Supplemental evidence to costs review to take into account Belsner

1 Introduction

1.1 This submission is in addition to our submission dated 13 October 2022 and is made due to the extension of the consultation deadline to accommodate the effect on pre-action costs (amongst other things) arising from the recent Court of Appeal decision in of *Belsner v CAM Legal [2022] EWCA Civ 1387* (Belsner).

1.2 Giving the unanimous decision in Belsner the Master of the Rolls says this at paragraph 15:

"…it is illogical that, whilst the distinction between contentious and non-contentious business survives, the CPR should make mandatory costs and other (e.g. Part 36 and PD8B) provisions for pre-action online portals, but otherwise deal only with proceedings once issued. Section 24 of the Judicial Review and Courts Act 2022 will allow the new Online Procedure Rules Committee (OPRC), in due course, to make rules that affect claims made in the online pre-action portal space. It would obviously be more coherent for the OPRC to make all the rules for the online pre-action portals and for claims progressed online…."

1.3 We agree. It is against the background of those words from the Court's judgment that we make this submission about civil justice.

1.4 It is important to remember and keep in focus a number of other consultations that should be taken into account when considering costs arising in pre-action as they are inter-connected. In summary the relevant reforms, either implemented or in contemplation, that occur to us are:

a) Department of Health and Social Care (DHSC) proposals for a pre-action protocol for fixed recoverable costs (FRC) for the resolution of low value claims of clinical negligence;
b) Reform of the Pre-Action Protocols (PAPs) introducing a robust requirement to engage with [A]DR; and,
c) The digitisation of the pre-action phase. Work on this project is being undertaken by the Ministry of Justice (MoJ) with an engagement exercise undertaken during November 2022 and development planned for 2023.

This costs consultation is a key element of that package of reforms/proposals.

1.5 In the reformed civil justice system of E&W there will be an enhanced emphasis on engaging with [A]DR leading to much more [A]DR of one kind or another taking place. That will give rise to more work in pre-action taking place as a result of which many more cases are likely to settle without requiring court proceedings to be issued. That is a desirable outcome for reasons we do not rehearse here. The costs incurred should be recoverable and the decision in Belsner gives rise to this as does the decision of the Supreme Court in Bott & Co Solicitors Ltd v. Ryanair DAC [2022] UKSC 8. Where the majority decided costs in a pre-action process could be recoverable. The decision is worth revisiting in the context of this re-opened consultation. The Bott decision is of course discussed in Belsner at paras 51-54.

1.6 Our response therefore does not consider the issue of should costs be recoverable in pre-action but how they should be recoverable and at what rate. We draw on examples from other pre-action contexts.

2 Comparison with costs regimes in other jurisdictions in E&W

2.1 *Low value clinical negligence claims*

Issues similar to those raised by the Belsner decision have already arisen in the DHSC consultation about a fixed recoverable costs scheme for the proposed pre-action protocol for low value clinical negligence claims. The Working Party for this consultation may find it helpful to consider the learning from that consultation and to liaise with the DHSC.

2.2 The DHSC consultation closed in April 2022 and the Government response is awaited. The following questions remained at large after a series of consultations that began in 2017.

a) *What is a low value claim of clinical negligence?*
The suggested values are: £25,000 (favoured by many) but some respondents to previous DHSC and CJC consultations on the same topic (there have been several) favoured £50,000 or £100,000. This question is obviously key to the question of the proportionate fees to be paid by the NHS as Neutral fees.

b) *What fee should be paid to Neutrals?*
In this proposed protocol the form of [A]DR chosen for the long stop resolution within the PAP is neutral evaluation.

2.3 *Significant difference between claims for clinical negligence/personal injury and other civil claims*

The proposed pre-action phase in the wider civil jurisdiction is different to clinical negligence/personal injury and certain others. In the broader case types there is not one single liable (paying) party. With clinical negligence the paying party is the NHS. In the Ombuds services it is an industry e.g. financial services with the Financial Ombudsman Service (FOS) or the Traffic Penalty Tribunal (TPT) where a number of local authorities fund the TPT.

2.4 In the existing online portals such as the Claims Portal (formerly the RTA Portal) and the Official Injury Claims portal (OIC), colloquially known as the Whiplash Portal, there is a single body paying i.e. an Insurer/MIB. Accordingly the insurance industry collectively paid for the platforms that deliver these pre-action solutions whilst working with MoJ and HMCTS to develop rules to govern those portals which, as the Master of the Rolls put it in Belsner, illogically are made by a body responsible for rules post-issue i.e. the Civil Procedure Rules Committee (CPRC).

