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10 FUN FACTS ABOUT *BELSNER*

Fact One: It's official: the Solicitors Act 1974 is a bit rubbish

The outcome of *Belsner* was very much in favour of the solicitor, but the undercurrent of the court's reasoning is that the present legislation is simply not fit for purpose.

In particular:

- the distinction between contentious and non-contentious costs is 'outdated and illogical' and is in 'urgent need of legislative attention';[1] and
- it is not logical that section 74(3) and CPR, r 46.9(2) should apply to cases issued in the county courts but not to portal claims.[2]

So, expect changes. Primary legislation may be required, but:

- the Master of Rolls has hinted at the fact that the Online Procedure Rule Committee[3] — which is a new committee that has been set up to deal with portals — may make portal-specific rules; and
- he also referred to the possibility of secondary legislation being made under section 56 of the Solicitors Act 1974, presumably to regulate the amount that solicitors are paid.[4]

Quite how any such secondary legislation would cure a problem that lies in primary legislation is not clear, but the bottom line is that changes of some sort are in the pipeline.

Fact Two: The Master of Rolls is a big fan of the Legal Ombudsman

The Master of the Rolls said this:[5]

> *'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. … 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*

[1] See *Belsner v CAM Legal Services Ltd* [2022] EWCA Civ 1387 at [15].
[2] *Ibid* at [70].
[3] *Ibid* at [15].
[4] *Ibid* at [86].
[5] See *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388 at [45].

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.'

Strong stuff. On the face of it, this is an existential threat to CMLF's present business model.

But CMLF are likely to fight back, and they have powerful reasons to do so:

- *Obiter comments*: The Master of Rolls' comments were not just *obiter*, but they were made without him having heard any argument on the issues and without any evidence being before the court, these being points that are not lost on CMLF.[6]
- *Questionable effectiveness*: Solicitors' clients have, one way or another, had access to judicial determinations of their fees since no later than 1603, so it would be curious if *obiter* comments of the Master of the Rolls (as opposed to legislation) were to change that. Indeed, such comments tend not to be effective. Those of us who are old enough to remember the 'Costs Wars' will recall how ineffective comparable comments about 'satellite litigation'[7] and 'blots on the landscape'[8] were in the early 2000s.
- *Each case must be decided on its own facts*: It is trite law that each case must be decided on its own facts, and as Robin Dunne points out in his recent article for the ACL, 'It is questionable whether many clients (or indeed solicitors) would agree that the Legal Ombudsman is a more effective way of bringing disputes about bills.'[9]
- *Not all CMLF's claims are obviously disproportionate*: The focus in recent years has been on small assessments (which are governed by the one-fifth rule), but this is only a part of CMLF's business. In particular, they are becoming very adept in seeking out billing errors, and such claims are governed by different rules. Furthermore, a large number of CMLF's claims are not for small amounts.

So, expect CMLF simply to fight harder (at least for now).

Fact Three: CMLF will be keeping the costs bar gainfully employed for years to come

Two years ago, reliable sources — namely, *The Sun* — said this, under the headline '*Brits ripped off by greedy 'no win, no fee' lawyers*':[10]

[6] See Dunne R, '*Belsner and Karatysz – where do we go from here?*' ACL, 28 October 2022, under 'Implications of the judgment'.
[7] See *Hollins v Russell* [2003] EWCA Civ 718 at [226], per Brooke LJ.
[8] See *Burstein v Times Newspapers Ltd* [2002] EWCA Civ 1759 at [29], per Latham LJ.
[9] See Dunne R, '*Belsner and Karatysz – where do we go from here?*' ACL, 28 October 2022.
[10] See https://www.thesun.co.uk/money/13070431/landmark-case-greedy-no-win-no-fee-lawyers/

'[CMLF] says around £2.5 billion could be waiting to be claimed by victims, with cases as far back as 2013 eligible.'

So, given the fact that the CMLF had their eye on 25 percent of £2.5 billion (namely, £625 million), it is fair to say that last Friday would have been a bad day in the office.

That may be so, but CMLF have plenty of opportunity to diversify:

- *Raising their sights*: If small claims are unprofitable, CMLF could easily start to target larger consumer work, the most obvious candidates being family work, probate work and employment disputes; this is all low hanging fruit from their perspective (especially family work). If you doubt me on this, have a look at CMLF's website.[11]
- *Raising their sights further*: Non-consumer work is more low-hanging fruit; many commercial firms' retainers have either not been updated for years, or (worse) have been drafted by a committee.
- *Lowering their sights*: If CMLF cannot make money by recovering costs in the High Court, there is ample opportunity for them to make money out of large numbers of complaints to the Legal Ombudsman. Twenty five percent of a large number of small complaints is still a lot of money. They could easily leverage the fact that complaints are administratively burdensome and that the solicitor pays the 'case fee' of £400 win or lose.

So, CMLF will be around for some time to come.

Fact Four: Ms Belsner lost, but you still need to give *Belsner* advice

Whist a failure to give *Belsner* advice may not be a breach of fiduciary duty, and whilst section 74(3) of the Solicitors Act 1974 will not be engaged in unissued claims, there is still a *professional* duty to give *Belsner* advice.[12]

A failure in this regard may be taken into account both for the purposes of whether the court should order that there be an assessment and the assessment generally.

