Case No: SC-2021-BTP-000929

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC2A 2LL

Date: 21/02/2022

Before :

SENIOR COSTS JUDGE GORDON-SAKER

- -

Between :

ST	**Claimant**
- and -	
ZY	**Defendant**

- -
- -

Mr Matthew Waszak (instructed by **Irwin Mitchell LLP**) for the **Claimant's Solicitors**

Hearing date: 2nd February 2022
This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 12 noon on Monday 21st February 2022.

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SENIOR COSTS JUDGE GORDON-SAKER

Senior Costs Judge Gordon-Saker:

1. The background to this matter is very sad. C is presently 7 years' old. In 2015 her father was killed in a road traffic accident when riding his motorcycle. A car driven by the Defendant turned across his path. The Defendant was convicted of causing death by careless driving in September 2016.

2. In October 2016 C's mother, ST, instructed Irwin Mitchell LLP ("IM") in relation to her claims and those of her four children, of whom C is the youngest. Of ST's children, only C is the child of the deceased. ST and the deceased were not married, but had lived together. IM issued proceedings claiming damages against the Defendant for ST, as administratrix of the estate of the deceased and on behalf of herself and her four children as dependants.

3. A separate claim was issued by other solicitors on behalf of the former wife of the deceased and her children.

4. At the first costs and case management conference, in July 2019, the court directed that the two claims should be consolidated, that ST should become the First Claimant and that the former wife should become the Second Claimant. Both ST and the former wife continued to be represented by separate solicitors.

5. In November 2019 the dependency claims of ST and of her older three children were discontinued. In relation to the claim brought by ST, that left the claim of the estate and the loss of dependency claim of C.

6. Those claims were settled in April 2020, together with the claims of the deceased's former wife and her children. The terms of the settlement were agreed to be confidential. However, of the sum payable to ST, no part was apportioned to the claim of the estate. All of it was apportioned to the loss of dependency claim of C.

7. In approving the settlement, HH Judge Coe QC, sitting as a Judge of the High Court, ordered that the Defendant should pay ST's costs of the claim "advanced only on behalf of [C] as a dependant and as an Administratrix of the Deceased's Estate" and directed that the costs payable by ST to her solicitors "shall be assessed pursuant to CPR 46.4 and shall take place following the conclusion of the assessment or agreement of the Defendant's liability for ST's legal costs".

8. The bill filed by IM on behalf of ST is in the total sum of £187,506.24. Subject to the approval of the court, the parties have agreed that the Defendant will pay costs of £132,000 inclusive of interest and the costs of the detailed assessment proceedings. In requesting a detailed assessment hearing, IM asked the court to approve the agreement of the costs between the parties and to assess the costs payable by C to IM.

9. The costs which IM seeks from C consist of:

    i) A shortfall of £53,719.16, inclusive of value added tax. Of the amount claimed in the bill, IM have deducted £16,602.24, the costs of preparing and checking the bill, and £1,617, the costs of preparing the schedule of costs for the joint settlement meeting. That reduces the bill to £169,287. From the agreed settlement figure of £132,000, IM have deducted 85% of the costs of drafting

the bill (£12,896) and £3,659.16 in respect of interest and the costs of detailed assessment. £169,287 minus £115,444.84 leaves a shortfall of £53,842.16. However the figure they seek is capped at £53,719.16, which was the figure given to ST in their letter dated 28th July 2021.

ii) A success fee of 12.5%. The profit costs will have to be assessed before the amount is known and article 5 of the Conditional Fee Agreements Order 2013 may limit the success fee payable.

iii) £1,092 in respect of the after the event insurance premium.

10. The total sum sought by IM from C would be a very significant part of the damages payable to C.

11. Mr Waszak, on behalf of IM, understood that the damages paid by the Defendant were still held by IM in their client account, despite the fact that the claim was settled in April 2020. Why the balance over the sum claimed by IM should still be held by IM is not obvious to me.

12. This judgment sets out my decisions on the following issues which arose on the detailed assessment of the Claimant's costs:

i) Whether there is an enforceable retainer between ST, on behalf of C, and IM.

ii) If so, whether the Claimant's bill contains costs which do not fall within the scope of the retainer.

iii) Whether the costs which exceed the budget approved by the court or the caps imposed by rule 3.15(5) of the Civil Procedure Rules 1998 ("CPR") fall within rule 46.9(3)(c).

iv) Whether the court should approve the provisional settlement agreed between the parties. On behalf of IM, Mr Waszak accepted that, if I found that there was no enforceable retainer, I should not approve the settlement.

