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Case Nos: HT-2022-000304 and HT-2023-000058

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Mrs Justice O'Farrell
[2026] EWHC 73 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 October 2026

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE ZACAROLI
and
LADY JUSTICE COCKERILL

BETWEEN:

MUNICÍPIO DE MARIANA
and the Claimants identified in the Schedules to the Claim Forms
Claimants/Respondent
-and-

(1) BHP GROUP (UK) LTD
(formerly BHP BILLITON PLC and thereafter BHP GROUP PLC)
(2) BHP GROUP LIMITED

Defendants/Appellants

Nicholas Sloboda KC and Jade Fowler (instructed by **Herbert Smith Freehills Kramer LLP**) for the **Appellants/Defendants** (BHP)

Roger Mallalieu KC (instructed by **PGMBM LAW LTD t/a Pogust Goodhead**) for the **Claimants/Respondents** (the claimants)

Hearing date: 6 October 2026

JUDGMENT

This judgment was handed down remotely at 10:00am on 16 October 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

Introduction

1. This case concerns the circumstances in which the court may make an order for interest on an award of costs under CPR Part 44.2(6)(g). It is part of long-running proceedings concerning the collapse of the Fundão Dam in Brazil (the Dam) in November 2015. There are some 450,000 claimants. They are individuals, businesses, municipalities, utilities and other entities claiming compensation from BHP for losses allegedly caused by the collapse of the Dam.
2. Mrs Justice O’Farrell (the judge) made an order on 26 January 2026 after a Stage 1 trial lasting some 5 months between October 2024 and March 2025. The judge decided that: (i) BHP were strictly liable as polluters under the Brazilian Environmental Law, (ii) BHP were, alternatively, liable as having been at fault under article 186 of the Brazilian Civil Code, and (iii) the claims were not time-barred. Both the judge and the Court of Appeal have refused permission to appeal these substantive decisions.
3. The judge also, however, ordered that BHP should pay the claimants: (i) 90% of their costs of the Stage 1 trial under CPR Part 44.2(2)(a) on a standard basis, (ii) pre-judgment interest at the rate of 1% above UK base rate on the total recoverable amount of the claimants’ Stage 1 costs from 1 August 2023 until 26 January 2026, and (iii) £43 million on account of costs under CPR Part 44.2(8). The claimants were refused an immediate detailed assessment of their costs.
4. BHP has appealed the judge’s award of pre-judgment interest on the grounds that: (i) the court had no power to award the claimants pre-judgment interest on costs “on account of a potential liability to pay a success fee reflecting the costs of funding the litigation”, and (ii) if there were such power, the court should not have exercised it in the claimants’ favour.
5. BHP’s arguments were essentially twofold. First, BHP said that the UK Supreme Court had made clear in *Hirachand v. Hirachand* [2024] UKSC 43, [2025] AC 599 (*Hirachand*) that the amended version of section 58A(6) of the Courts and Legal Services Act 1990, which made success fees irrecoverable, could not be circumvented by re-categorising the fee. This argument was based on the context (set out more fully from [19] below) that the original iteration of section 58A(6) permitted the recovery of success fees. Section 58A(6) was amended, following Lord Justice Jackson’s report, by section 44(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) to provide 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 ...”. That section prevented recovery of success fees directly or indirectly. BHP, therefore, submitted that the pre-judgment interest award made by the judge contravened section 58A(6) because it was only awarded on the basis that the claimants might incur **future** contingent costs by way of success fees. It was common ground that the claimants’ conditional fee agreements did not require them to fund their litigation costs until they succeeded in their claims, and it was only at that point that they owed their solicitors their base costs and a success fee.
6. BHP placed particular reliance on the fact that, even when success fees were recoverable (before the changes made by LASPO 2012), CPR Part 44.3B(1) (now

removed) provided that absent a specific court order, a party could not recover the part of the success fee “relating to the cost to the legal representative of the postponement of the payment of his fees and expenses”.

