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Belsner v Cam Legal Services [2022] EWCA Civ 1387 and Karatysz v SGI Legal LLP [2022] EWCA Civ 1388 considered.

Costs Litigation Newsletter

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On 27th October 2022, the Court of Appeal handed down judgments in two cases which are of considerable significance for the law and practice of solicitor-own client costs disputes, brought under section 70 of the Solicitors Act 1974. These are the cases of Belsner v Cam Legal Services [2022] EWCA Civ 1387 and Karatysz v SGI Legal LLP [2022] EWCA Civ 1388:

The judgments were handed down together as the cases were heard consecutively by the same division of the Court of Appeal, the Master of the Rolls, the Chancellor of the High Court and Nugee LJ earlier in October 2022. The context of the cases is well known: many solicitors who conduct personal injury claims and make deductions from their clients' damages, for success fees or other unrecovered costs, have subsequently found themselves embroiled in a solicitor-own client costs dispute, when their former client instructs new representatives, to challenge their bills of costs.

These two cases reached the Court of Appeal on issues respectively as to whether the solicitors were limited to the costs they recovered inter partes and a modest success fee due to failing to obtain their client's informed consent, and whether the solicitors had "won" the assessment, and were entitled to their costs of an assessment, because they had capped their costs on a delivered bill.

Turning first to the case of **Belsner** the facts of the case are redolent of many low value, high volume claims progressed the MOJ Portal, under one of the Low Value Protocols:

45. *The Solicitors in this case were instructed by the Client to bring her claim on the RTA portal. The claim was settled at stage 2 after the provision of medical reports, as is common, with the defendant's insurer paying damages of £1,916.98 plus fixed costs of £500 plus disbursements (ignoring VAT). The Solicitors retained the fixed costs and paid the Client the damages less a success fee of £321.25 (capped at 25% of the recovered damages – see [28] below). The Client later instructed new solicitors trading as checkmylegalfees.com to query the Solicitors' charging. The Solicitors point out that the Client did not appeal DJ Bellamy's assessment that they could reasonably have charged £1,392 (11.6 hours at £120 per hour) for their work (plus a success fee of £208.80), instead of the £321.25 plus £500 fixed costs (£821.25) which they actually asked for and were paid.*

6. On the first appeal, Mr Justice Lavender (the judge), allowed the Client's appeal, permitting the Solicitors to charge only the £500 fixed costs plus a £75 success fee (assessed at 15% of those fixed costs, again ignoring VAT). The judge approached the case on the basis that the Solicitors owed the Client fiduciary duties when their retainer was being negotiated. He held that an agreement for the purposes of CPR Part 46.9(2) had to be a valid and enforceable agreement. An agreement "whose performance would involve a breach of fiduciary duty" would not be valid and enforceable, and "[t]o that extent, therefore, CPR 46.9(2) [required] informed consent". As will appear, this short passage in the judge's judgment at [69] requires some unpacking.

The main foundation of this argument was whether the work done by the solicitors in the case was "non contentious" business, rather than "contentious" business with the consequence that section 74 (3) of the Solicitors Act 1974 and rule 46.9(2) CPR either applied or did not apply at all. Section 74(3) it should be remembered provides:

8. *Section 74(3) concerns the proportionality of the amount claimed by solicitors in respect of their costs. It provides that: "[t]he amount which may be allowed on the assessment of any costs … in respect of any item relating to proceedings in the county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and … counterclaim".*

Rule 46.9(2) states:

9. *Part 46.9(2) provides a long-standing exception to that statutory provision as follows: "[s]ection 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings".*

In addition, the argument was made and accepted in the High Court, that a solicitor and client stand in a fiduciary relationship: that failing to obtain a client's informed consent to the retainer, involved a breach of fiduciary duty which vitiated the claim to fees due under it, save in respect of those fees recovered from the opponent and a modest success fee calculated on the fees so recovered. The Court of Appeal summarised the issues thus:

13. *Against that background, the key questions that will require determination are: (i) whether section 74(3) and Part 46.9(2) apply at all to claims brought through the RTA portal without county court proceedings actually being issued, (ii) whether the Solicitors are required to obtain informed consent from the Client in the negotiation and agreement of the CFA, either due to the fiduciary nature of the solicitor-client relationship or through the language of Part 46.9(2), (iii) if informed consent was*

required, whether the Client gave informed consent tothe terms of the CFA relating to the Solicitors' fees, (iv) whether, in any event, what can be regarded as the term in the Solicitors' retainer allowing the Solicitors to charge the Client more than the costs recoverable from the defendant to the RTA claim was unfair under the CRA 2015, and (v) what are the consequences of the determination of these issues on the assessment in this case.

