1. I was counsel for the appellant in the *Belsner* case.

2. Despite the Master of the Rolls apparently considering the case significant for the purposes of this consultation, I do not believe that it is.

3. The consultation relates to four identified issues. So far as I can see, *Belsner* could only potentially relate to one of them, which is costs due under pre-actions protocols/portals.

4. Here, the potential significance of *Belsner* is that it confirms that those costs are "non-contentious" rather than "contentious" in the jargon of the Act – the threshold for contentious business being that court or arbitration proceedings are issued. This leads to supposed (and certainly well recognised) anomalies, such as employment tribunal work being "non-contentious business". A fact that is always amusing to employment practitioners.

5. This, however, is a purely semantic issue, resulting from the labels used in the legislation. Work done in the courts has always been regulated differently from other work. If the statute used the labels "court work" and "non court work" instead of contentious/non-contentious, then the semantic issue evaporates. No surprise is occasioned by describing work in the ETs as "non-court work".

6. The distinction between court and non-court work has its roots in the ancient principles of champerty and maintenance, which only applied to work done in court proceedings (as the doctrines arose from a desire to protect the outcome of such proceedings from manipulation, e.g. by local magnates – see the historical summary in *Giles v Thompson* [1993] 3 All ER 321 (CA), [1994] 1 AC 142 (HL). (*Giles* is one of those cases where the CA decision remains valuable despite it subsequent onward progress.) Therefore, payment by outcome was always allowed for non-court work, but not for court work. The prohibition on outcome-related payment for court work has of course been progressively relaxed since 1995 (when CFAs were first introduced), but the regulation of outcome-related payment arrangement remains different for non-court work and court work. (Thus, the DBA and CFA legislation does not apply to agreements for non-contentious business, save where the DBA relates to

employment work; however, even here DBAs for employment work are regulated differently from DBAs for court work.)

7. I do not see any reason why the increasing emphasis on settling cases out of court through structured protocol procedures requires any revisitation of the settled lines between payment arrangements which are allowed for non-court work and those allowed for court work. Of course, there may be an argument that the separate regulation of payment for court and non-court work is no longer necessary (although the separate regulation of employment cases as non-contentious was explicitly recognised in primary legislation as recent as 2013, when s. 58AA of the Courts and Legal Services Act 1990 was added). But any review of this system of separate regulation would go far beyond the ambit of the present consultation, and impact radically on the way in which non-contentious business agreements, contentious business agreements, CFAs, non-employment DBAs and employment DBAs are controlled.

8. Absent a comprehensive review of those issues, the difficulty with altering the current distinction between court work and non-court work (i.e. contentious and non-contentious business) is that it will impact on the boundary line between different regulatory regimes, which at the present is universally known and very clear. E.g. that you can have a contingency fee agreement for a case up to the point that court proceedings are to be started. But at that point, then unless you want to move over to a regulated DBA, you need to have a different arrangement instead.

9. It is important to stress that solicitors having different retainers for pre-issue work, on the basis it is non-contentious, is very common in the market. One of the ironies of *Belsner* was that, for all their protestations that the traditional dichotomy was irrational, it transpired that the respondent's solicitors themselves had a contingency fee agreement for pre-proceedings (i.e. "non-contentious") work and then a CFA for substitution at the point of commencement (i.e. "contentious" work).

10. There is also a widely used legal services model marketed by an influential legal commentator and solicitor called Kerry Underwood, which he calls the "Underwoods Model". This also involves solicitors having a contingency fee agreement pre-

proceedings and then a CFA for issued proceedings. This is often used by smaller practices, who do not have the wherewithal or expertise to draft their own retainer arrangements, and so take the "Underwoods Model" from Mr Underwood's consultancy business on an "off-the-peg" basis.

11. As such, disturbing the existing boundary between contentious and non-contentious work would have a wide impact, going far beyond the issue of protocols and fixed costs with which this consultation is concerned.

12. Turning to that issue, and whether the move to increased non-litigation dispute resolution demands a change to the existing system, I am unable to see that it does. The existing dichotomy has caused no issues since PAPs were introduced in 1999; since fixed recoverable costs began to be introduced in PI cases in 2003; or since the complex modern portal system was introduced in 2013. Note that it is not just the current portals which anticipated that proceedings thereunder would be subject to inter partes costs. Costs were always recoverable where cases settled even under the earliest PAPs (see the CA's decision of the housing disrepair PAP in *Birmingham CC v Lee* [2008] EWCA Civ 891), and the costs-only procedure was introduced to allow such costs to be assessed (old CPR 44.12A, now CPR 46.14). All costs claimed under that procedure were *ex hypothesi* non-contentious costs. This has caused no difficulty no since CPR 44.12A was introduced in July 2000 – and it will be appreciated that hundreds of thousands, if not millions, of cases have since been dealt with under that process.

13. The fixed costs system associated with PAPs is intended to regulate inter partes costs. But the distinction between non-contentious and contentious costs has no bearing on inter partes costs. Inter partes costs are either fixed, or assessed in accordance with CPR 44 (almost always on the standard basis), irrespective of whether their origin was contentious or non-contentious. So the existing CB/NCB distinction is of no relevant to inter partes fixed costs.

14. In terms of costs between a solicitor and its own client, assessment of non-contentious and contentious costs is subject to slightly different rules. But that is irrelevant to the workings of the protocols and portals for the reason just given at §12: this is not an

inter partes issue. And in practice, the assessment of contentious and non-contentious costs as between solicitor and client is the same – see the comments of the Supreme Court in *Bott v Ryanair* [2002] UKSC 8, [52]. Indeed, *Belsner* itself shows this: when the court re-assessed the costs having found that the case was non-contentious, it nonetheless affirmed precisely the same figure as the costs judge had allowed when assessing the costs under the contentious rules instead.

15. The only potential impact of the contentious/non-contentious divide is on the very point considered in *Belsner* itself – which is that s. 74(3) of the Solicitors Act may limit costs payable in county court contentious cases to those payable inter partes. This provision is almost certainly an artefact of the old county court scale costs system, repealed (save for the IP county court) in 1998, and (in my view at least) it is doubtful that fixed PAP costs have any connection to it (note that s. 74(3) is focussed on what is allowed on assessment of items of costs; entirely apt for the old county court scales, but not for modern PAP fixed costs which are not subject to assessment and which are global lump sums not broken down by item).

16. Since fixed PAP costs were never intended to operate between the parties (as Sir Rupert Jackson himself emphasised in his report commending them), then they should actively not be linked to costs between solicitor and client. This is therefore a reason for preserving the existing contentious/non-contentious dichotomy, so as not inadvertently to apply s. 74(3) to fixed costs never intended to operate except inter partes. Certainly, it does not provide any positive reason for changing the existing dichotomy, which is settled, provides an unmistakably bright line between different regulatory regimes, and causes no difficult of any kind in daily practice.

17. None of this is to be complacent. The Solicitors Act desperately needs updating in other areas, having diverged from contemporary practice in many ways. However, a certain linguistic curiosity aside, the non-contentious/contentious divide occasions no problems, and requires no reform.

Ben Williams

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