The procedure

13. CPR 21.10(1) provides:

> Where a claim is made –
>
> (a) by or on behalf of a child or protected party; or
>
> (b) against a child or protected party,
>
> no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

14. CPR 46.4 provides:

> (1) This rule applies to any proceedings where a party is a child or protected party and –
>
> (a) money is ordered or agreed to be paid to, or for the benefit of, that party; or
>
> (b) money is ordered to be paid by that party or on that party's behalf.
>
> ('Child' and 'protected party' have the same meaning as in rule 21.1(2).)
>
> (2) The general rule is that –
>
> (a) the court must order a detailed assessment of the costs payable by, or out of money belonging to, any party who is a child or protected party; and
>
> (b) on an assessment under paragraph (a), the court must also assess any costs payable to that party in the proceedings, unless –
>
> > (i) the court has issued a default costs certificate in relation to those costs under rule 47.11; or
> >
> > (ii) the costs are payable in proceedings to which Section II or Section III of Part 45 applies.
>
> (3) The court need not order detailed assessment of costs in the circumstances set out in paragraph (5) or in Practice Direction 46.
>
> (4) Where –
>
> (a) a claimant is a child or protected party; and
>
> (b) a detailed assessment has taken place under paragraph (2)(a),
>
> the only amount payable by the child or protected party is the amount which the court certifies as payable.

15. Paragraph (5) permits summary assessment where the costs payable comprise only a success fee. Paragraph 2.1 of Practice Direction 46 sets out five situations in which a detailed assessment need not be ordered under rule 46.4(2), none of which applies in the present case.

16. Before the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force, it was the invariable practice of solicitors acting for children and protected parties to waive their costs in excess of the sum recovered between the parties. Such waiver is one of the five situations in which the need for detailed assessment is obviated: PD 46 para 2.1(b).

17. In the years since the 2012 Act came into force, some solicitors have sought to recover their success fees from their clients when acting for children or protected parties. In the Costs Office I am aware of only two firms of solicitors who, in such cases, regularly seek to recover the fees which exceed the basic charges recovered between the parties. This is not a consequence of the 2012 Act, as shortfalls in basic charges have always been recoverable in principle.

18. In the present case, therefore, if IM wish to claim their costs in excess of the amount recoverable between the parties, there must be a detailed assessment of the costs payable by C. It was therefore unfortunate that on the day that the bill was listed for detailed assessment Mr Waszak told me that he had not been provided with the full set of IM's papers in advance of the hearing, although the court had been provided with them electronically. On the previous two occasions when I have listed IM's bills for detailed assessment under r.46.4(2), counsel had not been provided with the full set of papers. To misquote Lady Bracknell, once would have been a misfortune. Thrice begins to look like a policy.

19. In this case, in the event, Mr Waszak's lack of proper instructions did not matter, because I decided to reserve judgment on these preliminary issues. Had I not, I would have continued with the detailed assessment despite counsel's lack of instructions.

Was there an enforceable retainer?

20. Anticipating the court's concern, it was Mr Waszak who raised this potential issue in his helpful skeleton argument.

21. The conditional fee agreement was dated 10th November 2016 and recorded that it was entered into between IM and ST "for and on behalf of the dependants of" the deceased. However 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.

22. Mr Waszak accepted that this was poor drafting. While, on the one hand, the agreement was made with ST on behalf of the dependants of the deceased, the work covered by the agreement was, arguably, limited to the personal claim of ST.

23. At paragraph 35 of his skeleton argument Mr Waszak set out the relevant principles applicable to the construction of contracts and, at paragraph 36, submitted that the court should prefer the interpretation which was consistent with business common sense. I accept that and, if necessary, I would conclude that the obvious intention of ST and IM was that the agreement would cover work done on a claim on behalf of ST and her dependant children.

24. While Mr Waszak was concerned about the absence of a witness statement setting out the context in which the agreement was made, in my judgment there is sufficient evidence in IM's file of papers to explain that context. The file notes and attendance notes prepared before the conditional fee agreement was entered into make it clear that the claim to be brought was for ST and her children.

25. However I do not think that there is in fact an ambiguity which needs to be cured. It seems to me that "your claim" referred to the claim of "you" and "You, the client" was ST "for and on behalf of the dependants of" the deceased. There can be no issue that ST was able to enter into the contract on behalf of her children. "Your claim for damages" was therefore the claim of each of the dependants for whom ST was bringing a claim, including C.

26. In my judgment there was therefore an enforceable retainer in respect of C's claim for loss of dependency.

27. Although not relevant to this issue, it seems to me that the conditional fee agreement did not cover work on behalf of the estate.[1]

Does the bill contain costs which do not fall within the scope of the retainer?

28. A similar issue, whether costs were claimed which did not fall within the scope of the costs order, was raised in the Defendant's points of dispute at general point 2. It was submitted that the bill had not been drawn so as to exclude the costs of the discontinued claims, that only 2 items in the bill had been divided to exclude discontinued elements and that, by way of example, all of the costs of drafting the particulars of claim, schedule of loss and list of documents were still being claimed.