7. Secondly, BHP said that pre-judgment interest could only be awarded where the claimants were out of pocket or had borrowed money to fund their costs. Here, it was common ground (as I have said) that the claimants had done no such thing (see *Jones v. Secretary of State for Energy and Climate Change* [2014] EWCA Civ 363, [2014] 3 Costs LO 541, per Sharp LJ at [17] (*Jones*)).
8. In response, the claimants submitted that *Hirachand* had nothing to do with pre-judgment interest on costs. The fact that funding costs were irrecoverable did not mean that an award of pre-judgment interest under CPR Part 44.2(6)(g) could not be made on a broad discretionary basis taking into account all the circumstances, including that the relevant party had been required to pay the cost of funding, even if that funding cost would itself be irrecoverable.
9. The claimants accepted BHP’s argument that pre-judgment interest could only be awarded where the claimants were, in some sense, out of pocket. They submitted, however, that they were out of pocket, because they were contingently obliged to compensate their solicitors for the late payment of their fees through the success fee or part of it.
10. I have concluded that the judge was right so that the appeal should be dismissed. Logically, in my judgment, the primary question concerns the scope of the power in CPR Part 44.2(6)(g) to award pre-judgment interest on costs. BHP’s second argument comes first. An award of pre-judgment interest on costs is self-evidently about compensating one party for the loss of the time value of money. The recent authorities confirm that the power in CPR Part 44.2(6)(g) provides a broad discretion to compensate for the loss of the time value of money. The purpose of the power in CPR Part 44.2(6)(g) is to compensate the recipient either for having been kept out of its money or for itself being liable to compensate someone else (whether the solicitors providing the legal services themselves, an insurer or a third-party funder) for the fact that legal services have been provided to the recipient on credit.
11. Once the scope of the power in CPR Part 44.2(6)(g) is clear, the significance of *Hirachand* falls into place. *Hirachand* decided that the section 58A(6) prohibition on costs orders requiring the payment of a success fee could not be circumvented by including payment of the success fee in the order for substantive relief granted under the Inheritance (Provision for Family and Dependants) Act 1975 (the Inheritance Act). Such an order was anyway a “costs order” within section 58A(6). The Supreme Court said nothing, however, about the scope of the power in CPR Part 44.2(6)(g), nor about its interaction with section 58A(6).
12. On the facts in this case, the claimants can bring themselves within the scope of the power in CPR Part 44.2(6)(g) because they are under a liability, albeit through the mechanism of a success fee, to compensate their solicitors for the fact that they have provided the claimants with their services without payment. The order made by the judge does not infringe the prohibition in section 58A(6), because it is an order for pre-judgment interest on costs, which is quite distinct and separate from an order requiring

“the payment by one party of all or part of a success fee payable”. It compensates the claimants for the loss of the time value of their money.

13. I shall explain my reasons for these conclusions briefly under the following headings: (i) the claimants’ litigation funding arrangements, (ii) the relevant legislative and other history, (iii) the judge’s decision, (iv) the authorities on the scope of the power in CPR Part 44.2(6)(g), (v) discussion on the scope of the power in CPR Part 44.2(6)(g), (vi) *Hirachand*, (vii) discussion on the effect of *Hirachand*, and (viii) conclusions.

The claimants’ litigation funding arrangements

14. Somewhat unusually, we were only shown indirect evidence as to the claimants’ funding arrangements. They were described in the context of the *Pan NOx Emissions Group Litigation* as being applicable to the claimants’ solicitors’ entire portfolio of group litigation (see *Various Claimants v. Mercedes-Benz Group AG* [2024] EWHC 695 (KB) per Cockerill and Constable JJ at [47]).
15. The parts of that passage that are relevant to our case are taken from the evidence of Mr Goodhead as follows:

I confirm in respect of each and every one of the Litigations [including this case] that: (i) Pogust Goodhead acts for each of its clients pursuant to a Conditional Fee Agreement (“CFA”) within the meaning of section 58 of the Courts and Legal Services Act 1990; and (ii) There is no agreement between Pogust Goodhead’s clients and any third-party funder, pursuant to which a third-party funder has contributed or agreed to contribute to Pogust Goodhead’s clients’ costs in return for a share of any money or property which they may recover in the Litigations, or at all. ...

Pogust Goodhead’s funding arrangements with third parties ...

This firm’s funding is provided by way of a secured loan in the form of a corporate debt facility of \$552.5 million (the “Funding”) provided by Gramercy PG (UK) Holdings Ltd (“Gramercy UK”) with Gramercy Funds Management LLC (“Gramercy LLC”) acting as the investment manager for the debt facility. The Funding operates as a corporate debt facility whereby Pogust Goodhead makes regular drawdowns on an agreed cash flow basis which is subject to change. The funding is provided by Gramercy UK on a business-to-business basis to fund the operating expenditure of Pogust Goodhead. I confirm that the Funding is provided on the basis of a debt facility alone and does not involve equity investment.

