The Association of Costs Lawyers Response to the request for further comments following the decision in *Belsner*

As *Belsner* was confined to low value RTA portal cases (and indeed found to be non-contentious) we assume feedback is sought solely in respect of non-contentious cases. However, there will inevitably be cases which begin as non-contentious e.g. in the RTA portal and then later, due to an unexpected deterioration in the client's condition, become a higher value multi track contentious case. The below response is prepared on providing comments on the overall issues raised in *Belsner* and the potential reviews and consideration of current rules that will be required in the short term.

While not expressly referred to within *Belsner,* access to justice is an overarching point that needs to remain the forefront of any review or proposed change. Clients need protection from unscrupulous solicitors, and for the large part regulation and a clear and simple procedure for complaints through the Legal Ombudsman achieves this. It is wholly undesirable for clients to be out of pocket, owing their solicitors money after enduring many months and potentially significant inconvenience and stress in bringing a successful claim. When Qualified One-Way Costs Shifting (QOCS) was introduced, the primary aim was to remove the need for the recoverability of ATE premiums. However, it struck a balance to ensure that the Claimant would not lose more than the damages that they recovered to adverse costs. It is clear that when this was introduced the deductions from damages and shortfalls now being sought were not factored into account.

Indeed, there were anecdotal reports of such cases in the early days of Conditional Fee Agreements 20 years ago. A clear balance needs to be struck between providing consumer protection to the users of legal services (particularly 'lay consumers' who are unfamiliar with the law and 'vulnerable consumers') and avoiding restrictions and over-regulation which leads to numerous disputes and satellite litigation and subsequently results in the generation of even more costs whilst simultaneously using up large portions of the Court's resources.

<u>The distinction between Contentious and Non-Contentious Business Agreements</u>
The core question addressed in *Belsner* was whether s.74(3) Solicitors Act 1974 and CPR 46.9(2) apply to an RTA portal case where county court proceedings have not been issued. That issue has now been clarified in respect of those types of cases but this will no doubt have wider implications for other types of cases where clients will be liable to pay their solicitors the shortfall in unrecovered costs. The outstanding question to address now is whether the distinction between non-contentious and contentious business is still needed.

On the one hand it could be said that the distinction serves no purposes other than to create unnecessary satellite litigation. On the other hand it makes no sense for low value matters to take up significant High Court time for Solicitors Act 1974 assessments. Paragraph 51 of *Belsner* makes reference to *Bott & Co Solicitors Ltsd v Ryanair DAC [2022] UKSC 8* which included commentary from *Cook on Costs* (2021), para 8.1 that there is 'little practical difference between the two in most

circumstances'. There too was it recognised that court proceedings actually have to be commenced in order to be contentious. This was considered in *Simkin Marshall*[1]. There may be little practical effect but there may be unintended consequences elsewhere. The key point here is the client's route to challenge their solicitors' bills.

No distinction between contentious and non-contentious might otherwise be needed. In the context of *Belsner* at least, the definition of non-contentious business in the Solicitors Act 1974 could be strengthened to make it clearer that a matter does not become contentious until proceedings before a court have actually commenced.

We agree that where in recent years there has been far greater use of pre-action portals, and more are anticipated, the distinction becomes all the more illogical, as per para 14 and 61 of the judgment.

Clearer Information, Estimates and Retainers/CFAs to be provided to Clients

We would recommend an extension of 8.7 of the SRA Code on the 'best possible information' about pricing and overall costs (this is subject to the approval of the SRA given their regulatory role). As *Belsner* made clear, these are professional duties not necessarily fiduciary duties and therefore no fiduciary duties were owed to the client in the negotiation of their retainer. Solicitors must fully understand their professional duties.

When information about costs is provided to clients, they should be directed to the likely recoverable fixed costs. In *Belsner* the client clearly could have been told about Stage 1 and 2 costs. To not provide that information was indeed deemed to be a breach of the SRA code. She was not able to make an 'informed decision' (para 85). It was said that it is not satisfactory for solicitors to give clients an indication of costs that far exceeds damages and indeed what in reality they would end up actually charging the client.

The point does however highlight the woefully inadequate levels at which fixed costs have been set. Quite simply, solicitors cannot do the work for sums that can be recovered and at best clients can only expect to recover a small contribution towards the actual costs and indeed perhaps recoverable costs should be expressed as a contribution.

That information now needs to be communicated to clients in the manner set out in *Belsner*. It does not seem the solicitors were trying to enter into an unfair agreement with the client or indeed to ever charge the client the full amount, only to provide for charging the full amount with a discretionary reduction anticipated in reality. Both parties should be entering into funding arrangements with realistic provisions and expectations.

