

# NWL Costs Update – December 2021

## BCX (by his litigation friend KJP) v DTA (representative of the estate of CRS, deceased)- [2021] EWHC B27 (Costs)

An interesting case and a cautionary tale.

Solicitors will be aware of the Practice Note issued by the Senior Costs Judge concerning the procedure to be followed in respect of deductions from damages for children and protected parties (a copy of the Practice Note is available on our website).

CPR 46.4(2)(a) provides the Court must order a detailed assessment of the costs payable by, or out of the money belonging to a child or protected party unless the Solicitors waive their claim to any costs not recovered from the paying party.

In this case, the Claimants Solicitors, Irwin Mitchell (IM), sought costs to be paid from the Claimants damages and consequently on approval of the award of damages, Judge McCloud, ordered an assessment of costs.

IM subsequently agreed the party and party costs at £330,000 and sought to recover from the Claimants damages:

1. A shortfall in profit costs not recovered from the Defendant - £94,977.38 inclusive of VAT
2. A success fee in the sum of £62,848.92 inclusive of VAT
3. The ATE premium of £1,932.

Most firms would seek to recover 2 and 3 but not necessarily 1.

The matter originally came before the court on an application for approval of a deduction from the damages in respect of IM's costs as detailed above. Reliance was placed on the agreement of the litigation friend to the deductions sought. Whilst some weight should properly be attached to the agreement by the Litigation Friend, these was an issue as to whether the consent was informed. However, the Costs Judge had formed a preliminary view

as to the costs claimed and expressed considerable concern as to their reasonableness. An assessment was therefore required.

The Costs Judge then commenced an assessment of the costs but given the large number of items in the bill, on invitation, agreed to deal with it on a provisional basis, giving the opportunity for IM to come back on any disallowed costs at a hearing.

### The Shortfall

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The Judgment sets out in some detail the assessment of the costs but an interesting point to note is that an hourly rate of £365 for a Grade A Fee Earner in National 1 (Bristol or Southampton) for the period 2017-2020 was not considered unreasonable (brain injury RTA settled for £1.3 million). Rates for more junior fee earners were considered excessive and reduced (B £260, C £210, and D £135).

The provisional assessment resulted in an allowance of £274,859 which was considerably lower than costs were agreed at on a party and party basis - £330,000 (albeit that included interest and costs of assessment)! It followed that no 'shortfall' in costs was payable out of the Claimant's damages.

The paying party must be feeling aggrieved at having paid out substantially more than a Costs Judge thought it was worth (even on an indemnity basis)!

### Success Fee

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This was claimed at 20% and reliance placed by IM on the case of C v W [2008] EWCA Civ 1459. Having reviewed matters the Costs Judge allowed 15% - on the time costs he had allowed - finding that the CFA should be construed as providing for the success fee to be based on the

reasonable assessed time costs, not those which were claimed. The effect of this was that the Statutory Cap on success fees didn't come into play.

## ATE Premium

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This covered non recovery of disbursements and other sides costs following a Part 36 Offer. Notwithstanding QUOCS protection the Judge found the premium of £1,932 was reasonable.

## Thoughts

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Remember the decision is provisional only.

Approach any claim for 'shortfall' costs with caution (assuming you are not operating under a CFA lite) – at the end of the day the costs are coming out of a protected party's damages. If a reasonable party and party recovery is made, consider limiting costs to that amount. And if shortfall costs are sought try to be selective e.g. solicitor/ own client costs that might have been conceded or irrecoverable experts fees.

Whilst the costs Judge based the success fee on his assessment of reasonable time costs – we would always suggest basing the success fee deduction in protected party cases on the party and party profit costs recovered – it will always come across as more reasonable than seeking the success fee on the base profit costs claimed from the paying party or as detailed on the case management system.

And on the issue of hourly rates – to help in justifying high Grade A/B rates for conducting a large case – always look to delegate a decent proportion of work down to more junior fee earners at lower hourly rates.

**If you have any questions about anything in this update please do get in touch with us.**

**Lee Evans**  
**Director & Costs Lawyer**  
[Lee.evans@nwlcosts.com](mailto:Lee.evans@nwlcosts.com)  
**01244 317543**