And concluded in relation to all of them:

14. *For the reasons that appear in this judgment, I have decided in summary that (i) section 74(3) and Part 46.9(2) do not apply at all to claims brought through the RTA portal without county court proceedings actually being issued, (ii) the judge was wrong to say that the Solicitors owed the Client fiduciary duties in the negotiation of their retainer, (iii) 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 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, (iv) 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 CRA 2015, and (v) the court can and should reconsider the assessment on the correct basis, which is under paragraph 3 of the Solicitors' (Non-Contentious Business) Remuneration Order 2009 (the 2009 Order), which 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.*

In a sense one could end the analysis there. It is interesting to note that the much-touted fiduciary duty argument, essentially failed from first principles. It is not enough for a broadly drawn fiduciary relationship to exist to impose such a duty. Moreover, it is not a fiduciary relationship which creates a duty, rather because of the existence of a particular duty, a relationship may be labelled fiduciary. And finally, it is not enough to talk of duties in the abstract, there must be a particular duty in respect of a particular issue between solicitor and client for that duty to be given the character of fiduciary. As the Court of Appeal noted:

73. *The Client ultimately accepted that the fiduciary duty that she was relying on was the duty on the Solicitors not to act for their own benefit without her informed consent. Undoubtedly, the Solicitors owed that duty to the Client at the time of the CFA (because they were already acting in relation to the RTA portal claim), but did that duty apply to the negotiation for their own retainer? In Hurstanger Ltd v. Wilson [2007] 1 WLR 2351 (Hurstanger), the Court of Appeal held that an agent's duty not to take a secret commission had arisen when the loan documentation was signed. Hurstanger demonstrates that an agent cannot take a secret commission even during the negotiations or at the point at which it assumes its agency. That does not, however, mean that an agent cannot negotiate the terms of its agency in its own interests.*

And:

74. *The reason for this conclusion is that when solicitors and a client are negotiating the terms of the solicitors' retainer, the client does not have any reasonable expectation that the solicitors will not be acting in the negotiation in their own interests. Two passages from Lady Arden's judgment in Children's Investment Fund Foundation (UK) v. Attorney General [2020] UKSC 33, [2020] 3 WLR 461 make this clear:*

47. The Court of Appeal adopted the following test put forward by Finn J, sitting in the Federal Court of Australia, in Grimaldi v Chameleon Mining NL (No 2) (2012) 287 ALR 22, para 177: "… a person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest …"

48. *This formulation introduces the additional concept of reasonable expectation of abnegation of self-interest. Reasonable expectation may not be appropriate in every case, but it is, with that qualification, consistent with the duty of single-minded loyalty.*
…

51. *A person can be a fiduciary in relation to another party with whom he has a contractual relationship in respect of some only of his contractual obligations: see, for example, F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) [2012] Ch 613, especially at paras 212-216 and 223 per Sales J (as he then was). This is only one of the situations in which a fiduciary duty may arise. It is important to examine the very specific context in which it is said that a fiduciary duty arises. This point was made by Sales J (para 223): "The touchstone is to ask what obligations of a fiduciary character may reasonably be expected to apply in the particular context, where the contract between the parties will usually provide the major part of the contextual framework in which that question arises." (Emphasis added)*

75. *In the particular context of solicitors negotiating a CFA, the client cannot reasonably be entitled to expect the solicitors to act in the client's sole interest to the exclusion of their own interests. This principle applies even if the solicitor does owe the very same fiduciary duty in acting for that client in the RTA portal claim.*

Also of interest was the Court of Appeal's obvious concern for the business model of the representatives instructed by the client in this case at paragraph 15 of the judgment:

Finally, it is also unsatisfactory that solicitors like checkmylegalfees.com can adopt a business model that al-

lows them to bring expensive High Court litigation to assess modest solicitors' bills in cases of this kind. The Legal Ombudsman scheme would be a cheaper and more effective method of querying solicitors' bills in these circumstances, but the whole court process of assessment of solicitors' bills in contentious and non-contentious business requires careful review and significant reform.