Solicitors will want to offer terms that are competitive but also that are favourable to themselves. It was recognised at paragraph 73 that solicitors will negotiate the terms of a retainer in their own best interests, while not ignoring their fiduciary duties and there was nothing wrong with this. It is important that solicitors continue to be able

[1] See also para 53 *Belsner*

to negotiate terms with clients as they wish and no rule, regulation or other forces should interfere.

In *Belsner* the client was told about the estimate costs of the case, her estimated damages but not the fact she could probably only recover £500 of those costs from the opponent, and in addition still have to pay a success fee. Possibly many firms of solicitors have given similar advice so as not to confuse clients. It is likely that clients simply want to know simple bottom line figures i.e. what damages they will receive, what costs they can recover and what costs they will have to pay their solicitors (including success fees, VAT and disbursements). Pre LASPO, most clients (certainly in personal injury litigation) could expect to recover all of their damages and costs from the opponent.

This is unfortunately one of the post LASPO pitfalls of non-recoverable success fee and fixed recoverable costs though it was never envisaged that a whole arm of costs litigation would emerge whereby clients would be encouraged to litigate in the High Court against their former solicitors[2]. As stated above we do not believe the solution to this is to fix costs chargeable to clients as well as between the parties. Solicitors need to be free to negotiate terms with clients as they wish. Such flexibility is essential in order for market forces to operate properly.

In non-contentious matters the costs are likely to be low in most cases, especially in RTA portal cases. It is disproportionate to incur substantial costs in such cases and certainly makes no sense for parties to be incurring more fees arguing over shortfalls of costs than the total costs of the substantive claim for damages.

<u>An Alternative approach for Clients to challenge Solicitor's costs</u>

The Solicitors' (Non-Contentious Business) Remuneration Order 1994 used to provide a procedure for clients to challenge their solicitors' bills in non-contentious matters. This order was revoked in August 2009. Solicitor's costs had to be fair and reasonable having regard to all the circumstances of the case and that is retained under the 2009 Order under which the 1994 Order was revoked. Since this time solicitor and own client assessments have largely proceeded in the High Court. This is not sensible, especially on the scale of potential new cases following wide ranging marketing campaign by firms such as *checkmylegalfees.com*. An alternative needs to be found.

Under the Solicitors' (Non-Contentious Business) Remuneration Order 1994 a client could seek a 'remuneration certificate' from the Law Society where the total costs were less than £50,000. In appropriate cases the Law Society would issue a certificate stating what the council believed would be a fair and reasonable amount for the client to pay. This methodology for dealing with solicitors/own client disputes could be modernised and reintroduced. The ACL would propose a form of collaboration with the Law Society/Legal Ombudsman whereby an independent panel of Cost Lawyers and other Cost specialists could deal with lower value disputes on the papers. This would provide a clear process for clients whilst ensuring that significant resources are not expended by HMCTS.

[2] See also para 12 *Belsner*

Having regard to the above we offer the following suggestions as potential solutions:

1. The distinction between non-contentious and contentious business could be abolished but this is likely to have unintended consequences. A full review of the Solicitors Act is therefore likely to be required in order to modernise the contents and ensure that it is fit for purpose in the current legal services market.
2. Clear estimates to be given to all clients together with an estimate of what may be recovered. It would be recommended that there is provision for a 'boiler plate' template which can provide for figures to be provided for: the likely damages, the likely total costs, the likely costs to be recovered from the Defendant and an approximate estimate for any reductions.
3. Reintroduction of a remuneration certificate type procedure might have obvious advantages. However, further consultation will be required to determine which body would be responsible? The Legal Ombudsman deals with complaint against solicitors, including on costs. We do however question whether the Legal Ombudsman has the capacity to deal with potentially increased volumes or whether matters might take many months to resolve and resulting in other pressing complaints also being delayed. The ACL would be open to exploring a collaboration with the SRA/LeO to form a panel of 'costs experts' who can provide independent advice and adjudications.
4. While no practitioner with memories of the 'CFA wars' of the early 2000s would want a return to the minefield of the CFA Regulations, the ACL considers that amendments to the Conditional Fee Agreements Order 2013 stipulating the necessary provisions of a CFA, taking into account the rulings in *Belsner,* could go a long way towards avoiding future pitfalls for solicitors and clearer information for clients.
    a. An estimate of likely overall costs.
    b. An estimate of the likely recoverable costs (fixed or otherwise, perhaps with reference to costs budgets in non-fixed costs cases).
    c. Information about when a non-contentious claim might become contentious.