the trial judge until the case has been decided: CPR r 36.16.

70. The provisions of Part 36 are virtually unworkable in accordance with their purpose of achieving settlements if success fees are recoverable as part of the judgment sum, in this case the award under section 2 of the 1975 Act. Even if the defendant knows that the claimant has agreed to pay a success fee and knows the agreed percentage of the base costs, the claimant's liability to pay the success fee will be dependent on a result which will not be known "until the case has been decided" and its amount will be contingent on the amount of the base costs incurred up to and including the trial. Claimants also face difficulties in making their offers or responding to offers made by defendants. Further, even with more information, it will be very difficult to predict that

amount of the success fee which the court might include in the award. In this case, the judge made provision for a success fee of 25% (£16,750) but the agreed success fee was 72% (£48,175). These considerations pose great problems for all parties in determining the offers to be made and whether to accept them, and they similarly pose difficulties for the judge in determining the award to make.

71. It was these concerns that led Sir Rupert Jackson to comment in his Final Report at para 5.19 of Chapter 10:

> "The effect of permitting such success fees to be recovered is circular and risks undermining the effectiveness of Part 36. The client is in effect guaranteed a satisfactory protection against the Part 36 risk and has correspondingly less interest in accepting an offer. A defendant who makes a good Part 36 offer faces the risk of paying a correspondingly high success fee for the risk of the claimant rejecting that offer."

72. It will be seen, later in this judgment when I deal with the analogy drawn with proceedings under the MCA, that it was, in part, similar concerns which led to the overhaul of the costs regime applicable to those proceedings.

73. Both Cohen J and the Court of Appeal were alive to these difficulties. Cohen J said that he could not see how he "can avoid some potential (and it is only potential) injustice to either [the claimant] or the estate. All I can do is mitigate the potential by taking a cautious approach towards this liability" (para 59). The Court of Appeal endorsed the judge's approach "to this difficult aspect of maintenance cases where the claim is made on the back of a CFA contract" (para 64).

74. The potential of the combination of the inclusion of a success fee in the substantive award with the operation of the applicable costs regime to produce injustice to either party is a good reason to question the premise that provision for success fees can be made in the award. It is, in my judgment, no accident that these difficulties arise. The costs regime, and Part 36 in particular, is based on the proposition that the parties' costs in the litigation are to be dealt with only through the operation of the costs regime. The regime operates satisfactorily both when success fees are recoverable as part of a party's costs, as was the case from 2000 to 2013, and when, as now, they are not recoverable.

75. Ms McDonnell KC, appearing for the Daughter, submitted that the existence of the power under section 5 of the 1975 Act to grant interim relief supported her case. Under section 5(1), where it appears to the court that (a) the applicant is in immediate need of financial assistance but it is not yet possible to determine what (if any) final order will be made and (b) the property of the estate is or can be made available to meet the applicant's

need, the court may order one or more interim payments, subject to such conditions and restrictions as the court may impose. Any interim payment may be treated as a payment on account of an order under section 2: section 5(4). It was held in *Weisz v Weisz* [2019] EWHC 3101 (Fam), [2020] 2 FLR 95 that interim payments may be ordered under section 5 to fund the applicant's legal costs in the proceedings, and it was not suggested to us by Ms Stevens-Hoare that it was wrongly decided.

76. However, the jurisdiction to make provision for these costs by way of interim order, to enable a claim to be made which otherwise could not be made, is different in character from a power to include costs in a final substantive order when those costs are at the same time subject to the costs regime in the CPR. I do not see it as supporting the Daughter's case.

The effect of section 58A(6) of the 1990 Act

77. As regards the effect of section 58A(6), the submissions on behalf of the Daughter focus on the use of the words "a costs order". It is submitted that the prohibition imposed by the sub-section applies only if provision for the payment of a success fee is made in "a costs order", leaving it open for such provision to be legitimately made in the substantive relief.

78. There is no statutory definition of "a costs order" for the purposes of section 58A(6). Ms McDonnell submitted that "a costs order" has a well-recognised meaning as an order making provision for costs pursuant to the jurisdiction conferred by section 51 of the Senior Courts Act 1981. The fact that the prohibition is framed in terms of what may not be included in "a costs order" demonstrates that a wider prohibition was not intended and that, where permissible and appropriate, provision for a success fee may be made as part of the substantive relief. As "financial needs" in section 3 of the 1975 Act is apt to include liabilities of a claimant, which in turn may include liabilities for legal costs incurred in the proceedings, it is permissible, and may in the court's discretion be appropriate, to include provision for a success fee in an award under section 2 of the 1975 Act.

