Court of Appeal decides that legal costs in the pre-action protocol are non-contentious business, and dismisses clients' challenges to their solicitors' fees (Belsner v CAM Legal Services Ltd; Karatysz v SGI Le-gal LLP)

LNB News 27/10/2022 80

In Belsner, a unanimous judgment was handed down by the Court of Appeal on 27 October 2022 in the so-called 'costs case of the decade'. The case of Karatysz was linked and heard alongside it. The linked appeals concerned the way in which solicitors were entitled to charge their clients for bringing low-value road traffic claims through the online Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (commonly called the 'RTA portal'). Jeremy McKeown, barrister at 12 King's Bench Walk, Alicia Tew, barrister at Hailsham Chambers, and James Miller, barrister at 18 St John Street Chambers, provide commentary on the cases.

This analysis was first published on Lexis®PSL on 27 October 2022 and can be found here (subscription required).

Belsner v CAM Legal Services Ltd [2022] EWCA Civ 1387; *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388

Background

Belsner v CAM Legal Services Ltd [2022] EWCA Civ 1387

In *Belsner*, the client suffered minor injuries in a motorcycle accident and instructed her solicitors shortly afterwards. The solicitors issued a client care letter and terms of business which informed the client that she may be liable to pay their fees in excess of those recovered from the other side. It also included an estimate of their likely costs in the sum of £2,500 + VAT chargeable on an hourly basis (excluding disbursements), together with hourly rates. There was no information about the fixed costs. However, the solicitors' own assumptions were that the case would settle within the RTA portal. The solicitors did not alert their client that if the case settled within the RTA portal, the client could only recover fixed costs from the other side which would be limited to £500 + VAT (excluding disbursements). The conditional fee agreement (CFA) included a success fee of 100% of the base charges (capped at 25% of her damages for pain, injury and loss of amenity).

Liability was admitted and the stage 1 and 2 costs were paid, in the total of £500 plus VAT, plus disbursements. Damages were paid in the sum of £1,916.98. The solicitors retained the fixed costs and paid the client the damages, less a success fee of £321.25.

Ms Belsner, brought a detailed assessment in respect of her solicitors' fees. The solicitors had issued a bill for their fees in excess of the fixed costs recoverable from the other party, together with the success fee (assessed at 15% of the base costs).

Judgment

Belsner v CAM Legal Services Ltd [2022] EWCA Civ 1387

In summary, as Vos LJ sets out at [14]:

• in reality, the case concerned costs incurred in non-contentious business. Section 74(3) of the Solicitors Act 1974 (SA 1974) and CPR 46.9(2) do not apply at all to claims brought through the RTA portal without county court proceedings actually being issued

• no fiduciary duties are owed by solicitors when negotiating a CFA with a client. The appeal judge was wrong to say that the solicitors owed the client fiduciary duties in the negotiation of their retainer

• although the solicitors were not obliged to obtain the client's informed consent to the terms of the CFA on the grounds decided by the appeal judge, the solicitors did not comply with the SRA Code of Conduct for Solicitors (the Code) in that they neither ensured that the client received the best possible information about the likely overall cost of the case, nor did they ensure that the client was in a position to make an informed decision about the case

• the term in the solicitors' retainer allowing them to charge the client more than the costs recoverable from the defendant was not unfair within the meaning of the Consumer Rights Act 2015 (CRA 2015), and

• the Court of Appeal reconsidered the assessment on the correct basis, under paragraph 3 of the Solicitors' (Non-Contentious Business) Remuneration Order 2009 (2009 Order), SI 2009/1931. The 2009 Order, SI 2009/1931 requires the solicitors' costs to be 'fair and reasonable having regard to all the circumstances of the case'. The costs actually charged to the client in this case were fair and reasonable

Despite having decided as it did, the Court of Appeal went on to criticise the current state of the law and invited reform [15]:

• the distinction between 'contentious' and 'non-contentious' costs was outdated and illogical and was in need of urgent legislative attention

• while the Court of Appeal confirmed that it was the current state of the law, there was no logical reason why SA 1974, s 74(3) and CPR 46.9(2) should not apply to cases where proceedings are issued in the county court but not to cases in the RTA or Whiplash portals

• it was unsatisfactory that, in RTA claims in the RTA portal (and perhaps the Whiplash portal), solicitors seemed to be signing their clients up to a costs regime that allowed the solicitors to charge significantly more than the claim was known in advance to be worth. That may be alleviated by certain solicitors exercising their discretion to charge clients lesser sums after the event but that was not a satisfactory answer. Counsel for the solicitors had submitted that the solicitors would not have 'dreamed' of doing anything other than making a proportionate deduction as opposed to charging the full base costs to which they were entitled under the CFA agreement. However, the Court of Appeal responded as follows: 'In future, I hope that solicitors will not suggest CFA or other fee arrangements to their clients that allow for fees that they would not dream of actually charging.' [98]