Pogust Goodhead acts as a solicitor for clients in litigation. The Funding provides working capital which is used for all aspects of Pogust Goodhead’s work, including to use across its entire portfolio of cases and also in relation to its operating expenses. While it is of course true that a successful outcome in any of the cases on which Pogust Goodhead is instructed will assist Pogust Goodhead in repaying Gramercy UK, Gramercy UK must be repaid irrespective of the outcome of any of the Litigations relevant to the Applications.

Pogust Goodhead’s clients are not party to any agreement between Pogust Goodhead and Gramercy UK or Gramercy LLC. No agreement or relationship

exists or has ever existed between Gramercy UK or Gramercy LLC (or any previous funder) and Pogust Goodhead's clients. Pogust Goodhead's clients have no obligation to pay Gramercy UK, nor does Gramercy UK have any obligation to pay Pogust Goodhead's clients' costs.

As one would expect, Gramercy UK has put in place such security as would be appropriate for funding of the kind and scale provided, such as a charge over the firm's assets. This does not alter the position that Gramercy UK has not entered into any agreement with Pogust Goodhead's clients.

16. Both sides asked us to assume that the claimants in this case had entered into CFAs with their solicitors, Pogust Goodhead, under the terms of which (which we were not shown) the claimants were liable, upon the success of their claims, to pay their solicitors' base costs together with a success fee. The judge described at [51] that success fee as "reflecting the costs of funding the litigation". BHP accepted that success fees payable under CFAs will generally involve an element of compensation for funding costs by solicitors. In my judgment, therefore, we are able to assume that the success fees in this case are intended, at least in part, to compensate the claimants' solicitors for the funding costs they have incurred in providing legal services to the claimants without cost.

The relevant legislative and other history

17. Section 17(1) of the Judgments Act 1838 (section 17) originally provided that: "... every judgment debt shall carry interest at the rate of [8] pounds per centum per annum from the time of entering up the judgment ... until the same shall be satisfied ...". Section 17 related at that stage, of course, only to **post**-judgment interest. In *Hunt v. RM Douglas (Roofing) Ltd* [1990] 1 AC 398 per Lord Ackner at pages 415E-416C (*Hunt HL*), the House of Lords decided both that section 17 applied to orders for costs and that post-judgment interest on such orders ran from the date of the judgment (the so-called *incipitur*), and **not** (as previously thought) from the date of the Master's certificate at the end of the taxation of those costs (the so-called *allocatur*).
18. Purchas LJ (with whom Croom Johnson and Nourse LJJ agreed) had held (quite separately from *Hunt HL*) in *Hunt v. RM Douglas (Roofing) Ltd* (1988) 85(3) LSG 33, (1987) 137 NLJ 1133 at page 20 (*Hunt CA*) that funding costs could not be claimed as costs. He said that: "... by established practice and custom funding costs have never been included in the category of expenses, costs or disbursements envisaged by the statute and [Rules of the Supreme Court Order] ... To include them would constitute an extension of the existing category of "legal costs" which is not under the prevailing circumstances warranted".
19. When CFAs were first allowed by the Courts and Legal Services Act 1990 (the 1990 Act), section 58(8) of the 1990 Act provided that:

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.

Section 58(8) was repealed on 1 April 2000.

20. Just before section 58(8) was repealed, two important changes were made. First, section 17 was amended with effect from 26 April 1999 by article 3(b) of the Civil Procedure (Modification of Enactments) Order 1998 (made under section 4(2) of the Civil Procedure Act 1997). The amended section 17 provides as follows:

Every judgment debt shall carry interest at the rate of 8 pounds per centum per annum from such time as shall be prescribed by rules of court until the same shall be satisfied ...

21. Secondly, in 1999, the new CPR Part 44.2(6)(g) was introduced allowing for pre-judgment interest on costs by including a provision that “[t]he orders which the court may make under this rule include an order that a party must pay ... (g) interest on costs from or until a certain date, including a date before judgment”.

22. Section 58A(6) was introduced with effect from 1 April 2000 to permit the recoverability of success fees as between the parties. It did so by providing that:

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 provided for a success fee.

