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Costs when a 'portal' claimant dies

West (Deceased) v Burton (2021) EWCA Civ 1005

This appeal raised an issue as to the fixed costs and disbursements payable under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the Protocol"). The issue was framed as follows: where a person gave notification of a claim under the Protocol but thereafter died before its conclusion and the notified claim then, without legal proceedings being issued, proceeded to settlement between the deceased's personal representative and the defendant's insurers, were the costs and disbursements payable by the defendant to be calculated by reference to Section IIIA (or, as the case may be, Section III) of Part 45 Civil Procedure Rules (CPR)? Or were they to be calculated by reference to Section II of Part 45 of the CPR?

A District Judge had accepted the claimant's argument that Section II was the applicable section in this case. His primary reasoning was to accept the argument advanced on behalf of the claimant to the effect that the claim which was settled was that of the executor, not that initially notified by the deceased himself. Accordingly, he held that this was not a Section IIIA case but was a Section II case.

On appeal, a Circuit Judge reached the same conclusion. He noted that (among other stipulated exclusions) claims by personal representatives were excluded from the Protocol. He considered that it was necessary, under the fixed costs regime, to have regard to the identity of the

IN BRIEF

Where a person gave notification of a claim under the RTA Protocol but thereafter died before its conclusion and the notified claim then, without legal proceedings being issued, proceeded to settlement between the deceased's personal representative and the defendant's insurers, what costs were payable?

The Court of Appeal held that the costs were to be calculated under Section II of CPR 45.

claimant; and in the present case the entitlement to the damages (and costs and disbursements) had, on settlement, been the entitlement of the executor, who had not started the process: not of the deceased who had initially notified the claim. He thus, in effect, considered that the scheme contemplated that the same individual would be involved as claimant throughout.

Dismissing the defendant's further appeal, the Court of Appeal held that a "claim" and "claimant" for the purposes of the fixed costs regime were not to be equated with the meaning which they conventionally bore in the context of legal proceedings. As the judge noted, the word "claim" (and thence "claimant)" was not here being used in the Protocol in a formal sense. Rather it was being used as descriptive of a demand for damages prior to the start of any legal proceedings. Indeed, it was noticeable that, under the Protocol, a defendant was defined so as (primarily) to connote the insurer. The definition of "claim" in paragraph 1(6) of the Protocol was thus not to be equated with the definition of "claim" contained in CPR 2.3. Read as a whole, the Rules and the Protocol were drafted on the footing that the claimant throughout remained the person who issued the CNF. By way of example, that was illustrated by the entitlement to an increase in fixed recoverable costs by reference to a specified area "where the claimant lives and works …. and instructs a solicitor who practises in that area": (see CPR 45 (11)(2); 45.18(5); 45.29C(2)). That was also the general tenor of the Protocol. For example, paragraphs 7.6 and 7.7 of the Protocol referred to photographs of "the claimant's" injuries and to situations where "the claimant" was not wearing a seat-belt. Likewise, paragraph 7.8 referred to situations where "the claimant" was receiving continuing medical treatment. All this connoted that, for the purposes of the Protocol, the claimant throughout was regarded as the person who was involved in the road traffic accident. Furthermore, CPR 45.29A and 45.29B were in terms confined to claims started under the Protocol. The claim that was settled was that of the executor but he was not himself the person who started the claim, within the meaning of the Protocol. Indeed, as executor he never could have started such a claim, given the provisions of paragraph 4.5(3) of the Protocol. Consequently, this was not a claim, for the purposes of assessing costs, within the ambit of CPR 45.29A or 45.29B. Accordingly, costs fell to be assessed by reference to Section II.

It further followed that the judge was correct in finding that the outcome would have been the same even had the claim not exited the Portal. The provisions of Section III would not have come into play; and this would still have remained a Section II case.

This judgment did not result, as was suggested, in two potential applications for costs in two separate claims. The liability of the deceased for costs incurred prior to his death would be a liability of his estate. As such, they were capable of being sought by the executor as part of the overall recoverable costs on the settlement or the determination of the executor's claim.

The full judgment is at: West v Burton [2021] EWCA Civ 1005 (08 July 2021) (bailii.org)