LIONS UNDER THE THRONE

ANDREW HOGAN ON THE COURTS' PROTECTIVE STANCE TOWARDS DAMAGES DEDUCTIONS FOR CHILDREN OR PROTECTED PARTIES

Not all judges use an axe when assessing costs. Some prefer a metaphorical baseball bat or perhaps even a well swung sock full of wet sand when looking at a solicitor's bill.

One of the issues that has been bubbling away since the introduction of the LASPO 2012 reforms in April 2013, exacerbated by the extension of fixed costs in many personal injury claims in July 2013, has been the issue of deductions from damages to pay success fees, after-the-event (ATE) insurance premiums or shortfalls in basic charges as part of recovered costs.

> The court noted that the Litigation Friend was not given sufficient information

Background

In the halcyon days before 2013, when the sun always shone, Co*vid* was thought to be a rival to Blockbusters, and solicitors recovered standard basis costs and a success fee as an additional liability from the compensating party, deductions from damages were almost unheard of.

Solicitors accepted the costs they recovered from the opposing party to litigation. Many of them did not trouble the client with delivery of a formal bill of costs. But when the rules changed and costs recoveries shrunk, solicitors started levying unrecovered charges to their own clients, to be paid out of their damages.

This has had two immediate consequences. The first is the undoubted surge in solicitor-own client assessments under section 70 of the Solicitors Act 1974. Leaving aside the deduction by way of success fee, sums are frequently claimed in respect of unrecovered basic charges, and outraged clients are more than capable of bringing challenges in the SCCO or the District Registries to seek a refund.

The second is that, in PI claims, it has brought into sharper focus the practice of making deductions from damages where the client is a child or a protected party who proceeds by way of a Litigation Friend.

The rules governing whether such deductions will be allowed by the court are found principally in CPR Parts 21 and 46 and their associated Practice Directions; but are also subject to a Practice Note prepared by the Senior Courts Costs Office. The key point to remember is that where a case concerns a child or protected party, not only must the inter partes costs settlement have court approval, so must the deductions from damages for solicitor-own client costs.

The content of the Practice Note would appear to be unremarkable: but it potentially sets a solicitor wanting to make deductions beyond the unexceptional up for a world of pain. It provides that the judges in the SCCO will assess in a quasi-inquisitorial capacity all the costs that are claimed against the child or protected party, to determine whether any residual element is payable over and above what has been agreed with the opponent to litigation.

So it is entirely possible that in a given case, the costs might be assessed at a figure *lower* than that agreed with the opponent, which does not form a floor or irreducible minimum of costs that the solicitor can bank on. In those circumstances, as the recovered costs are client money, the solicitor will be obliged to provide a refund to the client.

> They must run a realistic eye over the file and the quality of the costs advice the client and their Litigation Friend has been given

Case law

An interesting example of this approach can be found in *BCX v DTA* [2021] EWHC B27. The issues were described thus:

'The sum payable by the defendant on the inter partes order for costs, inclusive of interest and costs of detailed assessment, has been agreed, following mediation, [at] £330,000. The claimant's solicitors Irwin Mitchell LLP ('IM') have not waived their entitlement to claim further costs against the claimant and seek payment of a sum from the claimant of £159,758.30 of the following:

'(i) £94,977.38 (inclusive of VAT), representing what is says is a shortfall in profit costs from those recovered from the defendant (the 'shortfall' claim);

'(ii) payment of a success fee in the sum of £62,848.92 (inclusive of VAT); and,

'(iii) payment of the costs of an ATE premium in the sum of £1,932.'

The Master then undertook a very thorough provisional assessment of the Bill.

Interestingly, the consent of the Litigation Friend to pay these charges was not regarded as particularly significant, nor did it constitute a reason to dispense with an assessment of the costs sought to be claimed from damages.

Moreover, the judge gave no weight to an advice that had been obtained from counsel on the reasonableness of the deductions. When assessing costs after evaluation of the bill, delving into the detail of the sums claimed, the overall figure allowed was less than the £330,000 that the opponent had paid.

ST v ZY [2022] EWHC (Costs) is a decision of the former Senior Costs Judge assessing costs and determining the appropriate deductions from damages, this time in the context of a claim brought on behalf of a child, whose father was killed in a road traffic collision.

The claimant's solicitors prepared a significant bill of costs, amounting to £187,506.24. On an inter partes basis it was agreed that the defendant should pay £132,000 including interest and the costs of the detailed assessment process. One of the key issues on any solicitor-own client assessment is the application of the presumptions in CPR 46.9.

