

Solicitor own client assessments post Belsner

And other interesting things to discuss after lunch

P.J.KIRBY QC

13 March 2024

The official version

- What are the implications of recent post-Belsner decisions on solicitor-own client disputes over large legal spend? Who is benefitting, and what new and unresolved legal risks do you face?

Belsner – in case you've forgotten

- RTA portal claims are not contentious business
- No proceedings done in the county court
- S74(3) Solicitors Act 1974 and CPR 46.9(2) do not apply
- No fiduciary duty owed in negotiation of the retainer
- Regulatory obligations
- Solicitors Act 1974 needs urgent attention

The consequences

- LSG 11.1.24 - £267,750
- Amount involved £321
- Richard Slade, founder and managing director of Richard Slade and Company, said: 'Having been fighting each other in court for the last 10 years, it's extraordinary and testament to the professionalism on both sides that we have been able to make this happen. The name "Checkmylegalfees.com" is a fantastic name and it's fair to say that Mark has, single-handedly, moved on the law of costs more in recent years than, perhaps, any one individual has ever done before. I am looking forward to working with Mark to continue the good work, though, from now on, we'll be on the same side in court.' Quoted in LSG

Belsner – the counterfactual – informed consent

- What if proceedings had been commenced had informed consent been obtained?
- “... 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 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”

Belsner – the counterfactual – informed consent

- “... 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 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.”

Belsner and fixed recoverable costs

- Will the arguments put forward by the client in Belsner gain increased importance with the advent of FRC?
- Yes if there are proceedings in the County Court – see decision in Belsner re informed consent
- Watch this space – potentially very important with the very significant expansion of FRC and much larger cases being dealt with in the County Court

Common law/fiduciary duties vs regulatory duties

- 62 ... (iii) in considering fiduciary duties of solicitors, leaving aside professional and duties under the Code of Conduct which are different, Sir Geoffrey Vos MR stated that solicitors act for themselves in negotiating a new fee arrangement with a client and have the freedom to negotiate a new retainer in their own interests. Enhanced obligations such as informed consent arising from a fiduciary duty relationship do not apply where solicitors are stipulating the terms on which they will act: see *Belsner v CAM Legal Services Ltd* [2023] 1 WLR 1043 at [72]-[81] ... *Boodia v Slade* [2023] EWHC 2963 (KB) Freedman J

Common law/fiduciary duties vs regulatory duties

- 68 ...(ii) Any duty to ensure clients receive the best information about pricing and the likely overall costs of the case are professional duties by statute or regulations. They are different from the common law duties and the consequences of breaches of common law duties. It does not therefore follow that there is scope for implied incorporation. There is an analogy here with Belsner at [80], referred to above where Sir Geoffrey Vos MR adopted the same reasoning to refuse to imply into fiduciary duties analogous regulatory duties. **Boodia v Slade** [2023] EWHC 2963 (KB) Freedman J

Fiduciary duties where retainer has been concluded

- The obligation of a solicitor to an existing client, when taking security which is inconsistent with his or her equitable lien, to notify the client expressly if he or she wishes to retain the lien, is a professional duty which has been judicially recognised for over a century. I cannot trace any indication in the Belsner case that the Court of Appeal intended to cast doubt on it. **In re Peak Hotels and Resorts Ltd (in liquidation) Candey Ltd v Crumpler [2022] UKSC 35 Para 65 Lord Kitchin**

Fiduciary duties where retainer has been concluded

- “.. given the fiduciary relationship between solicitor and client (even under a conditional fee agreement, once it has been concluded: see *Belsner v Cam Legal Services* at [72], [75]) and the potential for conflicts of interests inherent in a conditional fee agreement, it would be very surprising for a general term to be implied entitling the solicitor to prefer their own interests over the client. The expectation, where an actual conflict of interest and duty may arise, is the opposite, namely that the solicitor will so conduct matters to avoid an actual conflict, if possible, and where there is an unavoidable conflict ensure that it does not prejudice their client’s best interests.” **Forster v Reynolds Porter Chamberlain LLP** [2023] EWHC 1150 (Ch) para 229 per Fancourt J

Fiduciary duty – points to note

- Belsner is only dealing with the absence of such a duty when negotiating the terms of the retainer
- The fiduciary duty is very relevant once the retainer is concluded
- Point likely to arise – the relevance of the existing fiduciary duty where the retainer agree to re-negotiate the retainer

Talking about retainers (OK but not costs)

- **Miller v Irwin Mitchell LLP** [2024] EWCA Civ 53
- The solicitors had not assumed a duty of care to a potential client during a telephone call to its legal helpline, including advice on limitation periods in personal injury claims, to advise her on how to safeguard against the risk that the potential defendant's insurer would not cover liability to pay her claim.
- In Belsner there was an argument about when there was first a retainer

Getting the terms of the retainer right

- **Diag Human SE v Volterra Fietta** [2023] Costs L.R. 1511
- A solicitors' firm could not recover its fees under a conditional fee agreement (CFA) with a client where the CFA did not comply with the Courts and Legal Services Act 1990 s.58 and s.58A. The unenforceable provisions could not be severed from the CFA, there was no quantum meruit basis on which the solicitors were entitled to be paid for their services, and sums paid to the solicitors on account had to be returned to the client.

Getting the terms of the retainer right

- **Ivanishvili v Signature Litigation LLP** [2023] EWHC 2189 (SCCO)
- Monthly invoices rendered over several years by a law firm to its client, under a retainer which incorporated a conditional fee agreement, were not statutory bills under the Solicitors Act 1974. There was nothing in the retainer to confer any contractual right to render interim statutory bills nor was there any basis for inferring, from the parties' conduct, any such agreement.
- [shout out to a fellow speaker!]

Getting the terms of a settlement right (or maybe just complying with them!)

- **Olukoya v Riverbrooke Solicitors Ltd** [2023] EWHC 2771 (SCCO) Costs Judge Leonard assessed a solicitor's bill as nil. There was a binding contractual agreement as to the sums payable by the client following an informal resolution by the Legal Ombudsman.
- Further the solicitor had rendered a final bill to the client and required permission of the court to amend it. No permission had been sought, and permission would not be given.
- Finally the solicitor was estopped from trying to recover a higher sum in any event. (H/T civillitigationbrief.com)

The next big one?

- **Menzies v Oakwood Solicitors Ltd** [2023] EWCA Civ 844 but Sup Ct has given permission to appeal on 6.2.24
- For the purposes of the Solicitors Act 1974 s.70, "payment" of a solicitor's statutory bill was a transfer of money in satisfaction of a bill with the client's knowledge and consent. Where the retainer between solicitor and client specified the client's consent to deduction of the bill from compensation payable to the client, payment took place when that deduction was made for the purposes of the 12-month time limit under s.70(4) for the court's exercise of its power to assess the bill.

Thank you!

Any questions?

pj.kirby@gatehouselaw.co.uk

@kirby_pj