

NWL Costs Update – March 2022

Fatal Accident Costs

DUTY TO INFORM CLIENT OF BUDGET OVERSPENDS

ST v ZY [2022] EWHC B5 (Costs)

The Background

This was a Judgment of Senior Costs Judge Gordon-Saker in a Fatal Accidents claim.

C is the 7-year-old child of the deceased and his mother ST who lived with the deceased but was not married to him. ST instructed Irwin Mitchell in relation to her claims and those of her 4 children of whom C is the youngest. IM issued proceedings for ST, as administratrix of the estate of the deceased and on behalf of herself and her 4 children as dependents. A separate claim was issued by other solicitors on behalf of the former wife of the deceased and her children.

The two claims were consolidated (Order July 2019) and by November 2019 the dependency claims of ST and her three older children were discontinued leaving the estate claim and the loss of dependency claim for C.

The claims settled in April 2020 but none of the sum payable to ST was apportioned to the Estate claim. The Defendant was ordered to pay ST's costs of the claim, "advanced only on behalf of C as a dependent and as administratrix of the Deceased's Estate.

IM subsequently delivered a bill of costs for £187,506.24 which was agreed subject to Court approval at £132,000 inclusive of interest and costs of assessment. IM asked the court to approve the agreement on costs and to assess the costs payable by C to IM which included:

- A shortfall on the bill of £53,719.16

- A success of 12.5% (PC to be assessed before applied)
- £1,092 in respect of ATE premium

Procedure

As IM sought to recover costs in excess of that recovered from the paying party a Detailed Assessment of the costs payable by C was required – this decision however relates to a number of preliminary issues.

The Retainer

The claim was funded through a CFA dated 10.11.16 and whilst it was recorded that it was entered into between IM and ST "for and on behalf of the dependants of" the deceased the agreement was expressed to cover:

Your claim for damages arising from the death of [the deceased] caused by an accident on or around [date] which is made by you as a Dependant of the Deceased under the Fatal Accidents Act 1976.

Arguably the work covered by the agreement was limited to the personal claim of ST. However, the Court considered the evidence contained in IM's file which made it clear that the claim was brought for ST and her children. There was therefore an enforceable retainer in respect of C's loss of dependency claim. As an aside the Judge commented that the CFA did not cover work on behalf of the estate.

The Bill

The Defendant had argued in Points of Dispute that the Bill failed to exclude costs of the discontinued claims. The Points of Reply (POR) stated that the bill didn't include any specific costs relating to the discontinued claims. The Judge pointed out that only those costs that were incurred on C's behalf could be payable out of C's damages. The Judge concluded that work related to the

discontinued claims was indeed sought in the bill and that:

“No particular thought would appear to have been taken to separate out the costs for which C is not liable”.

Costs in Excess of the Budget

Costs had exceeded the budget in respect of 3 phases totalling £31,304.68. In the POR, IM had conceded £25,052.69 whilst arguing there was a good reason for exceeding the Witness Statement phase. In addition, and somewhat bizarrely IM also sought to recover costs of the budgeting process which were £11,028 in excess of the caps imposed by CPR 3.15(5) e.g., the 1 and 2% and advanced no ‘exceptional circumstances’ to justify it.

The Judge pointed out:

“I have seen nothing to suggest that any of this was explained to ST”.

Costs sought from C (Solicitor/Client) are covered by CPR 46.9(3) which provides:

Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –

(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;

(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;

(c) to have been unreasonably incurred if –

(i) they are of an unusual nature or amount; and

(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.

The budget overspends were considered to be unusual in nature. But as to whether they were unusual in amount the Judge commented:

“I have found nothing to suggest that ST was told about the budget or about the effect of the budget. To avoid the presumption applied by CPR 46.9(3)(c), the solicitor must tell the client that as a result the costs might not be recovered from the other party. That must mean as a result of their unusual nature or amount. Telling the client that some costs might not be recovered from the other side is not sufficient. ST should have been told that the

budget was being exceeded by a wide margin and that, as a result, those costs might not (and, indeed, almost certainly would not) be recovered from the other side.

Accordingly, in my judgment, the costs in excess of the budget and in excess of the caps imposed by CPR 3.15(5) are to be presumed to have been unreasonably incurred”.

And in a further parting shot said:

“I should add that I think it very surprising that a solicitor would not tell their client that the budget had been exceeded and that the costs in excess of the budget would not be recoverable. At that point the client is moving from pursuing a claim in which reasonable and proportionate costs will be recoverable to a claim where no further costs will be recoverable in respect of some or all of the phases”.

Given that there was a valid retainer and given the value of the budget overspends the Court approved the costs settlement at £132,000. A Detailed Assessment was still required in respect of the bill not least in respect of costs which were not covered by the retainer.

Thoughts

Firstly, in a Fatal Accidents claim – check your retainer before you start. If you need any advice on this, please get in touch.

Secondly, and most importantly always ensure your client has a copy of the approved budget.

Always monitor your costs as against the budget to try and avoid any overspends. If in doubt get in touch and we can cost your file/analyse the costs and advise if you are over budget in total or by phase.

In the event of any overspend always ensure the client is advised such overspend will almost certainly not be recovered from the paying party.