23. In December 2009, Lord Justice Jackson’s Final Report in his Review of Civil Litigation Costs recommended a package of measures including that “the two key drivers of costs” under CFAs, namely the lawyer’s success fee, and the after-the-event (ATE) insurance premium, should no longer be recoverable from an unsuccessful defendant (see [2.1]-[2.8] of that report).

24. As a result, section 44(4) of LASPO 2012 replaced the original section 58A(6) with the following provision:

A costs order made in any 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.

I shall refer to that provision, which **prohibits** costs orders including the requirement to pay a success fee, as “section 58A(6)” in the remainder of this judgment.

25. It can be seen from this explanation of the legislative history that *Hunt CA* clarified that funding costs were not to be regarded as part of the costs of litigation. Before and after *Hunt CA*, funding costs were irrecoverable as part of the costs of litigation. The only exception to that rule was during the period between 2000 and 2013 when the first version of section 58A(6) of the 1990 Act was in force (see [22] above).

26. Whether coincidentally or not, at roughly the same time as the first version of section 58A(6) provided by statute (for the first and only time from April 2000) that costs orders **could** include success fees (whether or not they included funding costs), section 17 of the Judgments Act 1838 was amended and CPR Part 44.2(6)(g) was introduced to allow the award of pre-judgment interest on costs. Allowing success fees to be recovered as costs may have meant in practice that claimants in CFA-funded litigation had no routine need to seek pre-judgment interest on their costs for that 13-year period.

27. The position was, however, different after 2013, when success fees once again ceased to be recoverable as costs (because of the second version of section 58A(6) – see [24] above). It is that position that we are considering in this case.

The judge's decision

28. The judge decided the question in issue before us briefly. I can, therefore, conveniently set out the entirety of her reasoning as follows:

47. The claimants seek interest at the commercial rate of 1% above base rate on the totality of their costs as from 1 August 2023, the date at which half of the fees were incurred.

48. The defendants' position is that the claimants are not entitled to any interest on pre-judgment costs because they have not paid any legal fees or disbursements up front and have not explained how they are out of pocket.

49. CPR 44.2(6)(g) gives the court discretionary power to order a party to pay interest on costs from or until a certain date, including a date before judgment.

50. In [*Jones*] this rule was explained by Sharp LJ at [17]:

“The purpose of such an award is to compensate a party who has been deprived of the use of his money, or who has had to borrow money to pay for his legal costs. The relevant principles do not materially differ from those applicable to the award of interest on damages under s 35A of the Senior Courts Act 1981. The discretion conferred by the rule in respect of pre-judgment interest is not fettered by the statutory rate of interest, under the Judgments Act 1838, but is at large. Ultimately, the court conducts a general appraisal of the position having regard to what is reasonable for both the paying and the receiving parties. This normally involves an assessment of what is reasonable having regard to the class of litigant to which the relevant party belongs, rather than a minute assessment which it would be inconvenient and disproportionate to undertake. In commercial cases the rate of interest is usually set by reference to the short-term cost of unsecured borrowing for the relevant class of litigant, though it is always possible for a party to displace a “rule of thumb” by adducing evidence, and the rate charged to a recipient who has actually borrowed money may be relevant but is not determinative. See *F&C Alternative Investments Ltd v Barthelemy* (No. 3) CA [2013] 1 WLR at paras 98, 99 and 102 to 105 [*F&C Alternative*]; *Bim Kemi AB v Blackburn Chemicals Ltd* [2003] EWCA Civ 889 at 18 and for example, *Fiona Trust & Holding Corporation v Privalov* [2011] EWHC 664 (Comm).”

51. In this case, the claimants have not been required to fund the litigation directly and have made no payments in respect of costs. Pogust Goodhead have obtained funding for the litigation and the claimants do not have to pay any costs unless and until any damages are awarded. However, in that eventuality, the claimants will be liable to pay success fees to their legal representatives reflecting the costs of funding the litigation, thereby reducing any damages received. It is a liability for costs, albeit a contingent liability at this stage. As a matter of principle, the claimants should be entitled to compensation in respect of the funding expenses for

which they will be indebted out of any damages. The fact that their solicitors and/or funders have accepted the risk that the costs and funding expenses will only be recouped from any damages does not detract from that position.