Of significance going forward the Court of Appeal fired some warning shots about the potentially unfair structuring of some retainers and the need to comply with professional duties:

84. *In this case, the Client was given most of the information she needed to make those decisions, with the exception of one vital matter, namely the fixed recoverable costs that the defendant's insurers would pay within the RTA portal. It would have been straightforward for the Solicitors to inform the Client of the level of the fixed recoverable costs that could be recovered at stages 1 and 2. The Client was told that the Solicitors estimated their base costs at £2,500 (net of VAT and disbursements), and that many such claims would settle within the RTA portal after production of medical evidence and financial losses. She was also given an estimate of £2,000 for her damages. Had she also been told of the level of the fixed recoverable costs, she would have been able to compare the likely recoverable costs with the amount she was being asked to agree to pay the Solicitors. As the Client submitted to us, she would then have known that she was assuming a liability to pay the Solicitors five times the costs she would be getting back from the defendant. I do not think that the Solicitors can be said to have complied with either [8.7] or [8.6] of the Code without providing that information.*

85. *For these reasons, the Solicitors neither ensured that the Client received the best possible information about the likely overall cost of the case, nor did they ensure that she was in a position to make an informed decision about whether she needed the service they were offering on the terms they were suggesting.*

86. *In my judgment, it is wholly unsatisfactory for solicitors generally, and these Solicitors in particular, routinely to suggest that their clients agree to a costs regime that allows them to charge significantly more than the claim is known in advance to be likely to be worth. Solicitors do not resolve this unsatisfactory state of affairs by allowing a discretionary reduction of their charges after the case is settled. It would, in theory, be possible for there to be an order made under section 56 of the 1974 Act to deal with this problem, and perhaps some of the others I have identified in relation to current practice, by the establishment of reformed general principles applicable to the determination of the proper remuneration of solicitors in respect of non-contentious business within the pre-action online portals.*

Although the Court of Appeal was not concerned with the failure to provide best possible information, in that it did not affect the outcome of the case, which focused on whether a fair fee had been charged to the client, the Ombudsman certainly would be concerned with such failures and the potential would exist for a remedy to be granted.

Turning to the other case of **Karatysz,** although ostensibly a shorter decision on simpler point, it is of equal importance for solicitors to understand the key points which arise from this judgment, given issues which can arise when billing personal injury clients, in low value litigation for low levels of fees. The first point, is that given a solicitor will invariably be capping the costs they have incurred set against what they expect the client to pay, what is the actual amount of the bill for the purposes of section 70(9) of the Solicitors Act 1974? The Court of Appeal stated:

35. *In reality, the proper question might be more clearly phrased, in respect of the category or categories of costs being assessed, as "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?". It matters not whether the costs charged in the bill have been paid or not, so long as that fact is made clear on the face of the bill. I also do not think that it matters that the costs stated have been paid in whole or in part by a third party, whether insurer or not, again so long as that fact is clearly stated on the face of the bill.*

36. *I do not, therefore, think that the judge decided the case contrary to the rationale or any other principle provided for in section 70(9). The judge did what he was supposed to do in the circumstances of this case. He decided the amount of this Bill on its proper interpretation by asking himself what the Bill was actually demanding to be paid (or to have been paid) by way of fees. In reality, it was a simple question once one understood that the last line of the Bill told the reader that the balance payable by the Client was "limited to 25% of damages plus ATE", £455.50, which had been paid. On that basis, the only sensible interpretation of the Bill as a whole was that it was demanding whatever had already been paid, namely £1,116 by Aviva plus £455.50 by the Client, totalling £1571.50 – notwithstanding that that sum is not stated on the face of the Bill as it should have been.*

Facetiously, one might note that despite all the powder and shot spent in the Court of Appeal, in the end the court simply decided that the amount of the bill of costs, is the amount that the client is asked to pay!