So, unless and until the SRA makes changes to the Code of Conduct, it would be wise to give the following information:

- Your best estimate of your fees;
- Your best estimate as to recovery from an opponent (especially where fixed fees are concerned);
- Where your hourly rate is higher than GHRs, a brief explanation as to the difference and the reasons for this; and

[11] https://www.checkmylegalfees.com.
[12] See *Belsner v CAM Legal Services Ltd* [2022] EWCA Civ 1387 at [83].

— Where you charge for incoming correspondence, funding advice, and other 'solicitor and client work', a brief explanation that such fees are not normally recoverable between opposing parties, and the reasons for charging those fees.

Fact Five: *Belsner* Advice Max® may be a good idea

In future, CMLF may wish to argue — and probably will argue[13] — that clients in portal claims should be counselled about the fact that the costs are non-contentious. Their argument will be that if clients were not told about this, the process by which fees were negotiated was not 'fair' — this being part of the test to be applied to the assessment of non-contentious fees — and that this should be reflected in the amount that that court allows.

This argument can be forestalled by briefly mentioning the following, either in the client care letter or the conditional fee agreement:

— the fact that until a claim is issued, the work is non-contentious;
— the fact that this means that clients do not have the protections afforded by section 74(3), and that as such, there is no statutory protection that limits fees to those recoverable from an opponent; and
— the fact that if the client were to seek an assessment of the solicitor's fees, the test would be 'fair and reasonable' and not merely 'reasonable'.

This *Belsner* Advice Max® will not in any way provide a better and clearer service to clients; indeed, it will just add to the length of retainer documentation. That may be so, but it would be the safest thing to do, at least for the foreseeable future.

Fact Six: Charging more than you intend to be paid is a bad idea

The Court of Appeal was strongly critical of the practice of having retainers that allow for recovery of fees that are in excess of those which the solicitor intends to be paid. The Master of the Rolls said this:[14]

> *'It is wholly unsatisfactory for solicitors generally … 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.'*

[13] See Dunne R, '*Belsner and Karatysz – where do we go from here?*' ACL, 28 October 2022 ('No firm will have told their client that they will not have the benefit of the statutory protection under section 74(3) until and unless the matter goes to stage three and proceedings are issued. Would this be considered unfair?')
[14] See *Belsner v CAM Legal Services Ltd* [2022] EWCA Civ 1387 at [15].

There are two points to make about this:

- firstly, contracts of retainer should not provide for fees that would never, in practice, be charged to a client; and
- secondly, if fees are going to be capped or limited, this should be done in advance and by way of a contractual provision (preferably in the contract of retainer itself).

My recommendation would be to use a *Harrington* agreement.

Fact Seven: Non-contentious business agreement can creep up on you unawares

It is easily possible for a written and signed contract of retainer to become a non-contentious business agreement without anyone realising.[15] Whilst this is not necessarily a bad thing, it is best avoided unless this is your intention.

Given the fact that it is now known that unissued portal claims are non-contentious work, it may be a good idea to state in the agreement that it is neither a non-contentious nor contentious business agreement.

Fact Eight: Your bills are likely to be wrong

This is the most important part of my talk.

The Master of the Rolls said this:[16]

> *'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.'*

So, a bill needs to set out the fees, but then needs to provide (in effect) a statement of account and statement of what the demand for payment is.

[15] See, eg, *In Re Thompson ex p Baylis* [1894] 1 QB 462 and *Bake v French (No 2)* [1907] 2 Ch 215.
[16] *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388 at [46].

This is of pivotal importance. A failure to comply with this will, at the very least, mean that late assessments may be brought when otherwise they would not have been brought, and may even mean that your supposed bills are not bills at all.

Fact Nine: Gross sum bills are risky

The use of gross sum bills is very common in the personal injury sector. Given the fact that it is now known that unissued portal claims are non-contentious, CMLF are likely to argue[17] that it is not permissible to deliver gross sum bills (this being because there is no statutory authority to deliver gross sum bills in non-contentious work).[18]

This is a rabbit hole that is best avoided; the law is complex, out of date, and highly uncertain.[19]

This being so, by far the safest thing to do would be to deliver detailed rather than gross sum bills, and then to limit the fees charged as per the retainer. With modern PMSs, this ought to be easy.

Do not make the mistake of limiting any such bill to amount of the deductions from the client's damages. The bill must be for the whole amount of your fees, and not merely the deductions.

Fact Ten: Audits are good

It is clear from the combined effect of *Belsner* and *Karatysz* that vulnerabilities may arise not just from a badly drafted retainer, but at any stage in the course of the retainer.

It is no longer sufficient to review only your retainer. Indeed, it is inviting trouble to do so.

Problems can be avoided only by reviewing the entire process, and by paying particular attention to billing practices.

Annual audits are to be recommended in this regard.

MARK FRISTON
Hailsham Chambers
1st November 2022

[17] See Dunne R, '*Belsner and Karatysz – where do we go from here?*' ACL, 28 October 2022, in which Robin Dunne has said 'Almost every firm in these low-value case send gross sum bills, which it appears are impermissible in non-contentious work.'
[18] See *Friston on Costs* (3rd ed), at [35.58], and in particular, fn 60.
[19] *Ibid* at [35.57]–[35.62].