52. On balance, I consider that it would be appropriate for the court to exercise its discretion and award pre-judgment interest on costs, at the rate of 1% above base rate, up to the date of the order for costs. The claimants' submission that the court should adopt the point at which half of the fees were incurred, 1 August 2023, for the purpose of calculating the interest, is a pragmatic and proportionate approach which the court accepts.

The authorities on the scope of the power in CPR Part 44.2(6)(g)

29. *McPhilemy v. Times Newspapers Ltd (No 2)* [2001] EWCA Civ 933, [2002] 1 WLR 934 was decided shortly after the introduction of the CPR. It concerned the permissive power to award interest on costs under what was then CPR Part 36.21(3)(b), where a claimant had beaten the defendant's Part 36 offer. Chadwick LJ (with whom Longmore and Simon Brown LJJs agreed) said at [23] that the purpose of the power was to redress the element of "perceived unfairness" which arose from the "general rule that interest is not allowed on costs paid before judgment" (see *Hunt HL* at page 415F).
30. In *Bim Kemi AB v. Blackburn Chemicals Ltd* [2003] EWCA Civ 889, [2004] 2 Costs LR 201 (*Bim Kemi*), Waller and Kennedy LJJs said, in relation to the power in CPR Part 44.2(6)(g), that there was no reason in principle why the court should not make such an order for pre-judgment interest "where a party has had to put up money paying its solicitors and been out of the use of that money in the meanwhile" (see also *Douglas v. Hello!* [2004] EWHC 63 (Ch), [2004] 2 Costs LR 304 per Lindsay J at [24]).
31. In *Nova Productions Ltd v. Mazooma Games Ltd (No 2)* [2006] EWHC 189 (Ch), [2006] RPC 15 (*Nova Productions*), Kitchin J cited all the preceding authority on CPR Part 44.2(6)(g) before concluding at [16] as follows:

In the light of all these authorities, it seems to me that the court has a broad discretion when deciding whether to award interest on costs from a date before judgment. That discretion must be exercised in accordance with the principles set out in CPR 44.3 and the court must take into account all the circumstances of the case, including such matters as the conduct of the parties and the degree to which a party has succeeded. Further, the discretion must be exercised in accordance with the overriding objective of dealing with the case justly. I am unable to accept the submission that interest on costs should only be awarded in a case which is in some way out of the norm. I find no basis for that in the CPR and I believe it would provide an unwarranted fetter on the court's discretion. This conclusion is, in my judgment, supported by the decisions of the Court of Appeal in [*Powell v. Herefordshire Health Authority* [2002] EWCA Civ 1786, [2003] 3 All E.R. 253 and *Bim Kemi*] ...

32. *Fosse Motor Engineers Ltd v. Conde Nast and National Magazine Distributors Ltd* [2008] EWHC 2527 (QB), [2009] 3 Costs LR 377 (*Fosse*) decided that the power under CPR Part 44.2(6)(g) could be exercised even when the litigation was funded by insurers. At [12], Akenhead J said that he could presume that insurers had made a loss or incurred a cost, and continued: "[t]he award of interest on costs, certainly as a matter of principle

and discretion, is not, I believe, intended to require a minute examination as to how a successful defendant, in this case, particularly funded the litigation”, even if there were cases where interest would not be appropriate. The award of interest on costs was, in principle, “primarily compensatory, to compensate a party in whose favour an order of costs is made against the burden of having had to pay costs as the case has run along”.

33. In *Fattal v. Walbrook Trustees (Jersey) Ltd* [2009] 4 Costs LR 591, [2009] EWHC 1674 (Ch) (*Fattal*), Christopher Clarke J said at [25]-[26] that an order of pre-judgment interest on costs was not an exceptional occurrence. He repeated its primary purpose, namely to compensate the recipient for the fact that he has been precluded from obtaining a return on the money which he has had to expend on costs and has thus been out of pocket. Christopher Clarke J did not, however, think it mattered that the costs had actually been funded by a company owned by the party to the litigation, rather than the party itself.
34. The judge correctly cited the statement of principles enunciated by Sharp LJ in *Jones* (see [50] of her judgment at [28] above). The key points made in that passage are that the discretion conferred by CPR Part 44.2(6)(g) is at large, and requires the court to conduct a general appraisal of the position having regard to what is reasonable as between the parties. The purpose is to compensate a party who has been deprived of the use of his money, or who has had to borrow money to pay for his legal costs. We were referred to a number of other cases considering the discretion exercised under CPR Part 44.2(6)(g), but I did not find them to have enunciated any different statement of the principles.

