

***BCX v DTA* [2021] EWHC B27 (Costs):**

Shortfall? What Shortfall?

1. Cases in which the solicitor for a successful claimant, who has obtained a damages and costs order against a defendant, seeks to recover any shortfall in costs from the client, are a matter of some understandable controversy.
2. On the one hand, the terms of most retainers do provide that the client is liable to pay all the solicitors' reasonable costs incurred notwithstanding partial recovery from the other side (the "shortfall")¹. On the other hand, any such shortfall would often have to be met from the damages obtained by the claimant in the litigation. The controversy is all the more acute where the claimant is a protected party.
3. The notes to the current White Book at 21.10.2 and 46.4 (*"Where costs are recovered from a paying party on behalf of a child or protected party solicitors frequently waive any further claim for costs, in which case there is no need for a detailed assessment of the solicitor and client costs"*) indicate some antipathy to shortfall recovery, albeit there is no rule or professional code which prevents or discourages it.
4. It will be noted that the process of a solicitor-client assessment although (in broad terms) an indemnity assessment boils down to a determination of what is reasonable for the client to pay to the solicitor. The outcome does not have to be an assessment in a sum greater than that agreed² with the Defendant on an inter partes basis although it frequently would be.
5. The recent case of *BCX v DTA* [2021] EWHC B27 (Costs) (a decision of Master Brown in the SCCO³) is an example of a claim for a shortfall against a protected party leading to an unexpected outcome.
6. C (a protected party) settled his claim against D. C was entitled to recover his reasonable costs from D.
7. The court approved the damages settlement and also ordered: *"Unless the Claimant's solicitors waive their entitlement to be paid by the Claimant such shortfall in the costs recovered inter partes as they may otherwise be entitled to under the terms of their retainer, there be a detailed assessment of the Solicitor/Client costs incurred on behalf of the Claimant and of the amount which it is reasonable for the Claimant's solicitors*

¹ Although such agreements sometimes say that such an outcome is "rare" or "unlikely" in which case C might argue that (a) the solicitor needs to prove that a rare or improbable event occurred to justify recovery of the shortfall or perhaps (b) that such a statement is a misrepresentation because in fact there often is a difference between what C can recover from D and what C owes the solicitors.

² After all, any agreement by D to pay a particular sum in respect of C's costs is made without the (sometimes costly) safeguard of a detailed assessment.

³ 16th December 2021.

to recover from the Claimant in all the circumstances such costs to be assessed on the basis provided for in CPR 46.4 and CPR 46.9.”

8. D subsequently agreed to pay £330,000 in respect of C’s costs.
9. C’s solicitors then sought to recover a balancing sum of around £159,000 from C, representing the “shortfall” in profit costs of c. £95,000, success fee (not of course recoverable from D) and a modest ATE premium.
10. Master Brown described the application as “in effect, for a deduction from the damages received by the Claimant as there appears to be no other source of payment of the costs (par 6)”.
11. He pointed out the effect of inter partes costs and solicitor/client assessments (at pars 12 and 13): *“Thus, where a legal representative limits his claim for costs to the costs recovered inter partes from a defendant a detailed assessment of the solicitor’s claim against the claimant will not generally be required: plainly in that situation there is no prospect that the protected party’s interests will be harmed as the protected party will not actually to have to pay anything from their damages or otherwise. Again, whilst an approval is required of the inter partes settlement of costs (i.e., by the defendant to the litigated claim) pursuant to CPR 21.10 it is difficult to see how any such settlement would not be approved if the legal representatives have waived any claim for costs or the interests of the protected party or child are otherwise unaffected by the terms of the settlement.”*

“In other situations where a claim is to be maintained by the solicitors the effect upon the protected party can be substantial; such a claim has the potential, for instance, to reduce the ability of the Deputy to provide for any care that may be required or in a case of damages for loss of earnings any provision to children or other dependents of the claimant. The problem may be particularly acute where the protected party has been required to accept deductions from the full value of the claim on account of contributory negligence or because the prospect of success on the claim were uncertain. In the event of a significant claim by the solicitors against the protected party for ‘shortfall’ it is clear that the approval of any inter partes costs compromise might be a somewhat more significant exercise because of the possibility of there being an inadequate recovery against the defendant, and increased exposure of the protected party to a claim by his solicitors for costs.”

12. At par 16 he said: *“In general pre-LASPO [i.e before the Jackson reforms], and the ending of the recovery inter partes of success fee and ATE insurance premiums in many personal injury claims, claims for costs were not generally made against protected parties by their legal representatives over and above the sums recovered. Such claims were in general waived. It is only more recently, as I understand it, that ‘shortfall’ claims have been made in respect of base costs in addition to claims for the payment of success fees. Plainly ‘shortfall’ claims could in law have been made before LASPO but were not, as I understand, generally made where the claimant had the benefit of an inter partes costs order; solicitors would, as I understand it, generally content themselves with the recovery of costs, including additional liabilities such as success fees and ATE premiums from a defendant. My own experience, for what it is worth, suggests whilst claims are now made sometimes for some modest recovery against the*

claimant in respect of the 'shortfall' claim it has been recognised that not all the time recorded on solicitors' ledger might be recoverable against the protected party. More recently the costs claimed have been based substantially on all the time which has been recorded by the solicitors without any significant further deduction. That is, as I understand it, largely the case here; I understand that some costs relating to the recovery of costs from the Defendant, including some that might have been claimed for the mediation (as to costs), have not been claimed."

13. He went on to assess the solicitors' bill as against the client. He stated that he had discussed with Counsel for the solicitors the position if he *"took the view that the inter partes sum received was a generous compensation to the solicitors for their costs and that the reasonable costs produced by a process of assessment, albeit provisional, were less than the sums recovered from the Defendant (par 43)"*.
14. On assessment, the fees which the client was liable to pay the solicitors (profit costs and disbursements) were £274,859 plus 15% on solicitors' costs (£26,850) plus premium (£1,932). This was less by c £30,000 than the sum agreed with D for costs.
15. He concluded ultimately that the costs were high and that: *"Overall my assessment of the reasonable sum the Claimant is required to pay his solicitors is less than the Defendant had agreed to pay. However, it is in accordance with my own instinctive and necessarily highly preliminary view that the inter partes compromise looked generous and should be approved. The consequence of this finding is that, provisionally, I am not currently satisfied, that any payment should be made by the protected party in respect of IM's claim for a "shortfall" (par 60)."*
16. He reduced the success fee from 20% to 15%. He held that the premium was recoverable.

Outcome

17. The outcome (albeit provisional) is that (a) there is no costs shortfall to be taken from C's damages (b) presumably the balance of the costs of c. £30,000 should be repaid to D.

Dan Stacey

Hailsham Chambers

Dan.Stacey@HailshamChambers.com

020 7 643 5000

07881 950 619

20th December 2021

Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.