2.5 The issue of funding the parties' representatives' involvement in clinical negligence, like the involvement of solicitors in the Claims Portal and the OIC, is not an issue because fixed costs are allowed and paid either by Insurers the Government (via the NHS).

2.6 The DHSC consultation suggested a scale of evaluators' fees which some evaluators, with whom we discussed the scale, considered too low. In contrast, others providers of evaluation services are charging fees commensurate with the proposed scale.

2.7 The proposed evaluator fees preferred by DHSC are shown in the table below and follows a suggestion by the General Council of the Bar of England and Wales:

Type	Fee (£ + VAT)
Liability and quantum	2,000

Liability only	1,500
Quantum only	750

See page 44 of the consultation here. As we have said, this scale has not met with universal approval and a Government response is awaited.

2.8 *Employment tribunals*

In the Employment Tribunal the issue of funding does not arise because the Government pays for compulsory [A]DR (conciliation) to be provided in the pre-action phase on the basis (presumably) that to provide such a service at taxpayers' expense is for the good of society overall.

2.9 *SEND tribunals*

In the context of Special Education Needs and Disability (SEND) local authorities are on the receiving end of claims and usually meet the costs of mediation and the claimants' legal costs. A system of compulsory pre-action mediation is being contemplated (see para 31 here) in the Green Paper; the consultation about which closed in July 2022. A Government response is awaited from the Department for Education (DfE). Given the scope of this consultation an approach to the DfE may prove useful as this consultation prepares its Final Report.

2.10 *Family*

Family mediation is an activity that can only be undertaken by mediators whom the Family Mediation Council has approved.

In Family there is a requirement for a preliminary session to explore whether mediation is appropriate called a Mediation Information and Assessment Meeting (MIAM) which is compulsory but, since legal aid for funding mediation was withdrawn, there has been a decline in the number of mediations on the basis of cost.

2.11 Desk-based research found a family mediation for 2 hours can cost £480 plus VAT for 2 parties from one provider. Another family mediator charges £750-£1,000 plus VAT for a mediation session lasting 4-5 hours. The Government has introduced a voucher scheme under which family mediators are paid £500 by the Government to mediate eligible cases. Apparently this has been a success as this scheme has been extended beyond its original expiry date.

3 Fees charged by [A]DR Service Providers in the wider civil jurisdiction

As to the costs of civil [A]DR there is only limited information available but these examples are in the public domain:

3.1 *CEDR fixed fee service*

https://www.cedr.com/commercial/fixedfee/

Costs are determined based on the total value of the claim and counterclaim. Where there are active proceedings before the Court this calculation is based on the amounts set out in the parties' pleadings.

COST PER 2 PARTY CASE				
Claim value N>	**£75,000**	**£125,000**	**£250,000**	**£500,000**
Fixed Fee – including up to 4-hours prep and up to 7 hr mediation	£1,000	£2,000	£2,500	£3,200
Extra hourly charge applicable after 7 hours of mediation time only	£200	£250	£300	£400
(All fees exclusive of VAT)				

Average across the 4 claim value bands: £2,175 + VAT

3.2 *Clerksroom Mediation fixed fee service*

Service for claim values	**Fee for 2 party case + VAT Face–to-Face**	**Fee for 2 party case + VAT Zoom**
Bronze – N>£80,000	1,100	750
Silver - £80,000-£250,000	3,000	2,100
Gold - £250,000-£1,000,000	3,800	2,600
>£1m	POA	POA

Average across the 3 claim value bands: £2,633 + VAT for Face-to-Face or £1,817 + VAT for Zoom.

3.3 *The Society of Mediators*

The Society works on a fixed-fee basis irrespective of the value of the case. There are no administrative charges.

<u>The fees for Founder Mediators (which include preparation and reasonable travel) are:</u>

Half-Day Mediation – £1,200 + VAT (up to four hours)

Full-Day Mediation – £1,800 + VAT (up to eight hours)

<u>Fees and Charges for Junior Mediators</u>

Typically £500-£1000 + VAT per day

4 <u>Proposed regime for the wider civil jurisdiction</u>

4.1 Our understanding is that in the wider civil jurisdiction pre-action phase it is intended the private sector (i.e. Online Dispute Management platforms supporting ADR Service Providers) will deliver the portals or platforms to manage the pre-action phase in those parts of the civil jurisdiction not subject to the online regimes that are already online in pre-action e.g. the conciliation of employment claims via ACAS.

