1975 ACT CLAIMS

Inheritance Act claims: Heads I win, tails you lose – CFA-funded claims under the 1975 Act

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It is hard not to sympathise with a defendant facing a claim under the Inheritance (Provision for Family and Dependants) Act 1975. They must try to predict the outcome of the most unpredictable of claims. If they predict wrongly, they can expect a heavy penalty in costs. But, even if they predict correctly, their opponent is likely to be impecunious, giving little or no prospect of costs recovery.

The position is worsened further where the claimant is funding their solicitors under a conditional fee agreement (CFA). Following the Court of Appeal's decision last year in *Hirachand v Hirachand* [2021], the claimant stands to recover their base costs and a portion of their success fee if they succeed.

What options does a defendant have in such a situation? Strike-out or summary judgment are unlikely to be available. A Part 36 offer is an imperfect defence – if accepted, the claimant receives their costs, and if rejected, Part 36 sanctions count for little against an insolvent opponent.

Facts

Faced with this dilemma, a defendant may feel the need to try something a little creative. This is what happened in *Chimelu v Egemonye* [2021].

This was a 1975 Act claim brought by a claimant spouse against the estate of his late wife (the deceased). The deceased's estate was £131,598.50. The claimant was impecunious and instructed his solicitors under a CFA. The first and second defendants, siblings of the deceased, were the primary defendants.

The claimant needed permission under s4 of the Act to bring his claim beyond the six-month time period. The first and second defendants blamed the claimant for the delay and contested permission. It was listed for hearing as a preliminary issue.

In advance of the hearing, the first and second defendants also brought a composite application to protect their costs position. They sought to:

- order the claimant or his solicitors to make a payment into court as a condition of s4 permission being granted;
- disallow the claimant's success fee as a limb of the claim; or
- compel the claimant to obtain after the event (ATE) insurance.

The various applications came before District Judge Carter in the High Court in Manchester over two days. The judge expressed sympathy at paras 3 and 4 with the first and second defendants' position:

> *The defendants in this case have the concern that, if the claimant is successful, they will have to pay substantial amounts of costs well in excess of whatever they may or may not be left with out of the estate and therefore they will be substantial losers. If they are successful and they keep their entitlement under the estate (and I bear in mind again this is a relatively small estate) the money they have inherited from their sister will have long gone in their costs, which they will not be able to enforce against the claimant because he is impecunious… There is no doubt a lot of merit in that concern.*

Nevertheless, the judge granted the claimant permission to bring his claim under s4 of the Act and rejected the first and second defendants' application in its entirety.

Ordering a payment into court as a condition of the claim proceeding

The first and second defendants tried to rely on general case management powers, and in particular CPR r3.1(3)(a), which gives the court a power to make orders subject to conditions, including a condition to pay a sum of money into court.

The problem was that s4 is not a case management power. This was, in reality, an attempt to obtain security for costs in circumstances where the first and second defendants were not entitled to that relief. The case law in respect of r3.1(3) limited its use to cases where claims were being conducted with deliberate disobedience or a lack of good faith, neither of which applied.

Moreover, a key consideration was the claimant's inability to make any payment ordered. If the claimant could not afford to make the payment, as would presumably be the case with most 1975 Act claimants, his Art 6 right to a fair trial would be infringed.

Ordering a payment from the claimant's solicitors

The first and second defendants' riposte was to say that, if the claimant could not afford to make such a payment, his solicitors should be ordered to pay instead.

This was, in all but name, an application for a non-party costs order under CPR r25.14. That was how the judge treated it. The conditions for such an order were not satisfied as this was not a claim 'being funded in return for a share of the proceeds of the litigation' (para 20).

It would appear that an ordinary CFA, where, upon success, fees are payable in addition to a percentage uplift, is very unlikely to expose the solicitors to the risk of a non-party costs order. The same may not be true if another sort of litigation funding is in place and, early on in proceedings, defendants may wish to satisfy themselves how a claim is being funded.

Disallowing the claimant's success fee

The first and second defendants also asked the court to decide in advance that the claimant could not recover his success fee. This aspect of the application pre-dated the judgment in *Hirachand*, cited above. It was considered unmeritorious then and would doubly be so following the Court of Appeal's decision.