79. In my judgment, this submission fails for several reasons.

80. First, given the clear public policy underpinning the prohibition on the recovery of success fees in civil proceedings contained in section 58A(6), it would be very surprising if a success fee, which is not recoverable under the costs regime, was nonetheless recoverable as part of the substantive award. The policy, so clearly spelt out in Lord Justice Jackson's Report, would be wholly undermined in the cases where that was held to be possible. I construe "a costs order" in section 58A(6) as including any order which dealt with the costs of the proceedings in which it was made, irrespective of the statutory

provision or other jurisdiction under which it was made. As Ms Stevens-Hoare KC submitted on behalf of the Widow, an order that provides for one party to pay another party's costs is a costs order. The order made by the judge in the present case under section 2 of the 1975 Act was therefore, to the extent that it made provision for payment of part of the Daughter's success fee, "a costs order" within the meaning of section 58A(6). This is consistent with the language of section 58A(6), its evident purpose and the policy considerations on which it rests.

81. Second, Ms McDonnell's submissions fairly raise a question as to why section 58A(6) refers to "a costs order" and not simply to "an order". What is the purpose of this qualification? In my view, the answer is to be found in the authorities reviewed earlier in this judgment. The principle that A's costs of civil proceedings against B are not recoverable save by way of an order under the applicable costs regime does not apply to the recoverability of such costs against C in a claim based on a cause of action that A has against C, as in for example *British Racing Drivers' Club Ltd v Hextall Erskine & Co*, or indeed against B where A has a separate cause of action for such costs, as in a case of malicious prosecution.

82. Third, I do not accept that "financial needs" for the purposes of an award under the 1975 Act will include liabilities for costs incurred in the proceedings leading to the award, while proceedings under the 1975 Act are characterised as civil proceedings subject to the costs regime in the CPR. I have already explained the reasons for this. In any proceedings falling within that broad category, the costs of the proceedings are treated separately from the substantive relief and are not awarded as part of the substantive relief. The important policy reason for this common law principle is to uphold the integrity and coherence of the costs regime. This principle was part of the legal background against which the 1975 Act was passed and there is nothing in the Act to suggest that it was not to apply.

83. Fourth, there is nothing in section 58A, or in the Jackson Report and the Government's acceptance of its recommendations, to suggest that an exception was to be made for claims under the 1975 Act, either by retaining express provision for recovery or by an express exception to the application of section 58A(6). By contrast, some very limited exceptions were made for some claims by section 48 of LASPO 2012 (as regards claims for damages for diffuse mesothelioma) and by the terms of the commencement order bringing the amendments to section 58A into force: see The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 5 and Saving Provision) Order 2013 (SI 2013/77). By article 4, success fees remained recoverable in claims for damages for diffuse mesothelioma, certain publication and privacy claims and insolvency-related claims. Success fees ceased to be recoverable in insolvency-related claims and in publication and privacy claims under CFAs made after 6 April 2016 and 6 April 2019 respectively: see The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 12) Order 2016 (SI 2016/345) and (Commencement No 13) Order 2018 (SI 2018/1287). They remain recoverable in mesothelioma claims. Ms

McDonnell acknowledged that, leaving claims under the 1975 Act to one side, she could not identify any other civil proceedings where success fees would be recoverable.

84. Fifth, the implications of Ms McDonell's submissions arguably go far beyond claims under the 1975 Act. The basis of her submissions is that, while success fees are not recoverable under the costs regime contained in the CPR by reason of section 58A(6), there is no prohibition on their recovery as part of the substantive relief if they can properly fall within the scope of the substantive relief. Her submissions are, of course, confined to relief under the 1975 Act, that being the subject of these proceedings. If allowing the recovery of success fees is permissible as part of an award under the 1975 Act, it is not clear to me why they should not as a matter of principle equally be recoverable as consequential loss in appropriate circumstances in claims for damages in tort or for breach of contract. But, it is well established by authorities, including those referred to above, that litigation costs are not recoverable as between the parties to the action in which such damages are awarded, and the basis of that principle is that the costs regime would otherwise be undermined.

