BELSNER V CAM LEGAL SERVICES:

AM I INFORMED AND AM I CONSENTING?

Introduction

1. In *Belsner v Cam Legal Services Ltd* [2020] EWHC 2755, Lavender J ("the Judge") has held that a client ("C") did not give informed consent to the recovery from her of a sum by her solicitors ("solicitor") over and above the costs recovered from the defendant in litigation ("D"). As a result, the solicitors were limited to the fixed costs which they recovered from D.

2. The Judge held that a solicitor seeking to rely on CPR 46.9(2) has to show whether the client gave informed consent to the payment of an amount of costs greater than that which the client could have recovered from the other party to proceedings (par 32 of judgment). This was so notwithstanding (a) there was an apparent contractual right to recover on the part of the solicitor and (b) some generalised information as to the possibility of C being charged fees in excess of those recovered from D was provided by the solicitors to C.

3. There has already been a great deal of comment on the case (only handed down a week or so ago!). Behind the headlines lurks a raft of complicated issues as to (a) the obligations a solicitor has to its client at the time of entry into the retainer (b) the interaction of the solicitor's contractual rights and statue, especially CPR 46.9; and (c) the meaning of "informed consent".

Background

4. C was injured in an RTA. Damages were always going to be modest. C instructed solicitors who entered into a CFA with her, with no cap on base costs but an uplift capped at 25% of damages. The Client Care letter, T&Cs and CFA provided that C could be charged fees in excess of those recoverable from D but (a) did not enter into particular detail of those circumstances (b) provided an estimate to the effect that "the basic charges for the work … will be £2500".

5. Liability was admitted by D in accordance with the Low Value RTA Protocol ("Protocol") and damages of £1916.98 in damages were paid to C; and fixed costs and disbursements of £1783.19 were paid over too.

6. The solicitors paid over £1531.48 (damages less £385.50) to C but did not give her a bill of costs or an invoice. C sought delivery of a statute bill. The statute bill provided amounted to £3588.40. As the judge pointed out (par 21), engaging the solicitors on the terms proposed by them would have left C with no damages and £605.90 out of

pocket. For the purpose of the assessment, the solicitors had agreed to limit what they sought to recover from C to the fixed costs plus £385.50 (success fee subject to the cap).

Statute

7. S 74(3) of the Solicitors Act 1974 reads:

"74(3) The amount which may be allowed on the assessment of any costs or bill of 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 of any counterclaim."

Civil Procedure Rules

8. CPR 46.9(2) and (3) reads:

"46.9(2) Section 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.

(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;

(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;

(c) to have been unreasonably incurred if –

(i) they are of an unusual nature or amount; and

(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party."

Judgment

9. The Judge held that:

a) CPR 46.9(2) requires informed consent. A solicitor who wishes to rely upon CPR 46.9(2) must not only point to a written agreement which meets the requirement of the rule, but must also show that his client gave informed consent to that agreement insofar as it permitted payment to the solicitor of an amount of costs greater than

that which the client could have recovered from another party to proceedings. For this purpose, the solicitor must show that he made sufficient disclosure to the client (par 70).

b) The solicitors did disclose to C that the agreement between them permitted payment to them of an amount of costs greater than that which C could have recovered from another party to proceedings. In particular they disclosed that (i) if she won her claim C would pay the success fee and could not recover it from her opponent (ii) C would pay the difference between the solicitors' basic charges, expenses and disbursements and the amount agreed or allowed by the court in respect thereof (par 73).

c) However, it did not specifically inform C that if the claim settled for £10,000 or less in the Protocol then only £500 profit costs would be paid over as fixed costs; and that if it left the Protocol and settled for £2250 of less, then only £550 would be paid over as fixed costs (par 74). Thus on many possible settlement outcomes, C would have her damages swallowed up by costs and indeed potentially pay a balancing sum to the solicitors.

d) The fact that the solicitors did not in fact seek to claim its contractual entitlement was not relevant (par 84).

e) It ought to have been brought specifically to C's attention (for her to give informed consent) that while their estimate of its costs was £2500 plus VAT, she might recover only £500 or £550 plus VAT from insurers (pars 85 and 90).

f) Therefore the consequence is that C did not give informed consent to the agreement and that therefore the solicitors cannot rely upon that for the purposes of CPR 49(2).

