

OVERSPENDING BUDGETED COSTS – THE IMPORTANCE OF KEEPING CLIENTS INFORMED



The background

The case concerned a 7-year-old child ('C') whose father died in a road traffic accident in 2015. C's mother ('ST') brought claims for each of her four children, including the C, as dependants of the deceased.

A CCMC took place in July 2019 and the claims brought by ST and the deceased's former wife were consolidated, however ST and the former wife were represented by separate solicitors. In November 2019, the claims of ST and her three other children were discontinued, but the estate's claim and that of C remained. Settlement was ultimately achieved and approved, it was subsequently ordered that the defendant should only pay ST's costs of the claim as it related to C as a dependent and as an administratrix of the estate, with costs to be assessed. As C was a protected party, a solicitor and own client costs assessment was ordered.

The bill filed for C's solicitors amounted to a total £187,506.24, the parties had further provisionally agreed, subject to the permission of the court, that the defendant would pay £132,000 inclusive of interest and VAT. However, there was a shortfall which the solicitors sought to recover from the damages payable to C, plus a success fee of 12.5% and the ATE premium.

The issues for the court

Senior Costs Judge Gordon-Saker was asked to determine four issues:

- (1) The enforceability of the retainer
- (2) Whether the bill contained costs which fell outside the scope of the retainer
- (3) Whether the costs which exceeded the budget approved by the court fell within CPR 46.9(3)(c)
- (4) Whether the court should approve the provisional settlement between the parties

The judgment

On the first issue, notably the validity of the retainer, it was commented by both the judge and counsel that this had been poorly drafted. Despite this, the court was satisfied that there was an enforceable retainer in respect of C's claim for dependency, however despite not being relevant to the issues at hand, the judge further commented that he did not consider the retainer covered the work undertaken on behalf of the estate. Furthermore, the conditional fee agreement did not impose a direct liability on C to pay the solicitor's costs, thus the correct analysis was that only ST would be liable.

As to the second issue, only the costs incurred on C's behalf would be payable from the money belonging to C. The judge commented that some of the items claimed in the bill related to the discontinued claims, it was not disputed that C was not liable to pay the costs of the claims for the other dependents. No particular thought was given to separating out the costs for which C was not liable such as, aspects of the Particulars of Claim, ST's witness statement, and initial investigations about who can claim as a dependent. The claimant solicitors were instructed to re-draft the bill before the next assessment.

On the third issue, the costs claimed exceeded the court approved amounts in three phases: issue/statements of case, witness statements and ADR/settlement. The costs which exceeded the budget totalled £31,304.68. The defendant relied on CPR 3.18(b) and argued that the court should not depart from the approved budgeted costs unless satisfied there is good reason to do so. No arguments were advanced in the reply that there had been good reason to depart from the budget in either the issue/statements of case or ADR/settlement phase. However, a good reason was advanced for the overspending on the witness statements phase, but this attracted criticism from the judge.

The defendant further took issue with the amount claimed by ST, which exceeded the caps provided by CPR 3.15(5). The total of the caps was £4,800; however, ST was claiming £11,038. No arguments of exceptional circumstances were advanced in the reply and the claimant solicitors conceded that they sought to recover that sum from C's damages. There was little evidence this had been explained to ST, although she had been advised that there would be a shortfall and an estimate was provided of the same.

The court considered the provisions of CPR 46.9(3) which state:

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

[...]

(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 judge commented that the meaning of "unusual" in the rule must be read in the context of a between the parties assessment. The excess costs were not of an unusual nature as they reflected work which would ordinarily be done; however, it was emphasised that the *amount* may be unreasonable without the *nature* being unreasonable. The court considered the excess costs were unusual in amount, the figures being so far over what they should have been and what the court decided they should be.

As to the second limb of r.49.3(c), the judge highlighted that the presumption is that solicitor must tell the client the costs might not be recovered as a result of their unusual nature or amount. The judge accepted that ST had been informed throughout that there would be costs which would not be recovered from the defendant and would be deducted from the damages. However, ST should have been explicitly informed that the budget was being exceeded by a wide margin and that as a result those costs might not, and in all probability would not, be recovered from the defendant.

Accordingly, it was held the costs in excess of the budget and in excess of the cap imposed by CPR 3.15(5) were unreasonably incurred.

Finally, as the judge held there was a valid and enforceable retainer, he approved the settlement of costs between the parties.

Conclusion

This case serves as a stark reminder that if a solicitor is to over-spend it must be made clear to the client that the budget has been exceeded, that costs may be unusual in nature or amount, and therefore it is unlikely those costs will be recovered. Clients should be properly informed; it is insufficient to advise in more general terms that some costs may not be recovered. Solicitors should not ignore the budget and incur costs which they know or ought to know will not be recovered.