hailshamchambers

Belsner v Cam Legal
[2022] EWCA Civ 1387

Claimant ordered to repay £295.50

Dan Stacey

28 October 2022

Belsner v Cam Legal: Claimant Ordered to Repay £295.50

The long-anticipated Court of Appeal decision in *Belsner v Cam Legal Services Limited* [2022] EWCA Civ 1387 has just been handed down. The leading judgment (with which the Chancellor and Nugee LJ agreed) was given by Vos MR. It (together with the linked case of *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388) represents a comprehensive win for the appellant Solicitors and a corresponding defeat for the respondent Claimant. The judgment provides guidance and food for thought on a number of issues. The main ones are summarised here.

Facts

The Client instructed the Solicitors in a low value RTA claim under a CFA which informed her that their costs would be c. £2500 and the damages c £2000. It did not (adequately) inform her that the costs recoverable from the defendant were likely to be c £500 plus disbursements. The Client was therefore at risk of a negative outcome if the costs claimable by the Solicitors exceeded her recoverable damages.

To many, it would be evident that the Client should have been told that the consequences of the CFA she was entering into included the possibility or probability that she might end up out of pocket, absent a post-settlement indulgence from the Solicitors. The question was whether the Client is left to complain to the regulatory authorities (including the Legal Ombudsman) or has a substantive remedy in the detailed assessment.

On appeal from DJ Bellamy, Lavender J held that the Solicitors were not entitled to recover more from the Client than they had recovered from the defendant because s 74(3) of the Solicitors Act 1974 applied and the CFA/written agreement did not provide adequate information on the costs risk so that the Client could not have given informed consent to it. The Solicitors appealed to the Court of Appeal.

S 74(3) Limitation

At stake was whether the Client could rely upon the limitation in s 74(3) which prevents the Solicitor recovering from the Client more than it could have recovered from the other side in the underlying proceedings ("the s 74(3) limitation"). If so, then the Solicitor was unable to recover from the Client in costs anything more than it recovered from the defendant and would be limited to £500 plus costs. There is one exception: CPR 46.9(2) provides that if there is a written agreement which expressly permits payment to the Solicitor of an amount greater than that which the Client could have recovered, then the s 74(3) limitation does not apply.

S 74(3)

S 74(3) reads:

"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… "

CPR 46.9

CPR 46.9(1):

"this rule applies to every assessment of a solicitors bill except [immaterial exceptions]"

CPR 46.9(2):

"S 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".

Key Holding

The crucial holding of the CA is that s 74(3) of the Solicitors Act 1974 (as incorporated into the Civil Procedure Rules by CPR 46.9(2)) does not apply to cases brought through the RTA portal where no county court proceedings are actually issued. Therefore the solicitor is not limited to what it recovers from the other side and needs no written agreement permitting additional recovery from the client.

But the court also took the opportunity to consider

(a) whether the Solicitors are required to obtain informed consent in the negotiation and agreement of the CFA

(b) if informed consent was required, whether the Client gave that consent

(c) whether the term permitting the Solicitors to charge more than they recovered from the defendant was unfair under the CRA 2015.

Issue 1: Does s 74(3) and CPR 46.9(2) apply?

The CA held that s 74(3) of the Solicitors Act 1974 did not apply to claims brought through the RTA Portal (pars 45 – 61). That was because the 74(3) limitation only applies

(a) to "contentious business" and

(b) "in respect of any item relating to proceedings in the county court".

The CA held that (on the basis of long-standing case law) because no proceedings were issued, the business could not be said to be "contentious". Furthermore, there were no "proceedings in the county court" and there would never be such proceedings, because the RTA portal was mandatory. "Accordingly, … s 74(3) and CPR 46.9(2) do not apply at all to claims brought through the RTA portal without county court proceedings actually being issued" (par 60). This being so, the s 74(3) limitation did not apply. As a result, the informed consent issue under CPR 46.9(2) did not arise either (pars 67 – 71).

Issue 2: Did the fiduciary nature of the solicitors relationship with Ms Belsner give rise to a duty to obtain the client's consent?

The CA also held that no fiduciary duties are owed during the negotiation of the Solicitors' remuneration (pars 72 – 81). The principal question was whether fiduciary duties were owed in relation to the negotiation between the Solicitor and Client for the CFA or terms of the retainer. The fiduciary duty which the Client was relying upon was the duty not to act for their own benefit without her informed consent. The CA held that

> (a) when solicitors and 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 (par 74)
>
> (b) 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 (par 75)
>
> (c) there are duties to ensure that the client receives the best possible information about pricing and the likely overall costs of the case but they are professional/regulatory duties rather than fiduciary duties (par 80).

Issue 3: Did the client give her informed consent to the terms of the CFA relating to the Solicitors' fees?