4.2 A distinctive feature of the wider civil jurisdiction is that the costs of [A]DR are usually met by each party, typically in equal shares. This is because there is no single paying party or group of common paying parties and the issue of where liability lies varies widely from one

case to the next. Whereas in the OIC, for example, liability is (usually) always with the Insurer.

4.3 Having said all that, there is an existing expectation on parties in cases falling in the wider civil jurisdiction that they will engage in [A]DR under all PAPs. Although empirical evidence is in short supply about funding [A]DR at present it will be the case that most [A]DR events happen on the basis the parties share the cost of the Neutral.

4.4 Taking into account all that is said above, a possible pre-action costs regime in the civil jurisdiction could be:

Pre-Action Track (value bands, £)	**Approach**	**Notes**
Small Claims (0-10,000)	No costs allowed Neutrals' fees fixed by scale related to claim value and paid by MoJ	Consistent with costs regime and [A]DR funding in the SCT.
Fast (10,001-25,000)	Neutrals' fees fixed by scale related to claim value Quaere, whether the Help with Fees rules should apply to Neutrals' fees	Civil claims vary as to where liability lies with complex fact/law matrices often bearing no relation to claim value. Consequently parties usually agree to bear their own costs of [A]DR and share the costs of the Neutral. The Neutral's fees therefore need to be affordable and proportionate to the Track's claim value band.
Intermediate (25.001-100,000)	Neutrals' fees fixed by scale related to claim value Quaere, whether the Help with Fees rules should apply to Neutrals' fees	Civil claims vary as to where liability lies with complex fact/law matrices often bearing no relation to claim value. Consequently parties usually agree to bear their own costs of [A]DR and share the costs of the Neutral. The Neutral's fees therefore need to be affordable and proportionate to the Track's claim value band.
Multi (100,001+)	Parties to agree Quaere, whether the Help with Fees rules should apply to Neutrals' fees	Early interlocutory application post-issue to resolve, inter alia, any outstanding costs issues

4.5 The level of fees on the proposed scales should be put out to consultation in the same way that the DHSC has done in relation to the scale of fees for evaluators.

4.6 If the Help with Fees rules are to apply in pre-action to Neutrals' fees the consultation should provide a model of the effect of those rules on the likely income for Neutrals using data from the existing court fees regime with an explanation of how the Government would reimburse Neutrals for undertaking [A]DR subject to Help with Fees, e.g. monthly accounting in arrears on production of evidence of completed case. This will enable ADR Service Providers to understand the proposed payment system in all cases. If set at the right level a market should be created that ADR Service Providers will be willing to support.

4.7 Providing Help with Fees could be accommodated by pre-action platforms signposting relevant parties to the Help with Fees portal (here). This is signposted by the pages leading to the Online Civil Money Claims (OCMC) platform, for example. Those pages could be amended so as to refer to Help with ADR Fees.

4.8 It appears Government has recognised the importance of pre-action interventions in a number of different settings to support provision of a timelier and effective justice system. Government has demonstrated its support by paying for:

a) a conciliation service in employment disputes;

b) vouchers for family mediation; and,

c) a neutral evaluation service for claims of clinical negligence (proposed).

Where appropriate local authorities meet the costs of [A]DR interventions in certain jurisdictions.

4.9 The charge made by ADR Service Providers would be a single fixed fee for each case. The fee would be arrived at taking into account the following specifications:

a) [A]DR service managed online using a platform meeting the MoJ specifications as to data security, data privacy and the requirements of the ICO and the Data Protection Act, 2018;
b) Delivery to be on paper, by telephone, video conferencing or in person as agreed and appropriate to the value of claim;
c) Proportionate to the value of claim in accordance with an agreed scale of fees; and,
d) Payable upfront via a debit or credit card as court fees are paid for OCMC but paid directly to the ADR Service Provider. In other words, in the same way court fees are payable.

5 Conclusions

5.1 Costs in civil claims that are incurred in meeting the enhanced obligations under the reformed PAPs should be recoverable from the other party either by agreement or via an early interlocutory hearing post issue.

5.2 Such an application would deal with cases where, for example, the claim is settled but there remain issues about the quantum of such costs. Or where issues of good faith engagement are raised and require resolution. The possibility of such an application made in the near term will act to focus minds, both those of the parties and their representatives.

5.3 The question of what costs and who pays for them needs to be tackled on a Track specific basis and we have proposed such an approach, above.

5.4 Where such costs need to be reduced to a scale, as in our proposed scale for the SCT, that scale should be put out to further consultation.

We would be pleased to contribute further if thought helpful.

Tony N Guise

Director, DisputesEfiling.com Limited

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Contact:

m. 07716 146 796

e. tonyguise@disputesefiling.com