Civil Justice Council
Ministry of Justice
Post Point 10.24
102 Petty France
London SW1H 9AJ

12 December 2022

Dear Sir/Madam,

RESPONSE TO THE CJC COSTS WORKING GROUP CONSULTATION (EXTENDED) – NOVEMBER 2022

The Association of Consumer Support Organisations (ACSO) responded to the Civil Justice Council (CJC) consultation on costs on 11 October 2022, making specific reference to costs budgeting, Guideline Hourly Rates (GHR), costs under pre-action protocols/portals and the digital justice system and consequences of the extension of Fixed Recoverable Costs (FRC).

ACSO welcomes the consultation extension to allow the CJC to gather information and perspectives on the outcome of *Belsner -v- CAM Legal Services Limited* [2022] EWCA Civ 1387 ('*Belsner*').

ACSO represents the interests of consumers in the civil justice system and the reputable, diverse range of organisations who are united in providing the highest standards of service in support of those consumers. Its role is to engage with policymakers, regulators, industry and the media to ensure there is a properly functioning, competitive and sustainable civil justice system. The review of civil litigation legal costs and the mechanisms through which they are calculated, ordered and processed is therefore of direct relevance to our members.

We note that the CJC has refrained from asking any further consultation questions when reopening for responses for an additional 4 weeks to consider the outcome in *Belsner*. It is our view that the focus and direction that further questions could have provided would have been desirable. It is clear that the CJC places an importance on the outcome of *Belsner* when considering extending FRC, for example, but why the CJC believes these to be intertwined is unclear without supporting detail. However, the Master of the Rolls said the following at paragraph 61 of *Belsner* and so our response is prepared with that in mind:

> "*These conclusions do not mean that the distinction between contentious and non-contentious costs is a meaningful or logical one now that the pre-action online portals form a significant part of the litigation environment. I have no doubt that the 1974 Act is in urgent need of legislative attention. Moreover, these conclusions do not mean that it is logical for section 74(3) and Part 46.9(2) to apply to cases where proceedings are issued in the County Court and not to cases pursued through pre-action portals.*"

It is further noted that neither the connected judgment in *Karatysz -v- SGI Legal LLP* [2022] EWCA Civ 1388 or the awaited litigation in *Edwards (& others) -v- Slater and Gordon UK Limited* SC-2021-APP-000231 ('*Edwards*') have been mentioned in the extended consultation document. ACSO is of the opinion that the current ongoing costs reforms should consider, not only the issues arising from ***Belsner*** (which is essentially limited to 'non-contentious business' issues only) but should also consider such other ongoing solicitor-own client costs litigation which is addressing both contentious business issues and other issues more broadly in respect of solicitor/client costs law and practice. This is particularly the case where the proposed extended FRC regime increases the legal fees burden on the consumer by way of 'shortfall liabilities' (i.e. the difference between a consumer's actual legal fees and the fixed recoverable contribution) where FRC are restrictive and/or remain static over time.

Contentious -v- Non-Contentious Business

Arguably the most important issue discussed in the case of ***Belsner*** is that of contentious and non-contentious business pursuant to Part III of the Solicitors Act 1974 ('the Act'). While the ***Belsner*** judgment reaffirms, and helps to add context to, what is contentious and non-contentious business, and to what extent the client in that case progressed with informed consent, it does not address the outstanding issues caused by the Act.

In our consultation response, we advocated a continued distinction between contentious and non-contentious business, particularly as it usefully distinguishes between areas of law which are significantly process-driven and others which are adversarial, but we did call for parity in the detail provided in their respective regimes.

ACSO considers that the biggest outstanding issue in this area are the differences in consumer protections between the two regimes, which causes uncertainty, misunderstanding and will cause inevitable satellite litigation. The Act affords significant consumer protections to litigants retaining solicitors to act for them in a contentious business field by limiting a client's solicitor/client costs liability to those recovered between the parties, as a default measure (Section 74(3) of the Act). ***Belsner*** assisted the sector to understand that the pre-action phase in a civil claim, in that case a personal injury claim, is non-contentious until such a time as court proceedings are issued. It is therefore important to understand the protections afforded by the Act for non-contentious business, which are significantly fewer, particularly where the emphasis on the current costs reforms promote and encourage the pre-issue/non-contentious business space.

Section 57 is devoid of the detail provided for contentious business, causing confusion and unrest in the market, perhaps even dysfunction, which could be exacerbated if, as ACSO contends, static or otherwise restrictive FRC (existing and extended) causes increasing solicitor damages shortfall deductions.

ACSO considers that this imbalance must be resolved before FRC are extended, changes are made to the pre-action protocol, digitisation is progressed, or any other actions identified through the original consultation are taken.

It is our view that the CJC has three main options to resolve the imbalance on consumer protection between non-contentious business and contentious business and to provide the much-needed clarity for solicitor own-client costs and the matter of informed consent:

1. Increase the protections of non-contentious business to the same level as those for contentious business in the Act; or
2. Reduce the consumer protections afforded by contentious business in the Act to the same level as those for non-contentious business; or
3. Adjust the protections in both regimes to meet somewhere in the middle.

