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Belsner v Cam Legal Services (2022) EWCA Civ 1387

This case raised important questions concerning the way in which solicitors charge their clients for bringing small road traffic accident claims (RTA claims) on their behalf.

The solicitors in this case were instructed by the client to bring her claim on the RTA portal. The claim was settled at Stage 2 after the provision of medical reports, as was common, with the defendant's insurer paying damages of £1,916.98 plus fixed costs of £500 plus disbursements (ignoring VAT). The solicitors retained the fixed costs and paid the client the damages less a success fee of £321.25 (capped at 25% of the recovered damages).

A District Judge held that the solicitors could reasonably have charged £1,392 (11.6 hours at £120 per hour) for their work (plus a success fee of £208.80), instead of the £321.25 plus £500 fixed costs (£821.25) which they actually asked for and were paid. On the first appeal, a High Court Judge allowed the client's appeal, permitting the solicitors to charge only the £500 fixed costs plus a £75 success fee (assessed at 15% of those fixed costs, again ignoring VAT). The judge approached the case on the basis that the solicitors owed the client fiduciary duties when their retainer was being negotiated. He held that an agreement for the purposes of CPR Part 46.9(2) had to be a valid and enforceable agreement. An agreement "whose performance would involve a breach of fiduciary duty" would not be valid and enforceable, and "[t]o that extent, therefore, CPR 46.9(2) [required] informed consent".

The core question in the appeal was whether the judge was right to assume, as he did, that section 74(3) of the Solicitors Act 1974 (section 74(3)) and CPR Part 46.9(2) (Part 46.9(2)) applied to cases brought through the RTA portal, where no county court proceedings were actually issued. That

issue turned broadly 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). That distinction has been entrenched in statute for many decades.

Issue 1: Do section 74(3) and Part 46.9(2) apply to claims brought through the RTA portal without county court proceedings actually being issued?

The Court of Appeal held that the distinction between contentious and non-contentious business was fundamental to the costs' regime established by the 1974 Act. Accordingly, section 74(3) and Part 46.9(2) did not apply at all to claims brought through the RTA portal without county court proceedings actually being issued.

Issue 2: Were the Solicitors required to obtain informed consent from the Client in the negotiation and agreement of the CFA, either due to the fiduciary nature of the solicitor-client relationship or through the language of CPR 46.9(2)?

The judge was wrong to think that the client's informed consent was required in this case because of the wording of Part 46.9(2). Part 46.9(2) is and was irrelevant to the formation of the CFA in this case and he was wrong to say that the solicitors owed the client fiduciary duties in the negotiation of their retainer.

Issue 3: Did the Client give her informed consent to the terms of the CFA relating to the Solicitors' fees?

It was wholly unsatisfactory for solicitors generally, and these solicitors in particular, routinely to suggest that their clients agree to a costs regime that allowed them to charge significantly more than the claim was known in advance to be likely to be worth. Solicitors did not resolve this unsatisfactory state of affairs by allowing a discretionary reduction of their charges after the case was settled. 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 other problems identified 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.

Issue 4: Was 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 unfair under the CRA 2015?

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 not unfair under the CRA 2015.

Issue 5: The consequences of these determinations on the assessment in this case

In all the circumstances, the client ought as a matter of good professional practice to have been told the level of fixed costs that she would recover if the case settled within the RTA portal. But that did not necessarily mean that the solicitors' Bill was unfair. The question was only whether it was fair and reasonable in all the circumstances, having regard to the factors in the 2009 Order for the client to pay an additional £385.50 on top of what was recovered from the third party. There was no reason why she should not be required to do so. She had filed no evidence suggesting that she was not a reasonably sophisticated client. She accepted in her points of dispute that she expected that she might have to pay some of her base costs. The District Judge had assessed the solicitors'

reasonable base costs at some £1,392 plus VAT, which exceeded the £500 plus VAT recovered from the third party. The client had never suggested that she did not understand that she would have to pay a success fee on top of some of her base costs. The success fee charged fee was capped by statute at 25% of recovered damages. The High Court Judge admittedly applied the success fee (of 15% of base costs) assessed by the District Judge to the base costs of £500 recovered from the third party, but he thought the solicitors had a legal duty to obtain the client's fully informed consent to charging more by way of base costs than was recovered from the third party. He was wrong about that.

The solicitors capped their fees voluntarily at a fair and reasonable level after the event, even if they ought to have told the client what she would recover by way of fixed costs in the RTA portal, and even if they ought to have agreed in advance when they entered into the CFA to the cap they later applied voluntarily.

The overall Bill was fair and reasonable and this court would, therefore, re-assess the total base costs and success fee payable as being £821.25 plus VAT (£500 + £321.25, the latter figure being £385.50 less VAT).

The appeal was therefore allowed in the total sum of £821.25 plus VAT. The sum of £295.50 must be repaid by the client to the solicitors.

The full judgment is available at: [Belsner v CAM Legal Services Ltd [2022] EWCA Civ 1387 (27 October 2022) (bailii.org)]

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