27 October 2022

Belsner v. Cam Legal Services Limited (the *Belsner* case)
Karatysz v. SGI Legal LLP (the *Karatysz* case)

SUMMARY OF THE JUDGMENTS IN *Belsner* and *Karatysz*

Important note for press and public: this summary forms no part of the court's decisions. It is provided so as to assist the press and the public to understand what the court decided.

Introduction

These two appeals concerned the way in which solicitors charge their clients for bringing small road traffic accident claims (RTA claims) through the online pre-action protocol for low value personal injury claims in road traffic accidents (the RTA portal).

The RTA portal was established in 1990 to enable defendants to RTA claims to pay damages and fixed costs quickly without the need for proceedings. At its height, more than 600,000 cases per annum were brought through the RTA portal. The Civil Liability Act 2018 has introduced tariff damages for RTA claims up to £5,000. 300,000 of these claims are now brought each year through the Official Injury Claim Service (the Whiplash portal).

The Solicitors (defendants/appellants) in the *Belsner* case brought the Client's (claimant/respondent) case on the RTA portal. When the claim was settled at stage 2 after a medical report, the defendant's insurer paid damages of £1,916.98 plus fixed

costs of £500 plus disbursements. The Solicitors retained the fixed costs and paid the Client the damages less a success fee of £385.50 (£321.25 plus VAT), which was capped by statute at 25% of the recovered damages.

The Solicitors (defendants/respondents) in the *Karatysz* case brought the Client's (claimant/appellant) case on the RTA portal. When the claim was settled at stage 2 after medical reports, the defendant's insurer paid damages of £1,250 plus fixed costs of £500 plus £250 plus disbursements. The Solicitors retained the costs and paid the Client the damages less £455.50, made up of a capped success fee of 25% of the damages (£312.50 including VAT) and the after the event insurance premium of £143.

The Clients in both cases later instructed new solicitors trading as *checkmylegalfees.com* to query the Solicitors' charging, and brought assessment proceedings in the High Court under section 70 of the Solicitors Act 1974 (the 1974 Act).

Both cases were decided originally by District Judge Bellamy in Sheffield, and on the first appeal by Lavender J.

Belsner

In the *Belsner* case, DJ Bellamy decided, in effect, that the Solicitors were entitled to charge the only sum which they had ever claimed from the Client, namely the success fee of £385.50. He allowed £1,392 in respect of base costs and a success fee of 15% of that sum. Lavender J allowed an appeal from DJ Bellamy's decision. He permitted the Solicitors to charge only the base costs of £500 that had been recovered from the insurers for the defendant to the RTA claim plus a success fee of £75. He ordered the Solicitors to repay £295.50 (the £385.50 success fee allowed by DJ Bellamy less the

£75 plus VAT success fee permitted by the judge). He proceeded on the assumed and then undisputed basis that section 74(3) of the 1974 Act and CPR Part 46.9(2) applied to RTA portal cases before proceedings were issued.

Section 74(3) provided that: "[t]he amount which may be allowed on the assessment of any 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 … counterclaim". CPR Part 46.9(2) provided a long-standing exception to that statutory provision as follows: "[s]ection 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".

Lavender J (the judge) decided in the *Belsner* case that the Solicitors were required to obtain the Client's informed consent to charging more than the fixed costs recovered from the insurers for the defendant to the RTA claim. The Client had to agree to greater charges under CPR Part 46.9(2), and an agreement whose performance would involve a breach of fiduciary duty would not satisfy that provision. A solicitor, as a fiduciary, could not receive a profit from his client without his client's fully informed consent.

The core question in the *Belsner* appeal to the Court of Appeal was whether the judge was right to assume that section 74(3) and CPR Part 46.9(2) applied to cases brought through the RTA portal, where no county court proceedings were actually issued. That question turned on whether the claims made within the pre-action portals were properly

to be regarded as "non-contentious business" (as the Solicitors contended), or as "contentious business" (as the Client contended).

In the *Belsner* case, the Court of Appeal therefore decided 4 main questions (i) whether section 74(3) and CPR Part 46.9(2) apply at all to claims brought through the RTA portal without county court proceedings actually being issued, (ii) whether the Solicitors were required to obtain informed consent from the Client in the negotiation and agreement of the Conditional Fee Agreement (CFA), either due to the fiduciary nature of the solicitor-client relationship or through the language of CPR Part 46.9(2), (iii) if informed consent was required, whether the Client gave informed consent to the terms of the CFA relating to the Solicitors' fees, (iv) whether, in any event, what can be regarded as the term in the Solicitors' retainer allowing the Solicitors to charge the Client more than the costs recoverable from the defendant to the RTA claim was unfair under the CRA 2015, and (v) what were the consequences of the determination of these issues on the assessment in *Belsner*.

The Client pointed to a fundamental unfairness in respect of what she was told about her claim. She accepted that she had freely signed a CFA retainer agreement with the Solicitors under which she agreed to pay personally any shortfall in the Solicitors' costs recovered from the negligent defendant. She accepted that she was told that the Solicitors estimated their base costs at £2,500, and her damages entitlement at £2,000. But she complained that she was not told that the fixed costs that would be recovered from the defendant were only £500, five times less than she would have to pay by way of base costs, before any success fee.