But the Court of Appeal further went on, to explain how a bill of costs should be structured:

46. *The Client argues that certainty is needed. I agree. Properly drawn bills ought in future to state the agreed charges and/or the amounts that the solicitors are intending by the bill to charge, together with their disbursements. They should make clear what parts of those charges are claimed by way of base costs, success fee (if any), and disbursements. The bill ought also to state clearly (i) what sums have been paid, by whom, when and in what way (i.e. by direct payment or by*

deduction), (ii) what sum the solicitor claims to be outstanding, and (iii) what sum the solicitor is demanding that the client (or a third party) is required to pay.

A sensible proposal, but it probably elides the distinction between a demand for payment, and the cash account (the ledger): having said that for a number of years, I have been suggesting that personal injury solicitors who submit bills to their clients (ie all of them) should set out clearly in invoice form what their demand is and how it is broken down with appropriate credits given.

Finally, the Court of Appeal was again critical of the practice of bringing High Court proceedings for disputes over costs where objectively trivial amounts were at stake at paragraph 45:

45. *The Client allowed checkmylegalfees.com to bring this costly case on her behalf, when she had almost nothing to gain. As Lavender J demonstrated at [42], she recovered £177.50 before DJ Bellamy, which was all that was really at issue except massive sums by way of costs. The process whereby small bills of costs are taxed in the High Court is to be discouraged. It is far more economic to use the Legal Ombudsman scheme which is a cheaper and more effective method of querying solicitors' bills in these circumstances. Moreover, whilst it has not been necessary to decide whether there were "special circumstances" in this case under section 70(10), because the Client has not succeeded on her appeal, there remains a lesson to be learned from this case. Firms such as checkmylegalfees.com and their clients should be in no doubt that the courts will have no hesitation in depriving them of their costs under section 70(10) if they continue to bring trivial claims for the assessment of small bills to the High Court, even if those bills are reduced on the facts of the specific case by more than one fifth under section 70(9). The critical issue is and always will be whether it is proportionate to bring this kind of case to the High Court. In this case, it was not.*

At a stroke, this means that where a claim is brought for a refund of a few hundred pounds, applying these dicta, even if a refund is ordered by the court on assessment, there is an excellent argument that the client should be deprived of their costs for acting disproportionately, to seek such a trivial sum by way of High Court proceedings when they should reasonably use the Ombudsman service.

Going forward, what would be the upper limits of a trivial or disproportionate claim to mount by way of a solicitor-own client assessment? I would have thought that a dispute for anything under £5000 would probably amount to such a dispute, as the costs on either side will almost certainly exceed that amount by some margin. It may go further. Given that claims for up to £10,000 for small consumer disputes are routinely allocated to the Small Claims track, one can see that the argument for most solicitors when confronted with an intimated claim of up to this level, will be to direct their former client to the Ombudsman.

CONCLUSIONS

So, what should a solicitor take away from these decisions as action points?

First, it is time to revisit their firm's retainer documentation and client care letter. Although the solicitors in this case escaped consequence, the Master of the Rolls was critical of the way the retainer was structured, and the failure to give advice to the client about likely levels of recovered fixed costs.

Secondly, it is time to revisit the way cases are billed and whether the form of bill used by the firm which are sent out at the current time reflect the views of the Court of Appeal at paragraph 46 and whether they need to be revised.

Thirdly, claims for the return of low value deductions are probably dead in the water now, if pursued as a solicitor own client assessment, as the Court of Appeal has indicated that a client should not recover the costs of doing so if the proceedings are disproportionate as brought.

Therefore, a solicitor should consider the robustness of the firm's complaints system, and how to make sure that any increased complaints to the Ombudsman, are appropriately dealt with, notwithstanding that the avenue of a High Court assessment, has been closed off for low value costs disputes, which would fall foul of a charge of disproportionality.