• it was illogical that the CPR should dictate mandatory costs and other provisions that apply to pre-action online portals but otherwise deal only with proceedings once they are issued at court. Section 24 of the Judicial Review and Courts Act 2022 allows the new Online Procedure Rules Committee (OPRC) to make rules that affect claims made in the online pre-action portals and that committee should make all the rules for claims progressed online and in the online pre-action action portals

• it is unsatisfactory that solicitors like checkmylegalfees.com can adopt a business model that allows them to bring expensive High Court litigation to assess modest solicitors' bills in cases of this kind. The Court of Appeal advised that the Legal Ombudsman scheme would be a cheaper and more effective method of querying solicitors' bills in these circumstances

Background

Karatysz v SGI Legal LLP [2022] EWCA Civ 1388

The client contested the true amount of the solicitor's bill of costs as they argued that they should have the costs of the assessment due to meeting the requirements of the one-fifth rule in the SA 1974, s 70(9).

The solicitors had argued that the actual cost of their bill was £1,571.50 which amounted to the £1,116 costs recovered from the defendant plus the £455.50 shortfall deducted from the client's damages.

However, District Judge Bellamy decided that the correct amount of the solicitors' bill of costs was £2,731.90. Since he then reduced the size of the bill significantly, he ordered the solicitors to pay the costs of the assessment under SA 1974, s 70(9) provided that the costs of an assessment shall be paid according to the event of the assessment, 'that is to say, if the amount of the bill is reduced by one fifth, the solicitor shall pay the costs'.

Judgment

Karatysz v SGI Legal LLP [2022] EWCA Civ 1388

The Court of Appeal was required to determine the 'amount of a bill' for the purposes of the SA 1974, s 70(9). Lavendar J decided on first appeal that a 'bill of costs is a demand for payment' therefore 'the amount of a bill is the amount demanded by the bill'.

The Court of Appeal largely agreed with Lavendar J and said that the question should be framed as follows: 'what is the total sum that the bill is demanding be paid to the solicitors, whether or not all or part of that total sum has actually been paid'.

In this case, the judge had been right to find that the bill totalled £1,571.50. Accordingly, the client had failed on the assessment to reduce the bill at all, and had to pay the costs by virtue of the effect of SA 1974, s 70(9). In future, properly drawn bills should state the agreed charges and/or the amounts that the solicitors were intending by the bill to charge, together with their disbursements. The bill should make clear what parts of those charges were claimed by way of base costs, success fee (if any), and disbursements. The bill should also clearly state:

• what sums had been paid, by whom, when and in what way (ie by direct payment or by deduction)

• what sum the solicitor claimed to be outstanding, and

• what sum the solicitor was demanding that the client (or a third party) was required to pay

The Court of Appeal noted that checkmylegalfees.com had pursued a costly case on the client's behalf, when she had almost nothing to gain and firms such as this should be in no doubt that the courts will have no hesitation in depriving them of their costs if they continue to bring trivial claims for the assessment of small bills to the High Court. This is even if those bills are reduced by more than the one fifth rule under the SA 1974, s 70(9). The critical issue is whether it was proportionate to bring such a case to the High Court, which it will not be in these cases.

Comment

Jeremy McKeown, barrister at 12 King's Bench Walk:

'Despite the decision in *Belsner*, the Court of Appeal was startlingly critical of both the current 'unsatisfactory' and 'illogical' state of the law and called for wholesale reform to rules and practice. It was equally critical of the approach of legal practitioners, specifically where they include terms in

CFAs which they would not 'dream' of enforcing and the lack of clarity of advice given to clients. The court further criticised the practice of bringing 'expensive' SA 1974, s 70 litigation to assess relatively modest bills of costs and suggested that an alternative route via the Legal Ombudsman may be preferable.

As it stands, the Court of Appeal's decision represents a resounding win for the status quo as it was understood and practised by solicitors. On the other hand, it represents a mighty rebuke of that same status quo, indicating that change may be coming.

The Court of Appeal was categorical in its criticism of the current state of law and practice. Arguably the most distinguished panel of the Court of Appeal, in a 3-0 ruling, made it known that their hand was forced by the unambiguous nature of the current provisions but that they were not impressed with how things stood.

Rarely does the Court of Appeal so explicitly criticise not only the state of the law but also the professionalism of those practitioners as a class conducting this type of litigation (although it must be stressed that there is no finding as to how representative or otherwise the arrangements in these cases were).

Claimant solicitors should be in no doubt that *Belsner* will be waved before the lower courts by parties hoping to hold solicitors to what the Court of Appeal has said is proper practice when advising claimants about the real-world impact of the CFA terms they are signing.

