

NWL Costs Update – October 2022

BELSNER APPEAL ALLOWED

Darya Belsner v CAM Legal Services Limited v [2022] EWCA Civ 1387

The Background

The underlying litigation was a simple RTA case which settled for damages of £1,916.98 plus fixed costs and disbursements totalling £1,738.19 inclusive of VAT.

The Case was run by the Appellant under a CFA, with a success fee of 100% subject to the statutory cap of 25% of the total amount of any general damages for pain, suffering and loss of amenity and damages for pecuniary loss, other than future pecuniary loss.

The Appellant paid the Respondent £1,531.48 (damages less £383.50) but did not provide a bill of costs or invoice.

The Respondent instructed Checkmylegalfees.com Limited (who later merged with Clear Legal Limited) who issued a Part 8 Claim form in the SCCO for the Appellant to deliver up a statute bill. On 24.05.18 the Appellant served its final statute bill which consisted of 4 items:

Basic Charges - £2,1717.90 plus VAT
Success Fee of 100% capped at 25% of damages - £383.50 plus VAT
Disbursements - £1,031 plus VAT

Total £3,588.40 plus VAT = £4,306.07.

The Appellant could have charged this less the costs recovered from the Defendant = £2,522.88 which would have been more than the damages recovered.

The bill went on then to cap the costs at 25% of damages = £385.50.

On 4th July 2018, the Respondent sought an assessment of the Appellants costs – restricted to profit costs and success fee.

On 06.02.19 DJ Bellamy carried out a Provisional Assessment (PA). He

- (1) Held in relation to basic charges that informed consent was required and had not been given
- (2) In the alternative, reduced some items of basic costs
- (3) Reduced the success fee to 15%

The consent issue is somewhat complex but revolves around Section 74(3) of the Solicitors Act 1974 and CPR 46.9. Taken together (and in the context of a Contentious Business Agreement) they restrict what can be recovered from the client to what is recovered from the paying party – in the absence of an agreement which expressly provides otherwise. And for the purposes of express or implied approval to costs the client's informed consent is required.

The PA was challenged and at Hearing on 02.07.19 the District Judge changed his mind on consent. He determined that the written documentation (CFA and retainer documents) were sufficiently clear that the Solicitors would seek to recover the shortfall between their costs and the costs recovered from the other side. Informed consent was not therefore required.

The Respondent appealed and it came before Mr Justice Lavender whose decision is dated 16.10.20. He determined that certain issues should have been brought to the Respondents attention if she was to give informed consent to the agreement insofar as it permitted payment to the Appellants of an amount greater than that which the Respondent could have recovered from her insurers. The Respondent did not therefore give her (informed)

consent to the agreement and the shortfall could not be recovered.

The Appellant appealed and the matter was heard by the Court of Appeal.

The Decision

The Court of Appeal changed the emphasis of the case. The core issue was whether the Judge was right to assume, that Section 74 (3) of the Solicitors Act 1974 and CPR 46.9 (2) applied to cases brought through the RTA portal where no proceedings were issued. This was summarised as whether the claims could be regarded as 'contentious business (as the client contended) or non contentious business (as the Solicitors contended) – a distinction the court found to be 'outdated' and 'illogical' with the whole process of solicitor client costs in need of 'significant reform'.

The court found that Section 74 (3) and Part 46.9 (2) do not apply to claims being brought through the RTA portal without county court proceedings being issued.

As CPR 46.9 (2) does not apply the issue of informed consent in this respect didn't arise. In respect of the suggested fiduciary duty the court said:

"The duty to ensure that clients receive the best possible information about pricing and likely overall cost of the case may have similarities to fiduciary duties of loyalty, but they are not such duties – the Judge was wrong to say the Solicitors owed a fiduciary duty in the negotiation of the retainer."

It followed from above that as a matter of law the Solicitors were not obliged to obtain the clients informed consent to the terms of the CFA on the grounds decided by the judge.

The court went on to criticise the lack of information given by the Solicitors about the overall likely overall costs of the case and did not ensure the client 'was in a position to make an informed decision about whether she needed the service they were offering on the terms they were suggesting'.

At paragraph 98 of the Judgement, it was said:

'The Client in this case has never had any real or economic interest in the pursuit of this costly litigation. Only checkmylegalfees.com have such an interest.'

And at 99:

'I think the overall bill was fair and reasonable. I would, therefore, re-assess the total base costs and success fee payable as being £821.25 plus VAT (£500+£321.25, the latter figure being £381.50 less VAT).'

At 100:

'The question to ask in order to determine the amount of the bill under section 70(9) of the 1974 Act (the 1/5th Rule) is

'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 bill was £821.25 plus VAT, the client achieved no reduction from the bill and consequently would ordinarily pay all the costs unless there were special circumstances – but given the complex issues involved in the case – the parties were left to agree that aspect with a determination on paper to follow if needed.

Thoughts

The decision provides welcome clarification in respect of RTA cases pursued through the protocol and confirmation of the distinction between contentious and non contentious business. However, it is clear that Solicitors needed to tighten up on the advice they give to clients.

The whole area of Solicitor client costs needs urgent reform.

Once positive is that this decision should make it much harder for firms like Checkmylegalfees fees to make money out of pursuing Solicitors.

If, in the light of this decision you have any concerns about your retainers please contact us – and we will do our best to help.