Discussion on the scope of the power in CPR Part 44.2(6)(g)

35. As already explained at [7] and [9]-[10] above, the essential difference between the parties as to the scope of the power is as to whether an award of pre-judgment interest on costs under CPR Part 44.2(6)(g) may **only** be made where the claimants are actually out of pocket or have borrowed money to fund their costs. The simple question is whether the discretion can be exercised in favour of a party who is liable (as in this case) to compensate someone else (whether the solicitors providing the legal services themselves or a third-party funder) for the fact that legal services have been provided to it on credit. The unusual funding mechanism employed in this case has not been considered in any of the cases we were shown.
36. It is clear that an award of pre-judgment interest on costs under CPR Part 44.2(6)(g) is not an exceptional or unusual step for the court to take (see *Nova Productions*, *Fosse* and *Fattal* at [29]-[31]). In general terms, it is also clear from all the cases I have cited that an award of pre-judgment interest on costs is intended to compensate one party for the loss of the time value of money. There is, however, nothing in the wording of CPR Part 44.2(6)(g) or elsewhere to suggest that such interest can **only** be awarded if the receiving party has actually expended money on costs or has borrowed money to pay such costs. Such a rule would fetter the court’s discretion, which would be at odds with the broad discretion provided for in the wording of the rule, and with the authorities (see *Nova Productions* at [31] and the passage from *Jones* cited in the judge’s judgment at [50] – see [28] above).
37. In this case, and presumably in many other litigation funding situations, the claimants had no obligation to pay their solicitors’ costs unless their claims were successful. At

that stage, however, the claimants became liable to pay their solicitors' base costs and a success fee. It was not in dispute before us that the success fees payable in this case could be assumed to include some element of compensation for the credit provided in respect of the solicitors' costs. I would endorse what Akenhead J said in *Fosse* to the effect that an application for pre-judgment costs should not normally entail a minute examination of the funding mechanism. It was clear in this case, and will be clear in many cases, that the receiving parties were obliged to provide compensation for the time value of the money used to fund their costs. In this case, that obligation was, as the judge said at [51], through payment of the success fee: "reflecting the costs of funding the litigation, thereby reducing any damages received".

38. Accordingly, in my judgment, the power in CPR Part 44.2(6)(g) provides a broad discretion to compensate for the loss of the time value of money, which is for the purpose of compensating the receiving party either for having been kept out of its money or for itself being liable to compensate someone else (whether the solicitors providing the legal services themselves, an insurer or a third-party funder) for the fact that legal services have been provided on credit.

Hirachand

39. In the light of what I have already said, the judge had power to make the challenged order, unless section 58A(6) or the authorities on success fees forbid it. BHP submits that *Hirachand* has such an effect.
40. In *Hirachand*, the claimant succeeded in obtaining an order for financial provision under section 2 of the Inheritance Act. The judge awarded the claimant a lump sum calculated by reference to her financial needs, which also included an amount referable to the claimant's liability to pay her solicitors a success fee under a CFA. The Supreme Court held that success fees were costs, and the costs of civil proceedings were to be dealt with exclusively in accordance with the CPR. They could not be recovered by substantive relief in the proceedings. Moreover, the order the judge had made in respect of the success fee was a "costs order" which was prohibited under section 58A(6).
41. Lord Richards explained the history of success fees at [42]-[54] of his judgment in *Hirachand*. He referred at [49] to the Government's response to Lord Justice Jackson's recommendations concerning success fees (see also [23] above). At [50], Lord Richards said that the Government's 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". At [52], he pointed out that Lord Justice Jackson had not suggested an exception to allow Inheritance Act claims to include awards of success fees. At [56], Lord Richards explained the general principle that costs were to be dealt with under the CPR, and at [62]-[63], why Inheritance Act claims did not provide an exception to that rule allowing irrecoverable success fees to be recovered.
42. At [77]-[85], Lord Richards dealt with the meaning and effect of section 58A(6). He said at [80] that a "costs order" under section 58A(6) included: "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". He concluded at [84] that it was not permissible for success fees to be recovered as part of an award under the Inheritance Act.