29. The reply to the points of dispute referred to the difference between common costs which are non-specific and which would have been incurred in any event and common costs which are specific and which are capable of identification and division. It was said that the bill did "not contain any specific costs relating to the discontinued claimed [sic]" and suggested that "these points are best addressed by the Court on a line by line basis".

30. During the hearing I told Mr Waszak that my view was that items were being claimed in the bill which related to the discontinued claims and for which C is not liable. Mr Waszak accepted that C is not liable to pay the costs of the claims of the other dependants. However, his instructions were that the costs claimed in the bill related to C's claim only. Not having a complete copy of IM's file, he was unable to address particular items.

31. Because it is not in issue that the costs of the discontinued claims are not payable out of C's damages, it is perhaps not necessary for me to attempt a detailed analysis of the relationship between C and IM. However, in the absence of anything in the conditional fee agreement which imposes a direct liability on C to pay IM's costs, it seems to me that the correct analysis is that only ST is liable to pay IM's costs. Although ST was not, I think, appointed as C's litigation friend she should be entitled to recover the expenses that she incurred on C's behalf. For the purposes of this assessment, only those costs which were incurred on C's behalf would be payable out of the money belonging to C. That would include costs which, although incurred for a number of dependants, would have been incurred in any event. However it would not include costs which could be divided between the individual dependants and which related to the claims of the other dependants.

32. The claims of ST and her other children for loss of dependency were discontinued on 15th November 2019. That was three years after IM were first instructed and six months before the claims were settled. Of the 1,529 items in the bill, 1,206 were incurred before 15th November 2019.

33. There are obvious examples in the bill of work that is claimed which did not relate to C's claim. For example in taking instructions from ST, time was spent in investigating

[1] The CFA was not intended to cover a claim by the estate – see IM's file note dated 2nd November 2016.

her claims for loss of dependency and bereavement and the loss of dependency of her other children. Items 7 and 8 are an early example. Quite why it would be reasonable to charge for even a junior fee earner to spend 48 minutes researching the APIL Guide to Fatal Accidents to see who can bring a claim for loss of dependency and then spend 30 minutes considering an internal guidance note on fatal claims by the costs management team is unclear. Although all of this time should be disallowed anyway as unreasonable, much of it related solely to the separate claims of ST and the time should have been divided.

34. As the Defendant points out, part of the time spent on the Particulars of Claim, schedule of loss and list of documents related to the separate claims of ST and her other children. The same can also be said of ST's witness statement. Work was done on disclosure in relation to the discontinued claims; and also for the costs and case management conference when the claims were discontinued. Most of the instructions to counsel relate to the reasons for the discontinuance. I appreciate that in order to calculate the loss of dependency it would have been necessary to calculate the losses to the whole family and then apportion the relevant part to C. However there was clearly work done in relation to ST and the other children which would not have been needed had a claim been brought by C alone.

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

Whether the costs incurred in excess of the budget should be presumed to have been incurred unreasonably

36. It is not in issue in the assessment proceedings between the parties that the costs claimed exceed the amounts approved by the court in three phases of the budget:

    i) Issue/statements of case: the figure approved was £4,792.46, but £10,771.50 is claimed, an excess of £5,979.04.

    ii) Witness statements: the figure approved was £1,391.51, but £7,643.50 is claimed, an excess of £6,251.99.

    iii) ADR/Settlement: the figure approved was £12,452.85, but £31,526.50 is claimed, an excess of £19,073.65.

37. The total claimed in excess of the budget is £31,304.68.

38. Not surprisingly, in her points of dispute, the Defendant relied on CPR 3.18(b) which provides that on detailed assessment the court will not depart from the approved budgeted costs unless satisfied that there is good reason to do so.

39. In their reply, filed on ST's behalf, IM advanced no argument that there was a good reason to depart from the budget in relation to the issue/statements of case and ADR/settlement phases and offered to accept the approved figures. In doing so they conceded £25,052.69 which they now seek to recover out of C's damages.

40. In respect of the witness statements phase, a good reason was advanced. It was said in the reply that IM had to consider the witness evidence served on behalf of the Second

Claimant and served two additional, but unexpected, witness statements. In fact, it is clear from the bill that little time was, or should have been, spent on this work. A total of 1.9 hours was spent reviewing the statements of the Second Claimant. The last two witness statements to be served, those of C's grandparents, were 5 and 3 pages long. It is difficult to see how over £6,000 could be justified for this work. It is difficult to conclude that there is any realistic possibility that the court would have found a good reason to depart from the budget. Indeed, as Mr Waszak accepted in his skeleton argument[2] "it was largely assumed that the budget overspend would not be recovered from the Defendant".

41. CPR 3.15(5) provides that, save in exceptional circumstances, the recoverable costs of initially completing the costs budget should not exceed the higher of £1,000 or 1 per cent of the total of the incurred and budgeted costs and that the other recoverable costs of the budgeting and costs management process should not exceed 2 per cent of that total.

