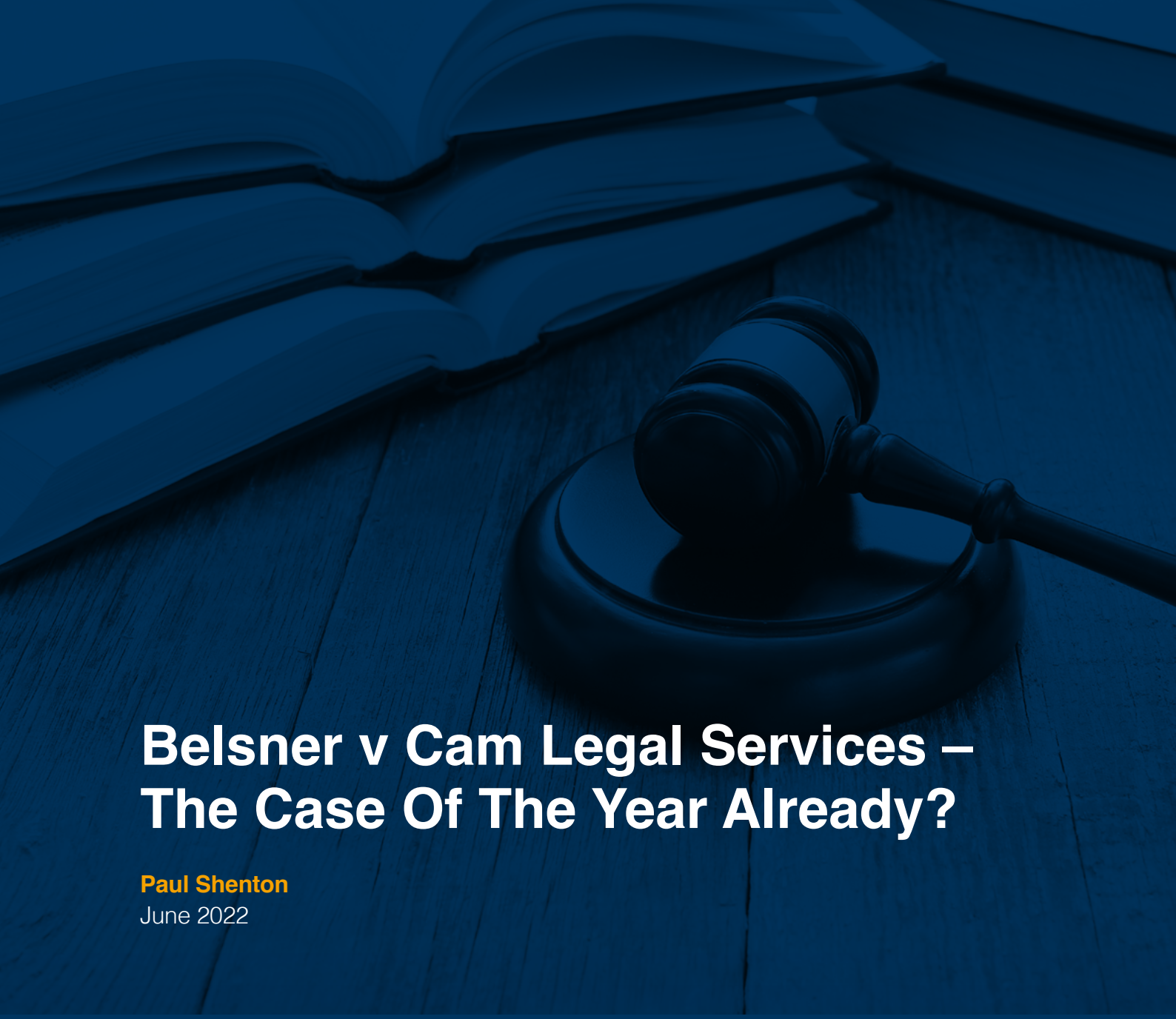

Belsner v Cam Legal Services – The Case Of The Year Already?

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The result of a new hearing of Belsner v Cam Legal Services on 11 July 2022, which centres on the issue of informed consent to deductions, has implications for thousands of cases where solicitors have deducted costs from damages in fixed costs cases and depending on the results of the hearing, may need to be repaid. .

The Background

The introduction of live broadcasting of Court of Appeal hearings (on YouTube) has sharply brought into focus the "ongoing" Court of Appeal Hearing in Belsner v Cam Legal Services.

It is a case which plainly has potentially significant implications for all solicitors, not only those acting in the personal injury sector.

Because of the significance of the issues, the Master of the Rolls took the unusual step of halting the original hearing mid-stream on day two, in February of this year. The Law Society were already an intervening party to the Appeal and are represented by Counsel.

The case has now been relisted for a new hearing on 11 July 2022 for 2 days with a third day being held in reserve if required. The Senior Costs Judge, Andrew Gordon-Saker has been invited to sit as an expert assessor for the relisted hearing.