85. A further submission made by Ms McDonnell was that the Widow's proposed interpretation of a "costs order" in section 58A(6) was impossible to apply to many of the forms of relief available under section 2 of the 1975 Act. While the order made in this case, allocating a sum for the success fee as part of a lump sum, could be said to be referable to the success fee, this would not be true of orders for the transfer of property or periodic payments. I do not accept this. The position is simply that the judge cannot in determining the appropriate relief include directly or indirectly any allowance for the success fee. Ms McDonnell also submitted that, because section 58A(6) prohibits the "payment" of a success fee, it does not prohibit a transfer of property or other non-monetary order. However, payment in kind is a well-recognised form of "payment" and it would produce perverse results if section 58A(6) were construed as applying only to monetary payments.

The analogy with family proceedings

86. As earlier noted, King LJ drew an analogy with awards in financial remedy proceedings under the MCA. Having noted the similarity of section 3(1)(a) of the 1975 Act to section 25(2)(b) of the MCA 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 foreseeable future" and referred to *Azarmi-Movafagh v Bassiri-Dezfouli* [2021] EWCA Civ 1184, [2022] 1 FLR 157 in which the Court of Appeal confirmed that provision could be made in an award under the MCA for a party's liability for their own costs in the proceedings, King LJ said at para 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 section 25(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."

87. In that passage, King LJ referred to the "no order principle" applicable to costs in financial remedy proceedings under the MCA. In my view, that is a crucial distinction between those proceedings and proceedings under the 1975 Act, to which the costs regime in the CPR fully applies.

88. The "no order principle" applicable to financial remedy proceedings was introduced by the Family Proceedings (Amendment) Rules 2006 (SI 2006/352), which amended the Family Proceedings Rules 1991 by adding a new rule 2.71. Rule 2.71 was in turn substantially reproduced as FPR r 28.3. Rule 28.2 applies most but not all of the costs provisions of the CPR to proceedings governed by the FPR ("family proceedings"). One of the CPR provisions that is not applied is CPR r 44.2(2) which sets out the general rule in civil proceedings that the unsuccessful party pays the costs of the successful party, if (as normally happens) the court decides to make an order about costs. Rule 28.3 which applies specifically to financial remedy proceedings, a sub-set of family proceedings, introduces the "no order principle" by providing that "the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party", except where the court considers it appropriate to do so because of the conduct of a party in relation to the proceedings: rule 28.3(5)-(6).

89. The introduction of the "no order principle" resulted from the work and recommendations of an Ancillary Relief Advisory Group established by the President of the Family Division and chaired by Thorpe LJ, and its costs sub-committee chaired by Bodey J. The proposed changes and the reasons for them were set out in a Consultation Paper (*Costs in Ancillary Relief Proceedings and Appeals in Family Proceedings*, CP (L) 29/04) published by the Department for Constitutional Affairs in October 2004.

90. The reasons given for the proposed change, set out in paras 25-27 of the Consultation Paper, are illuminating:

> "25. The policy intention behind the proposed rule amendment is to move the costs regime in ancillary relief proceedings further away from the classic 'costs follow the event' approach

> in civil litigation. This is because family cases are fundamentally different to civil contract or personal injury cases. It is often difficult to identify clear winners and losers in ancillary relief proceedings nor is it desirable to try to do so in most cases.
>
> 26. The Department wishes to enable the court to include consideration of costs as part of the overall settlement of the parties' financial affairs. Justice will be better served by dealing with costs as part of the substantive application rather than treating costs as a separate issue. If the court is able to take the costs of the parties into account when considering the most appropriate order for ancillary relief, it can dispose of the costs issue as part of the overall financial settlement.
>
> 27. The purpose of applying a 'no order for costs' principle in ancillary relief proceedings is to stress to the parties, and to their legal advisers, that running up costs in litigation will serve only to reduce the resources that the parties will have left to support them in their new lives apart. *The proposed amendments to the costs rules are designed to establish the principle that, in the absence of litigation misconduct, the normal approach of the court to costs in ancillary relief proceedings should be to treat them as part of the parties' reasonable financial needs and liabilities.* Costs will have to [be] paid from the matrimonial 'pot' and the court will then divide the remainder between the parties." (Emphasis added.)