The Solicitors were, as a consequence, under no obligation to obtain informed consent to the terms of the CFA. However, the Code of Conduct provides that Solicitors should ensure that clients receive the best possible information about pricing and the overall cost of the matter. The Client was not given the information relating to the fixed recoverable costs that the defendant's insurers would pay within the RTA portal (par 84). The Client was told that the Solicitors' likely base costs were £2500 and that her damages were c £2000. Had she been told of the level of fixed costs (£500 plus disbursements) then she would have known that she was assuming a liability to pay the Solicitors five times the costs she would have been getting back from the defendant. It might also have been said that on many likely outcomes, the Client would notwithstanding success in the damages claim have been "out of pocket". There was a failure to give any such advice and this was a failure to comply with [8.7] and [8.6] of the Code. But its consequences lay in the regulatory sphere.

Issue 4: was the term allowing the Solicitors to charge more than the costs recoverable from the defendant unfair under the CRA 2015?

The CA rejected the Client's fallback argument which was based upon the contention that the term as to the recovery of costs was unfair and not binding upon her under s 62(4) of the CRA 2015. The unfairness was said to be that it results in a liability in excess of the fixed maximum that would be allowed pursuant to s 74(3). The CA did not spend a great deal of time on this analysis as it appears that it was accepted that if s 74(3) did not apply then CRA 2015 did not add anything to the Client's case.

Issue 5: Consequences for the Assessment

If (as the court decided) the assessment was of non-contentious business, there would be a need to conduct the assessment again. The CA decided given the small sums at stake that it would carry out that exercise itself. It appears that in determining what was fair and reasonable, the CA held that it would be wrong to take into consideration the absence of fully informed consent (pars 97 and 99). The question was whether the overall bill was fair and reasonable and the CA held that it was (par 99) "in the convoluted circumstances of the three stages of the case". Thus the appeal was allowed and the "sum of £295.50 must be repaid by the Client to the Solicitors" (par 101). What trivial things arise from such mighty contests!

Comment – s 74(3)

The key issue was the threshold one (not argued by the Solicitors below): whether there was any applicable rule at all to the effect that Solicitors could only obtain a balancing or shortfall payment from the client on the basis of a written agreement. If (as the CA held) the s 74(3) limitation does not apply, then the Client cannot rely upon CPR 46.9[1].

Comment – Unsatisfactory Statutory Position

However, the CA considered that the current position (and thus the conclusion to which it was driven) was unsatisfactory in many respects (see, e.g., pars 15): there was no good reason for s 74(3) not to apply to cases in the portals; the scheme by which solicitors sign up their clients to a regime by which they can charge more than the claim is likely to be worth is "unsatisfactory".

Unsatisfactory too was the checkmyfees.com business model and its use of the High Court rather than the Legal Ombudsman for the assessment of modest bills of this kind. We can expect wholesale changes to the relevant CPR and Solicitors Act in due course.

Comment – Fiduciary Duty

A point of wide importance going forward relates to the duties owed on the entry into the

[1] One potential argument might have been that the intention of the Rules Committee in CPR 46.9 was to incorporate s 74(3) wholesale to all such assessments regardless of whether they stemmed from county court proceedings or not; but there is little material recording the deliberations of the rules committee on this point in 1998 and 1999.

retainer. The CA appears to have treated the fiduciary duty point as free-standing: that is to say contemplated that if a relevant fiduciary duty were owed, then it might operate to limit the Solicitor to recoverable costs in the assessment irrespective of s 74(3) or whether proceedings for breach of fiduciary duty were on foot.

However, the CA considered that the case law clearly excluded the existence of a fiduciary duty in respect of fees before entry into the retainer. There are certainly indications in the case law to this effect (cited in detail at pars 74 – 79) and although it might be said that none is directly on point, dicta from *Motto v Trafigura* [2012] 1 WLR 657 and *CIFF (UK) v AG* [2020] 3 WLR 461 provide some support for this.

On the other hand, some might think that

> (a) the creation of the retainer and negotiations about fees is precisely the moment when the typical client is in the hands of the solicitor and such a fiduciary duty ought to exist
>
> (b) a trustee and fiduciary can only deal or contract with its client on fair and transparent terms (e.g., *Bristol & West v Mothew* at 18D) and that ought to apply here
>
> (c) the CA in *Clare v Joseph* [1907] 2 KB 369[2] saw no difficulties at all in the solicitor owing fiduciary duties during the negotiations for its fees (e.g., Buckley LJ after stating that such fiduciary duties existed: "The solicitor was under these disabilities when bargaining with his own client because it was his duty to guard him from acting in a way prejudicial to his interest" and Fletcher Moulton LJ to a similar effect).

The fiduciary duty contended for in the CA was rather extreme: to act entirely in the interests of the client and pay no heed to the interests of the solicitor (par 75). If the fiduciary duty contended for (following *Clare v Joseph*) simply requires that the solicitor is obliged to act fairly and guard the client from acting in a way prejudicial to its interest, then

> (a) the solicitor would be obliged to ensure the client knew of the potential downside
>
> (b) the provision of that information would in no way prejudice the proper interests of the solicitor acting fairly towards his client (actual or potential).

Dan Stacey
Hailsham Chambers
28 October 2022

[2] Not cited to the CA.