Discussion of the effect of *Hirachand*

43. I have already stated the principles to be derived from *Hirachand*. They are, in essence, that costs (including success fees which were always to be regarded as costs of civil proceedings) were to be dealt with exclusively in accordance with the CPR. They could not be recovered by substantive relief in Inheritance Act proceedings. A substantive order in respect of a success fee made under the Inheritance Act was to be regarded as a prohibited “costs order” falling within section 58A(6).
44. BHP submitted that *Hirachand* made clear that neither the general rule as to irrecoverability of success fees nor section 58A(6) could be circumvented by the backdoor. It was the substance that mattered. BHP relied particularly on what Lord Richards had said at [80] and [85]:

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.

The position is simply that the judge cannot in determining the appropriate relief include directly or indirectly any allowance for the success fee.

BHP referred also to the decision of Leech J in *Musst Holdings v. Astra Asset Management* [2026] EWHC 1599 (Ch) at [17]-[30] and [40]-[46].

45. Despite these forceful submissions, I do not accept that *Hirachand* has the effect of making it impossible for the court to make an order for pre-judgment interest on costs under CPR Part 44.2(6)(g) on the facts of this case. *Hirachand* actually had nothing to say about the scope of the power in CPR Part 44.2(6)(g), nor about its interaction with section 58A(6). As I have already explained at [10] and [35]-[38] above, the power in CPR Part 44.2(6)(g) provides a broad discretion to compensate a receiving party. The purpose of CPR Part 44.2(6)(g) is to compensate the receiving party either for having been kept out of its money or for itself being liable to compensate someone else for the fact that legal services have been provided on credit.
46. The fact that success fees and funding costs cannot be recovered in themselves as part of a costs order at common law (see *Hunt CA* at [18] above) and by reason of section 58A(6) does **not** mean that an order for pre-judgment interest on costs under CPR Part 44.2(6)(g) is prohibited just because a receiving party has agreed to pay a success fee. Such a rule would interfere with the broad CPR discretion created by CPR Part 44.2(6)(g). It would be unjust to funded parties in a large number of situations. The broad discretion in CPR Part 44.2(6)(g) will always, in some sense, compensate the cost of funding the litigation. The power under CPR Part 44.2(6)(g) is, therefore, quite distinct from either the costs order itself or a substantive order specifically allowing recovery of a success fee. The award of pre-judgment interest in circumstances where a claimant may ultimately pay a success fee is not the same as the award of the success

fee itself either by way of a costs order or an order for substantive relief. The award of pre-judgment interest is compensatory, but it does not amount to the award of the success fee itself, nor is it awarded for the purpose of paying that fee.

47. There are two separate indications that support the proposition that the CPR Part 44.2(6)(g) power is separate and distinct from either the costs order itself or from a substantive order specifically allowing recovery of a success fee.
48. First, in *Nosworthy v. Royal Bournemouth & Christchurch NHS Foundation Trust* [2020] EWHC B19 (costs) (*Nosworthy*), Master Brown said this at [25]-[26] (with which I agree):

25. It is clear that in general the costs of funding are not recoverable as an item of costs in a Bill of Costs: see [*Hunt CA*] in which Purchas LJ held “there is no duty imposed upon the court to award party and party costs on an indemnity basis and by established practice and custom funding costs have never been included in the category of expenses, costs or disbursements envisaged by the statute and RSC O.62”. As Mr. McDonald put it, the cost of funding litigation is not recoverable in and of itself (referring to the decision in [*Hunt CA*] cited above for the pre-CPR position and *F&C Alternative* for the post CPR position). However it seems to me that without intending to provide any indemnity against the costs of funding, the application of a normal rule that judgment rate interest (described by Steele J as “generous if not penal”) be paid from the date of the costs order (‘the *incipitur* rule’) at least substantially mitigates the position. As I read [*Hunt HL*] (see generally [pages 415F to 416B] and *Simcoe v. Jacuzzi UK Group plc* [2012] WLR (D) 35 (see generally [39] to [48])) at least in part the justification for such a normal rule is that it would better enable the costs of funding to be met than if judgment rate interest applied only from the date of ascertainment or agreement of the costs (the ‘*allocatur*’ date). In *Simcoe* Neuberger MR concluded that the balance of justice still favoured the *incipitur* rule notwithstanding the increasing use of CFAs (such that no liability to pay for the solicitor’s own fees generally arises prior to the making of the costs order, in contrast to the position when *Hunt* was decided: see [42] of *Simcoe* and reason (ii) of Lord Ackner’s decision). I note in particular that at [46] of *Simcoe* Neuberger MR commented:

“It is right to mention Lord Ackner’s reason (v) as it deals with a case, postulated by the defendant, namely where the solicitors do not pay out a disbursement (e.g. the fees of counsel and an expert witness) until after they receive the costs from the defendant. In such a case, it seems to me, there can be ‘an express agreement between the solicitor[s] and [the barrister and witness] that any interest ... on disbursements [shall] be held by [the solicitors] for ... the ... persons to whom they are ultimately paid.’”