91. This passage, and particularly the emphasised sentence, demonstrates that it was as a result of abolishing a regime for the costs of financial remedy proceedings (save where the conduct of a party in relation to the proceedings justified an order) that costs could be dealt with as part of the substantive remedy.

92. It is relevant to the issue in this appeal to note that a significant problem with the pre-existing regime was that, after the court had made an order which in its judgment did justice between the parties, any prior Calderbank offer of settlement without prejudice save as to costs (see *Calderbank v Calderbank* [1976] Fam 93) was likely to be disclosed. As it was put in the Consultation Paper at para 22: "The consequences of failing to exceed a Calderbank offer can undermine completely the substantive order for ancillary relief that the court has just made. This stems from the closed nature of Calderbank offers, which are not brought to the attention of the court until all matters have been determined and the court is considering the issue of costs." The parallel with Part 36 and other offers in the context of proceedings under the 1975 Act is striking. The solution provided by the

new rules for financial remedy proceedings was to make Calderbank and other without prejudice offers inadmissible as regards costs. In determining whether a party's conduct justified an order for costs, account would be taken only of open offers.

93. The effect of the "no order principle" is that in substance there is no costs regime in financial remedy proceedings, save where justified by a party's conduct in relation to the proceedings. The inclusion of costs in the award made in the proceedings does not therefore undermine any applicable costs regime. The underlying rationale for the common law principle that the costs of proceedings are dealt with separately, and not as part of the substantive order, has no application.

94. There is a further, and perhaps more obvious, reason why there is no persuasive analogy with proceedings under the MCA. As already noted, success fees are prohibited in family proceedings. There is therefore no basis in the relevant authorities for supposing that, if success fees were permitted as between clients and their solicitors and counsel, they would be recoverable from the other party by means of a substantive award under the MCA. On the contrary, all the policy reasons which lie behind the prohibition on the recovery of success fees in section 58A(6) of the 1990 Act would equally apply.

95. In the course of his oral submissions Mr Wagstaffe KC, who argued this part of the case on behalf of the Daughter**,** made a submission by reference to the CA 1989. No reference had been made to the CA 1989 in the Daughter's written case, except in two footnotes.

96. Under Schedule 1 to the CA 1989, the court has power to make awards for the benefit of children and, in determining an application for an award, the court must have regard to, among other matters, "the financial needs, obligations and responsibilities which each [parent or other person in whose favour the court proposes to make the order] has or is likely to have in the foreseeable future" (para 4(1)(b)). As Mr Wagstaffe said, this wording is substantially the same as the equivalent provisions in the 1975 Act and the MCA. It is established that the court may include in an award under the CA 1989 a sum in respect of costs incurred in the proceedings.

97. It was nonetheless not suggested by Mr Wagstaffe that proceedings for orders under Schedule 1 to the CA 1989 might also provide an analogy with the proceedings under the 1975 Act. Nor, notwithstanding her great experience in family law, did King LJ draw any such parallel or even mention the CA 1989 in her judgment. This is not surprising, in light of a significant number of special features of these proceedings which include: the order must be for "the benefit of the child"; the application is not made for the applicant's benefit and the applicant is essentially acting on behalf of the child; although there is no positive rule providing that the "no order principle" applies to such proceedings, the general rule in the CPR that an order for costs (if any) will be made in

favour of the successful party expressly does not apply; and in practice orders for costs are not generally made. Further, the issue as to whether an award should include a sum in respect of a success fee could not arise, as success fees are prohibited in proceedings under the CA 1989.

98. Mr Wagstaffe's oral submission was confined to a situation where there are separate proceedings between the same parties under the CA 1989 and under the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") but they are heard together. He submitted that in such a case the court could provide in its award under the CA 1989 a sum in respect of a success fee payable in the TOLATA proceedings. It is unnecessary to decide this hypothetical question now but, whatever the answer, it does not assist to decide the issue which arises in the present appeal concerning a success fee incurred in the proceedings in which the substantive award is made.

99. For these reasons, I do not consider that a valid parallel can be drawn between proceedings under the 1975 Act and financial remedy proceedings under the MCA or, for the avoidance of doubt, proceedings under Schedule 1 to the CA 1989.

Conclusion

100. For the reasons set out above, I would allow the appeal and exclude from the order made in favour of the Daughter under the 1975 Act any sum for the success fee payable by her in respect of these proceedings.