Commentary

10. The decision (which is being appealed to the CA) is an example of the developing case law which requires informed consent from the client to costs obligations which might otherwise be imposed on the client by the terms of the retainer. To address some of the issues which arise.

Decision

11. First, many observers will have sympathy with the outcome in the case. It may well have been influenced by the manner in which C's damages were simply reduced by the solicitors without proper explanation. The Judge may also have seen it as unattractive not to alert C to the fact that certain likely outcomes (settlement at less than £10,000 in the Protocol) might well lead to the potential reduction of C's damages to nil. A "cap" such as that in *Herbert v HH Law Ltd* [2019] EWCA Civ 527 limiting costs to a

maximum of 25% of damages would ensure that such a downside to the client would be ameliorated.

Construction

12. Second, it is important to note that the decision of the Judge was based upon his construction of CPR 46.9(2). CPR 46.9(2) reads that the solicitor cannot claim more than the client would have recovered from D (i.e. fixed costs in this case) "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 agreement". The Judge in effect read that wording as importing a requirement that the solicitors must show that C gave "informed consent" to that agreement (par 68 and 69).

13. One question on appeal must presumably be whether that is properly to be implied into the sub-rule which (a) on its face does not mention informed consent (b) requires no more than express permission in a written agreement to payment of an amount greater than that which C could recover from D. In *Herbert v HH* (by contrast) the CA were construing CPR 46.9(3) which requires "express or implied approval" and has been construed in earlier case law as requiring that the approval be "informed" which is a relatively modest interpolation.

14. Of course, if the Judge's construction of CPR 46.9(2) was correct then it is logical that a voluntary waiver by the solicitor of rights to the base costs shortfall would not remedy their position. That is because absent informed consent s 74(3) of the Solicitors Act 1974 would apply automatically.

Fiduciary Duties

15. Third, the Judge relied quite heavily on certain cases relating to fiduciary duties (especially in respect of the disclosure of profits etc) but they were said to be relevant by way of analogy rather than directly.

16. Clearly, solicitors owe fiduciary duties to their clients in respect of costs matters. However, it is at least arguable that such duties give rise to a potential claim for breach of contract or fiduciary duty by the client rather than find themselves filtered into CPR 46.9. Much of the reasoning of the Judge related to the duties owed by a solicitor to its client so it might be asked whether (at least in a claim where the sums justified it) the substance of the issue could have been dealt with by way of a counterclaim for breach of fiduciary duty rather than by the interpretation of CPR 46.9(2).

Informed Consent

17. Fourth, the concept of a client giving informed consent to an agreement by which she is otherwise bound is quite involved. Informed consent appears to be equated in *Belsner* (and to an extent *Herbert v HH Law Ltd* [2019] EWCA Civ 527 at par 48[1]) with the signing of or provision to the client of a client care letter (and associated documentation) which contains the relevant information.

18. But the disclosure and candour contemplated by fiduciary duties tends to focus on actual appreciation by the client of what the fiduciary is up to[2]. It is notorious that clients seldom read let alone learn or inwardly digest the content of such documents.

19. So can it really be said that "informed consent" would necessarily be given by the client by their signature in any event? There is a difference between being contractually bound by a signature and actually understanding what is being signed up to.

Going Forward

20. It does seem that the situation for the solicitors might have been saved had there been a "cap" such as that in *Herbert v HH* (although see above for "informed consent"). Solicitors will want to consider the provision of such a cap in their retainers (and even the amendment of subsisting retainers). However, it seems probable that the CA (if and when the case reaches it) will provide further guidance on the position and address "informed consent" in solicitors' retainers.

Dan Stacey
23rd October 2020

[1] Although not entirely. In *HH*, the Master of the Rolls rejected the submission for Counsel for the solicitors that in the absence of evidence from Ms Herbert that she was, despite the documentation provided to her, misled or mistaken or that for some other reason she did not understand material matters relating to the success fee, she was to be conclusively regarded as having given her informed consent. "We do not agree. It was open to her to seek to show that the documentation relied upon by HH was inaccurate or misleading or, in some other respect, insufficiently comprehensive in an aspect material to her understanding of the nature or amount of the success fee." (par 40).

[2] Compare "informed consent" in medical treatment cases which focus on the patient's actual comprehension. In such cases it is seen as a process not a signature on a form.