In particular, claimant solicitors ought to pay attention and amend their working practices to:

• think very carefully before asking clients to sign CFAs or other fee arrangements which allow for fees which they either would not 'dream' of enforcing in full or which would, if enforced, likely wipe out the client's damages award given the fixed costs rules at play in that particular claim

• be sure to advise the client explicitly not only what the solicitors' likely base costs would be but also the maximum fixed costs recoverable from the other side under the rules to allow the client to appreciate and anticipate the shortfall that they are agreeing to pay

Another cautionary note arises in respect of bringing expensive SA 1974, s 70 proceedings to assess or challenge modest bills of costs. As advised by the Court of Appeal, solicitors not advancing such matters before the Legal Ombudsman may find themselves criticised by the court. That said, the pros and cons of the Ombudsman route were not considered and it is tempting to wonder whether it really does provide a satisfactory alternative. However, it may be that solicitors ought to explore that route before advancing a SA 1974, s 70 to ensure that they have an answer if challenged as to why it was not suitable in that specific case.

As for the next steps, it is unclear whether a further appeal to the Supreme Court is on the cards. If not, it is certainly possible that the attention that this appeal has garnered, and the force of the Court of Appeal's criticisms of the current state of the law, will provoke action for reform.'

Alicia Tew, barrister at Hailsham Chambers:

'Many costs lawyers and solicitors will be surprised to see that the court found Portal costs to be 'non-contentious business', which fall under a different legislative regime from costs incurred in issued claims. It is not helpful that solicitor-client costs which are incurred in the RTA portal are governed by different rules dependent upon whether proceedings are subsequently issued in the county court. Further, this will have an impact on the costs chargeable to all clients where claims settle pre-action. The distinction between contentious and non-contentious business does not correspond with current procedure, which encourages parties to settle without issuing claims. Vos LJ rightly calls for urgent legislative change.

Second, some clients might explore alternative options of resolving complaints against their solicitors, where solicitors have failed to comply with the Solicitors Code of Conduct when providing inadequate information about costs within the retainer letter. Although these issues may not determine the amount of costs under the current legislative regime for RTA portal costs, clients may understandably feel aggrieved. The answer to any professional negligence type of claim might be found within the judgment, which held there was no reasonable expectation of loyalty when negotiating the terms of a retainer such that no fiduciary duties arose. Clients might say that the law of negligence should expand to fill the lacuna left by the current procedure, which does not permit a challenge based on the law of costs despite a breach of the Solicitors' Code of Conduct. The answer of the Court of Appeal appears to be that the Legal Ombudsman is the right forum for such disputes, rather than a civil claim in court.

Third, it is notable that there might be additional consumer protection arguments which could be raised in subsequent cases. The arguments within the respondent's notice all assumed that the costs were contentious business, such that SA 1974, s 74(3) and CPR 46.9(2) applied. As such, those arguments fell away. It is possible that some creative new arguments will emerge from the field of consumer rights law.'

James Miller, barrister at 18 St John Street Chambers:

'Solicitors can today breathe a huge sigh of relief after the landmark Court of Appeal ruling, which has been dubbed the 'costs case of the decade'.

Judges in the Court of Appeal determined each point taken by Darya Belsner in the solicitors' favour and decided that the deductions taken from her damages of £821.25 plus VAT were fair and reasonable and did not need to be paid back. In reaching this decision, it was concluded that that SA 1974, s 74(3) and CPR 46.9(2) did not apply as this was a portal claim where county court proceedings had not been issued.

The decision is a major blow to those operating in the business of challenging solicitors' bills and is compounded by another Court of Appeal decision handed down today, *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388.

In *Karatysz*, the Court of Appeal dismissed an appeal against a decision in relation to the assessment of costs following a solicitor's deduction of 25% of damages in a personal injury clam. The Court of Appeal adopted the rationale in *Belsner* and issued a stark warning to those firms who continue to challenge small bills at assessment.

The issue of solicitors deducting client money from damages has been a hotly contested area for almost a decade. No doubt we can expect to see further fall out and reforms in the not-too-distant future.'

Sources:

• Belsner (Claimant/Respondent) v CAM Legal Services judgment (Defendant/Appellant)
• Karatysz (Claimant/Appellant) v SGI Legal judgment (Defendant/Respondent)
• Belsner and Karatysz judgments summary

Case details: *Belsner v CAM Legal Services Ltd* [2022] EWCA Civ 1387

- Court: Court of Appeal, Civil Division
- Judges: Sir Geoffrey Vos MR, Sir Julian Flaux C and Nugee LJ
- Date of judgment: 27 October 2022

Case details: *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388

- Court: Court of Appeal, Civil Division
- Judges: Sir Geoffrey Vos MR, Sir Julian Flaux C and Nugee LJ
- Date of judgment: 27 October 2022

Interviewed by Banita Kalia