26. He [Lord Neuberger] went on to say:

48. First, I would discourage too detailed an approach into the facts of the particular case in hand for the purpose of determining the date from which interest should run. As Lord Ackner’s speech in [*Hunt HL*] implies, when making such a determination, the court should take a broad view of the position. Prolonged argument let alone detailed evidence, on the issue must be avoided. There will often be no perfect date, and the decision inevitably

will, indeed should, be broad brush. Further, if interest was to run from different dates on different components of the costs, it would, in many cases, lead to arguments which would do the legal system no credit. The second observation is that I would not necessarily agree with the suggestion, at [2009] 4 Costs LR 591, para 30, that it may be inappropriate to award interest on costs where the case is being funded by a third party entirely voluntarily or otherwise free of any cost. I would have thought that, following the logic of reason (v) in para 11 above (and see para 46 above), if interest on costs is payable from the *incipitur* date, the party to whom it is paid may have to account for it to the third party, and, if that is correct, there would seem to me to be a powerful argument for saying that the third party should get interest on costs in the normal way.

49. Whilst in no sense binding on us, the logic explained by Master Brown by reference to Lord Neuberger's comments in *Simcoe v. Jacuzzi UK Group plc* [2012] EWCA Civ 137, [2012] 1 WLR 2393, very much supports the distinctions that I have sought to draw.
50. Secondly, the vice that Lord Justice Jackson saw in having made success fees recoverable was that their recoverability increased and had increased the costs of litigation (see [23] above). Claimants, particularly in personal injury cases, had no incentive to negotiate smaller success fees if they were always recoverable from the defendants. That perverse incentive is inapplicable in a case like this. Here, the claimants' funding arrangements were bespoke. It is not disputed that, upon succeeding in their claims, the claimants will be liable both for their solicitors' base costs and for success fees. The availability or otherwise of an order for pre-judgment interest on costs will have had no influence on the amount of that success fee.
51. To put this second point another way, the fact that the claimants have incurred, through the success fees, a contingent liability to compensate their solicitors for their funding costs is merely a trigger to enable interest to be claimed. It does not in any way influence the **amount** of interest to be paid. The amount awarded is based on what funding the costs would reasonably have cost the class of persons of which the claimants form part, as opposed to the value of the success fee itself. The claimants remain incentivised to limit the amount of success fees, notwithstanding their ability to recover pre-judgment interest on their costs.
52. I should mention, finally, BHP's point that, even when success fees were recoverable, funding costs were not recoverable as part of those success fees. CPR Part 44.3B(1) had provided that "[u]nless the court orders otherwise, a party may not recover as an additional liability – (a) any proportion of the percentage increase relating to the cost to the legal representative of the postponement of the payment of his fees and expenses" (see also *Nosworthy* at [32] and *Marbrow v. Sharpes Garden Services Limited* [2020] EWHC B26 (Costs) per Senior Costs Judge Gordon-Saker at [33]). I do not see how this point takes BHP any further. First, the provision relied upon was subject to the court otherwise ordering. Secondly, CPR Part 44.3B(1) had nothing to do with the award of pre-judgment interest on costs. The entire legislative history, that I have explained at [17]-[27] above, shows that the award of pre-judgment interest on costs is entirely distinct and separate from the recoverability of success fees.

Conclusions

53. I should say, in closing, that BHP said nothing in oral argument about the second part of its ground of appeal, namely that, if CPR Part 44.2(6)(g) gave the court the power to award pre-judgment interest on costs to the claimants, the court should not have exercised that power in the claimants' favour. In my judgment, the judge was entirely right to exercise the discretion that I have held she had in the way she did in the claimants' favour.
54. I would dismiss this appeal.

Lord Justice Zacaroli:

55. I agree.

Lady Justice Cockerill:

56. I also agree.