The Court of Appeal (Sir Geoffrey Vos Master of the Rolls, Sir Julian Flaux Chancellor of the High Court, and Lord Justice Nugee) decided that: (i) section 74(3) and CPR Part

46.9(2) did not apply at all to claims brought through the RTA portal without county court proceedings actually being issued, (ii) the judge was wrong to say that the Solicitors owed the Client fiduciary duties in the negotiation of their retainer, (iii) 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 Solicitors Regulatory Authority's 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, (iv) the term in the Solicitors' retainer allowing them to charge the Client more than the costs recoverable from the defendant was not unfair within the meaning of the Consumer Rights Act 2015, and (v) the court would reconsider the assessment on the correct basis under paragraph 3 of the Solicitors' (Non-Contentious Business) Remuneration Order 2009 requiring the Solicitors' costs to be "fair and reasonable having regard to all the circumstances of the case". The costs actually charged to the Client in this case were fair and reasonable.

In *Belsner*, the court commented that the current position was unsatisfactory: (i) The distinction between contentious and non-contentious costs was outdated and illogical. It was in urgent need of legislative attention. (ii) There was no logical reason why section 74(3) and CPR Part 46.9(2) should now apply to cases where proceedings are issued in the County Court and not to cases pursued through the pre-action portals. (iii) It was unsatisfactory that, in RTA claims pursued through the RTA portal (and perhaps the Whiplash portal), solicitors seemed to be signing up their clients to a costs regime that allowed them to charge significantly more than the claim was known in advance to be likely to be worth. The unsatisfactory nature of these arrangements was not appropriately alleviated by solicitors deciding, at their own discretion, to charge their

clients whatever lesser (and more reasonable) sum they might choose with the benefit of hindsight. (iv) It was illogical that, whilst the distinction between contentious and non-contentious business survives, the CPR should make mandatory costs provisions for pre-action online portals, but otherwise dealt only with proceedings once issued. Section 24 of the Judicial Review and Courts Act 2022 would allow the new Online Procedure Rules Committee (OPRC) to make rules that affect claims made in the online pre-action portal space. The OPRC could make all the rules for the online pre-action portals and for claims progressed online. (v) It was unsatisfactory that solicitors like *checkmylegalfees.com* could adopt a business model that allowed them to bring expensive High Court litigation to assess modest solicitors' bills in cases of this kind. The Legal Ombudsman scheme would be a cheaper and more effective method of querying solicitors' bills in these circumstances.

In *Belsner*, the appeal from Lavender J was allowed and the court ordered that the base costs and the success fee payable by the Client in this case should be assessed in the total sum £821.25 plus VAT. The sum of £295.50 was to be repaid by the Client to the Solicitors.

Karatysz

The decision in *Karatysz* took *Belsner* as its starting point.

In *Karatsyz*, DJ Bellamy decided several questions in assessing the costs. Most significantly, he decided that the amount of the Solicitors' bill (the Bill), for the purposes of section 70(9) of the 1974 Act, was £2,731.90. Accordingly, since he

reduced the size of the Bill significantly, he ordered the Solicitors to pay the costs of the assessment.

Section 70(9) provided that: "the costs of an assessment shall be paid according to the event of the assessment, that is to say, if the amount of the bill is reduced by one fifth, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs". Section 70(10) of the 1974 Act provided that the "costs officer may certify to the court any special circumstances relating to the bill or to the assessment of the bill, and the court may make such order as respects the costs of the assessment as it may think fit".

On the first appeal, Lavender J decided that "[s]ince a bill of costs is a demand for payment", "the amount of a bill is the amount demanded by the bill". He decided that the answer to the question "how much was being demanded by this Bill?" was that the Solicitors were merely seeking to justify their retention of the £1,116 received from the insurers for the defendant to the RTA claim and the £455.50 deducted from the Client's damages, and were not demanding more money. The Client was well aware of that fact.

The Court of Appeal broadly agreed with Lavender J's approach, deciding that the question to ask in order to determine "the amount of the bill" under section 70(9) was "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". When that question was asked in *Karatysz*, the judge had been right to find that the Bill totalled £1,571.50. Accordingly, the Client had failed on the assessment to reduce the Bill at all, and had to pay the costs by virtue of the effect of section 70(9).

The Court of Appeal said that properly drawn bills ought in future to state the agreed charges and/or the amounts that the solicitors were intending by the bill to charge,

together with their disbursements. They should make clear what parts of those charges were claimed by way of base costs, success fee (if any), and disbursements. The bill ought also to state clearly (i) what sums had been paid, by whom, when and in what way (i.e. by direct payment or by deduction), (ii) what sum the solicitor claimed to be outstanding, and (iii) what sum the solicitor was demanding that the client (or a third party) was required to pay.

The practice of imposing conditions on the face of a statutory bill was confusing and unhelpful. If conditions were to be imposed, they should be transparent. If, for example, the bill was for £5,000, but the solicitors wished to say that they would accept £4,000 in full and final settlement if payment were made within 14 days, that should be clearly stated. The amount of such a bill would be held to be £5,000.

The Court of Appeal said that the Client had allowed *checkmylegalfees.com* to bring a costly case on her behalf, when she had almost nothing to gain. The process whereby small bills of costs were taxed in the High Court was to be discouraged. The Legal Ombudsman scheme was cheaper and more cost effective.

It had not been necessary to decide in *Karatysz* whether there were "special circumstances" under section 70(10), because the Client had not succeeded. But the Court of Appeal said that firms such as *checkmylegalfees.com* and their clients should be in no doubt that the courts would have no hesitation in depriving them of their costs under section 70(10) if they continued to bring trivial claims for the assessment of small bills to the High Court, even if those bills were reduced on the facts of the specific case by more than one fifth under section 70(9). The critical issue is and always would be whether it was proportionate to bring such a case to the High Court. In *Karatysz*, it was not.