Of particular significance is the presumption relating to 'unusual' costs, and often points of dispute and replies will plead specifically that costs are unreasonably incurred due to a failure in respect of presumption (c). But even where a presumption is not pleaded, as this case makes plain, the court will have regard to it when assessing costs in the case of a child or protected party.

Particularly interesting, however, was the Master's careful evaluation of not only how the shortfall was incurred, but also why it was not recoverable, by reason of failings in the advice given to the client; and in particular how a substantial shortfall between an approved budget and costs that were later incurred was dealt with. There was nothing before the Master to indicate that the client was told about the budget, or the effect of the budget.

This failure to involve the client in the costs budgeting process permitted the invocation of the presumptions that apply to solicitor-own client assessments of costs contained in part 46; particularly in relation to what may be termed 'unusual costs'.

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> The judges are the 'Lions under the Throne' protecting the interests of children and protected parties

> Recovering shortfalls in basic charges from a client's damages are more problematic

Since those decisions above, there have been two further rulings: *EVX (A Minor) v Julie Smith* [2022] EWHC 1607 and *JXC v NIS* [2023] EWHC 1000.

In *EVX*, £28,113 was sought from the claimant's damages, representing a shortfall from the base costs recovered from the defendant in the underlying medical negligence action. The claim for fees covered costs incurred under a conditional fee agreement in effect from 2016, and included work at enhanced Grade C hourly rates for various junior fee-earners.

The primary issue was whether the hourly rates claimed, especially those for unqualified or newly qualified junior fee-earners, were reasonable and properly charged to the claimant's damages. The court referred to CPR 46.4 and CPR 46.9, which govern the costs recoverable from a child or protected party's damages.

The court emphasised that for the presumption of reasonableness to apply to costs incurred under a CFA, the litigation friend must have given informed consent to those costs, understanding both the amount and potential implications on recoverability from the defendant.

Costs Judge Brown concluded that the claimed hourly rates for junior fee-earners were unreasonably high and 'unusual in amount'. The court noted that the Litigation Friend was not given sufficient information about the 'unusual' nature of the junior fee-earners' rates, preventing her from giving informed consent.

The court therefore reduced the hourly rates for these junior fee-earners to align more closely with the guideline hourly rates. The court highlighted that the amount payable by the minor should be limited to what was reasonable under an objective standard, rather than solely based on the CFA agreement.

In *JXC* the claimant, a Royal Marines commando, suffered severe head injuries following a 20-foot fall during a training exercise. The case was concluded successfully. Substantial costs were recovered for the claimant on an inter partes basis.

The solicitors sought an additional £212,975 from JXC's damages, claiming this as a 'shortfall' between the costs recovered from the defendant and the actual legal costs under the CFA.

The court relied heavily on CPR 46.4 and CPR 46.9, setting out that solicitors' costs charged to a protected party (like JXC) must be independently assessed, even where a CFA is in place.

The principle from *ST v ZY* clarified that budget overspend should generally be viewed as unusual in amount, thus requiring specific client consent under CPR 46.9(3)(c) to avoid presumptions of unreasonableness. The court also considered *Herbert v HH Law Ltd* [2019] EWCA 527, emphasising that the client must be well informed about costs that might not be recoverable due to unusual or excessive amounts.

Costs Judge Leonard concluded that the solicitors had not sufficiently informed CXJ of the risks and implications of budget overspend. CXJ was advised of a potential shortfall but was not given specific information on budget overspend, nor authorised any spending beyond the court-approved costs budgets. The court held that costs incurred that were more than the budget were unusual in amount and presumed to be unreasonably incurred, given the lack of informed consent.

Faced with claiming shortfalls… a solicitor acting for a child or protected party is caught in a difficult situation

Conclusions

Faced with claiming shortfalls, success fees and ATE insurance premiums or forgoing a large element of profit, a solicitor acting for a child or protected party is caught in a difficult situation.

If they do not waive their entitlement to costs, they must run a realistic eye over the file and the quality of the costs advice the client and their Litigation Friend has been given, to see if the requirements of CPR Parts 21 and 46 are likely to be satisfied. ATE insurance premiums are likely to be allowed.

A reasonable success fee is likely to be recovered. Recovering shortfalls in basic charges from a client's damages are more problematic, but can be done if the appropriate informed consent to, for example, budget overspend, is shown.

What is clear from the case law and experience is that in this context, the judges are the 'Lions under the Throne' protecting the interests of children and protected parties - and their approval of unrecovered costs cannot be taken for granted.

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