Compelling a claimant to obtain ATE insurance

In our experience, there is a fairly common misconception that a CFA-funded claimant is under an obligation to obtain ATE insurance to ensure their opponent's costs can be paid.

Chimelu is a very clear authority to the contrary, following *King v Telegraph Group Ltd* [2003], itself affirmed on appeal [2004]. These cases leave no doubt – the court does not have the power to make that order.

Moreover, even if such a power existed, as the judge observed, there would have to be evidence that the claimant was able to obtain ATE insurance (para 18). Many CFA-funded claimants will of course be unable to afford to take out insurance in the first place, which again engages Art 8 rights and raises issues of access to the courts.

So what can a defendant do?

In most cases, the defendant's best hope is to mediate these claims – and to do so early. Where a settlement will mean paying some or all of a claimant's costs, there is much to be said for having the mediation take place before the bulk of those costs have been incurred. It may be satisfying to force an opponent to divulge hundreds of pages of bank statements, utility bills, receipts and so forth, but, in our experience, the costs of doing so are seldom proportionate outside spousal claims against good-sized estates. That said, mediations are not infallible. They can take place too early. Clients – and lawyers – may not be ready to put aside principle for pragmatism. It may be that some factual issues (such as domicile or biological parentage in an adult child case) need to be resolved before either party can take mediation seriously. A premature mediation may be doomed to failure as much as one which takes place too late.

In cases issued over six months from a grant of probate or letters of administration, a contested s4 hearing may be the only chance for a defendant to land a 'knockout blow'

before a case is locked into trial. This is tactically sound, but the case law is largely applicant-friendly, and a costs sanction may follow if the point is taken unsuccessfully (as in *Chimelu*).

The importance of Part 36 offers is also clear. A particular aspect to consider when offer-making against a CFA-funded claimant is the role of that claimant's solicitors. A well-judged Part 36 offer can drive a wedge between lawyer and client. In rare occasions, it can force solicitors to terminate their CFA and leave a claimant unrepresented.

Damage limitation

Finally, if trial is inevitable, there are economies to be made. Can a three-day trial be squeezed into two days? Is expert evidence essential? Are there costs savings to be made by abandoning weaker lines of arguments? For instance, calling ten witnesses to complain about a claimant's conduct may be a poor investment if a defendant's better point is their competing need.

Taking a more pragmatic approach to lifestyle expenses is perhaps the best example where considerable savings can be made without doing considerable harm to a defence. If a claimant has a penchant for luxury holidays, champagne or caviar, that is one thing. Extensive cross-examination on money spent on groceries, Netflix and magazines, as we have seen done, is quite another. The 1975 Act does not create a 'lifestyle court' and it is suspected that the majority of claims fail for reasons other than an unnecessary gym membership.

Damage limitation is a key part of any litigation against an impecunious party. These measures may save tens of thousands of pounds and many judges will be strongly sympathetic to robust case management measures. If, win or lose, a defendant is paying their own legal fees, they have everything to gain by stripping a trial down to the bare essentials.

Conclusion for practitioners

- A CFA-funded claimant is under no obligation to take out ATE insurance.
- Such a claimant is very unlikely to be ordered to make a payment into court (unless the particular requirements of distinct CPR provisions, such as security for costs, are met).
- It is similarly unlikely that solicitors acting under an ordinary CFA would qualify for a non-party costs order.
- Mediation is essential, and its odds of success tend to be highest when it takes place before significant costs have been expended on disclosure.
- A Part 36 offer can be a powerful offensive weapon and sow divisions between a CFA-funded solicitor and their client.
- Persuading a court to refuse permission under s4 of the Act may be a solution in some claims – but the case law is generous to applicants and a costs sanction may follow if the point is taken and then permission is granted.
- If a claim must go to trial, bold case management is essential. Pick your battles and the costs saved may number in the tens of thousands of pounds.

Cases Referenced

- Chimelu v Egemonye & ors (2021) PT-MAN-2019-000117
- Hirachand v Hirachand & anr [2021] EWCA Civ 1498; [2022] WTLR 185 CA
- King v Telegraph Group Ltd [2003] EWHC 1312 (QB)
- King v Telegraph Group Ltd [2004] EWCA Civ 613

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