Consideration of the above will not only be influenced by an assessment of what is the best outcome for the consumer and wider market, but also by the likelihood of government capacity to introduce primary legislation, as required by options 2 and 3. Robert Wright of the Ministry of Justice confirmed at the CJC's conference on costs in London on 13 July 2022 that there is no such capacity.

On the other hand, the CJC has the ability somewhat to address the imbalance of the protections afforded by the Act in favour of option 1 through the power to establish a committee under Section 56 of the Act who could then "…*make general orders prescribing the general principles to be applied when determining the remuneration of solicitors in respect of non–contentious business"* (Section 56(2) of the Act).

While it is noted that this committee does not currently exist, it is our view that the CJC should afford the sector clarity on consumer protection without awaiting either judicial intervention or primary legislative reform. The committee would have the ability to level the playing field between contentious and non-contentious business. The committee could, for example, bring an order, similar to the Solicitors' (Non-Contentious Business Order) Remuneration 2009, to increase consumer protections in non-contentious business and place both business types on an even footing through secondary legislation. This is something the Master of the Rolls indicated could be done in ***Belsner*** at paragraph 86 when he said:

> "*It would, in theory, be possible for there to be an order made under section 56 of the 1974 Act to deal with this problem, and perhaps some of the others I have identified in relation to current practice, by the establishment of reformed general principles applicable to the determination of the proper remuneration of solicitors in respect of non-contentious business within the pre-action online portals."*

However, this solution is also less than ideal. A duplication of the consumer protections for contentious business to non-contentious business would directly cause a duplication of some of the issues already experienced under that regime, such as those currently being argued in *Edwards*. In *Edwards*, amongst other things, the court will consider:

- Does s.74(3) (the 'limiting provision') of the Act apply to claims where FRC are payable?
- If so, what is required, in practice, by CPR.r.46.9(2) to release a solicitor from that limitation thereby creating a shortfall liability (i.e. is informed consent needed and, if so, what constitutes informed consent?)?

- To what extent, if any, do breaches of the Consumer Rights Act 2015 and/or the SRA Code of Conduct affect an agreement entered into between a solicitor firm and its client?

Save for primary legislative reform overhauling the Act, it is our view that there is no easy fix to the ongoing issues with solicitor own-client costs but it is clear that ***Belsner*** did not resolve any of the issues concerning contentious business which the ongoing test litigation will attempt to do.

There are countless further examples of ambiguity in the Act that are drawing on County Court and Court of Appeal resources and are requiring of reconsideration or further guidance. The Court of Appeal judgment in Menzies v Oakwood Solicitors Ltd [2022] EWHC 3199 (KB) was handed down just this week and is evidence that the law on time limits for the delivery of a bill to a client remains a source of confusion, decades after enactment.

Similarly, in the recently heard case of MNO v HKC & Anor [2022] EWHC 2919 (SCCO), the success fee claimed by a national law firm and which had been approved (and not subsequently challenged) by the litigation friend was reduced by the judge for want of a better initial funding explanation to the litigation friend at the outset of the claim. However, there was no finding about what the litigation friend would have done if a better explanation had been given. Anecdotally, we have heard accounts of wildly differing outcomes at approval hearings or any subsequent costs hearings, and liability for this confusion and inconsistency must sit with the Act.

If certainty cannot be achieved with the law underpinning solicitor own-client funding agreements, and FRC and pre-action reforms proceed without it, consumer representatives may have no option but to reduce, perhaps significantly so, the breadth and types of cases they can be retained for which will be detrimental to consumer access to justice.

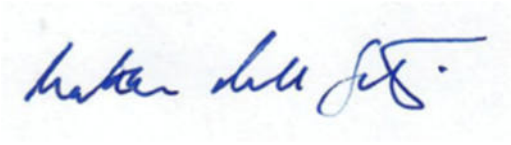
Consequences of failing to act

Some of the related issues regarding consumer protections are under consideration in the matter of *Edwards* (which includes 9 other connected cases) which is listed in the Senior Courts Costs Office over five days in June 2023. It is unlikely that the law will be settled then, and it is probable those cases will be taken to the Court of Appeal and heard in 2025.

It is ACSO's view that a decision by the CJC or other governing bodies to not intervene at all leaves the CJC with the alternative options of either awaiting pending test litigation which, subject to appeal and additional case law could take 2 to 3 years to crystalise, or, to make planned costs reforms without due regard to the issues that the Act causes, and risk exacerbation. ACSO warns against proceeding with the latter. Extending FRC and making other market changes without due regard to the outstanding issues could cause an access to justice crisis with uncertain (though increasingly important) funding agreements resulting in further satellite costs litigation clogging up the court system.

If you require further detail on any of the points raised above, or require any further information at all, please do not hesitate to get in touch.

Yours faithfully,



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