42. In her points of dispute the Defendant complained that ST was claiming £11,038 in excess of these caps. Given that the total of the caps was £4,800, the total sum claimed in the bill for this work was nearly four times the caps. No exceptional circumstances were advanced in the reply. IM conceded the £11,038 which they now seek to recover out of C's damages.

43. I have seen nothing to suggest that any of this was explained to ST. In his skeleton argument Mr Waszak set out very carefully the costs information that was provided to her.[3] She was told that there would be a shortfall and the letters estimated what the shortfall would be. In March 2020, the month before the claim was settled, the shortfall was estimated at £43,500 plus value added tax.

44. CPR 46.9(3) 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.

45. Mr Waszak submitted that the excess costs (over both the budget and the caps) were neither of an unusual nature nor of an unusual amount. I agree that they were not of an

[2] Para 44(iii)
[3] Paras 22 to 27

unusual nature. The excess costs were incurred in respect of the sort of work that would usually be done.

46. Mr Waszak submitted that "unusual amount" should be read in the context of "unusual nature". I can see no reason for that construction. It seems to me that the purpose of the rule is to apply the presumption that the costs were unreasonably incurred if they were unusual and the client was not told that they might not be recovered from the other party by reason of being unusual. Costs can be unusual either because of their nature (not of a type usually incurred) or because of their amount. Paying a brief fee of £50,000 when the usual fee would be £5,000 would be unusual and one can easily see that the solicitor should be at risk if the client is not informed that the fee might not be recovered because of that. The amount can be unusual without the nature being unusual.

47. Mr Waszak also submitted that "unusual" should be read as being between solicitor and client. However that seems to me to ignore the purpose of the rule. To avoid the presumption the solicitor is required to explain to the client that the costs may not be recovered because they were unusual. "Unusual" must therefore be read in the context of a between the parties assessment. Of course we are not here concerned with costs which are merely "unreasonable". A solicitor is not required to inform the client that particular costs may not be recovered because a court may conclude that they were not reasonably incurred or reasonable in amount.

48. Finally Mr Waszak submitted that the costs overall were not unusual. That, it seems to me, is not the test. The question is whether particular costs were unusual in nature or amount. There is unlikely to be a case where all of the costs are unusual in nature or amount.

49. Were the excess costs unusual in amount? In my judgment they were. In approving the budget at £53,401.72, rather than at £147,981.50,[4] the court arrived at the figures which it considered would be reasonable and proportionate to take the case to trial. In respect of issue/statement of case, that reasonable and proportionate figure was exceeded by over 100 per cent. In respect of witness statements, the reasonable and proportionate figure was exceeded by over 400 per cent. In respect of ADR/settlement, the reasonable and proportionate figure was exceeded by over 150 per cent. These figures are so far over what they should be, and what the court has already decided that they should be, that they must be unusual in amount.

50. I accept that IM did tell ST throughout that there would be costs which would not be recovered from the Defendant and which would be deducted from the damages. At the initial discussion about funding[5] ST was told that:

> "we would hope to conclude this case without incurring any significant amount of costs and so hopefully any shortfall will not equate to much in relation to the compensation".

51. In the costs update letter dated 12th July 2019 IM wrote:

[4] both figures being for estimated costs alone
[5] 23rd November 2016

> "Now that your case has been issued in Court, it is possible that the Court will set a budget which limits the amount of costs that the parties would have to pay to each other. We will advise you of this further if and when it arises."

52. In the costs updates ST was given specific estimates of what the shortfall would be. In March 2020 the estimate was £43,500 plus value added tax. The shortfall claimed is £53,719.16 including value added tax, so the final estimate before settlement was very close. I have found nothing to suggest that ST was told about the budget or about the effect of the budget.

53. 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.

54. 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.

55. 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.

56. Instead IM appear to have been happy simply to ignore the budget and incur costs which they would or should have known would not be recovered from the Defendant.

Approval of the between the parties settlement

57. Settlement at £132,000 (including interest and the costs of detailed assessment) of a bill of £187,506.24, represents a substantial reduction. However the budget and capped excesses alone amounted to £42,342 which would not have been recoverable and there clearly would have been substantial reductions in respect of the hourly rates and time claimed. The figure that has been agreed is, from C's perspective, reasonable.

58. As I have concluded that there is an enforceable retainer, there is no impediment to approving the settlement of the costs between the parties.

The way forward

59. The bill still needs to be the subject of a detailed assessment between IM and C, at which, inter alia, I will need to make a decision as to which costs should be disallowed because they do not fall within the scope of the retainer. IM may consider it helpful to redraft the bill to exclude those costs.

60. In the meantime IM should consider seeking directions as to the investment of the damages payable to C.