The Dispute

The case itself is notable only for being so ordinary. It concerned a low value RTA case that was dealt with as one would expect in the RTA portal. The claimant's claim settled for the relatively modest sum of £1,916.98 plus fixed costs and disbursements of £1,783.19 after submission of the stage 2 settlement pack.

The Claimant then applied under s.70 of the Solicitors Act 1974 for an assessment of the bill provided by his solicitors. The Court Ordered that:

"The Defendant's bill be assessed in the sum of £3,104.15 (being base profit costs of £1,392, success fee on the profit costs (at 15%) of £208.80, vat on the profit costs of £320.16 and disbursements inclusive of vat". The defendant firm (as many other firms would have /still do) capped their costs to the amount recovered from the opponent plus 25% of the damages recovered.

The High Court Appeal centred on two main issues namely:

First – the provisions of s.74(3) of the Solicitors Act 1974 which provides:

"(3) The amount which may be allowed on the assessment of any costs or bill of costs in respect of any item relating to proceedings in the county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and of any counterclaim."

Secondly – CPR 46.9 (2) which states:

"(2) Section 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount greater than that which the client could have recovered from another party to the proceedings."

At first instance before the district judge, the Court held that informed consent in respect of CPR 46.9 (2) was not required (as opposed to CPR 46.9 (3)). On appeal Lavender J allowed the appeal finding that:

"The relationship between solicitor and client is a fiduciary one. As a fiduciary, a solicitor may not receive a profit from his client without his client's fully informed consent…..whether there has been sufficient disclosure must depend on the facts of each case…a number of cased have considered whether the fiduciary duty must disclose not merely the fact that he is to receive a commission, but its amount."

Therefore, the judge found (1) that there is a requirement to obtain informed consent in respect of CPR 46.9(2):

"The requirement for informed consent which applies in cases under CPR 46.9 (3) does not arise because of the use of the word "approval" rather than the word "agreement". The requirement for informed consent arises because of the fiduciary nature of the relationship".

(2) That there had not been sufficient disclosure in this case, because the client had not been told what the likely recoverable costs would be – that being the case even as here they had provided an estimate as to their likely costs.

The implications of this judgment are clearly very significant. Solicitors firms throughout England and Wales will be aware of their potential liabilities if the Belsner decision is not overturned on appeal. There are undoubtedly a substantial number of cases (counted most likely in the hundreds of thousands) where deductions have been made from client's damages, where the cap in CPR 46.9 (2) would result in a repayment to their clients. Looked at another way, from my experience and that of others, the number of client retainers signed where informed consent has been given is likely to be worryingly small.

Questions for the Court of Appeal to Resolve

To ensure there is a firmer foundation for the next hearing the Court will consider four issues: These in summary will deal with the following:

First – Do the provisions of the Solicitors Act 1974 and in particular section 74(3), apply to cases which conclude prior to the commencement of legal proceedings? With the growing importance of pre-action protocols in all forms of litigation, this decision will have an impact far wider than the instant case. A matter which the Master of the Rolls came to fully appreciate during submissions as he is leading the pre-action protocols initiative! Should a litigation case which concludes before formal legal proceedings have been commenced be properly considered as non-contentious or contentious business?

Secondly – did the client give "informed consent" to the solicitor charging an amount greater than that recovered from the defendant? As it was put "A solicitor who wishes to rely on CPR 46.9(2) must not only point to a written agreement which meets the requirement of the rule, as the Defendant did, but must also show that his client gave informed consent to that agreement insofar as it permitted payment to the solicitor of an amount of costs greater than the client could have recovered from another party to the proceedings." When did that fiduciary duty commence – upon first meeting or when the retainer was signed or at some other time?

Thirdly, if section 74(3) does not apply directly because the Court finds stages 1 and 2 of the pre-action protocol are non-contentious business, what are the consequences?

Fourthly, treading into new territory in respect of the Consumer Rights Act 2015 and what would happen if, by virtue of either a written agreement for the purposes of CPR 46.9(2) or an assessment due pursuant to the retainer under the non-contentious regime, the amount of base costs is greater than fixed costs. In this respect, the Court will be asked whether it has sufficient evidence before it to conclude whether it is unfair for the amount of costs to be paid by the lay client to be more than the fixed costs and whether the terms allowing for such greater sum unfair under the 2015 Act and, if so, what the consequences are.

It can be seen that the outcome of this case has the potential to impact hundreds of thousands of previously settled as well as ongoing personal injury and litigation cases. There will undoubtedly be a large number of solicitors and claims management companies watching the new hit tv programme “Belsner” on 11 and 12 July 2022.

I will issue my analysis and the implications once the judgment is handed down, which given the importance of the case and the Master of the Rolls strictures about the importance of the delivery of judgments, will hopefully be not that long forthcoming.

Paul Shenton

Paul Shenton provides specialist advocacy and commercial advice to solicitor firms and their clients. He is ideally suited to do so, having spent many years in one of the world’s largest law firms and then leading a specialist practice focusing on legal costs and funding options.

Paul spent 13 years at Eversheds LLP, 8 years of which as a Partner. After initially specialising in Claimant professional negligence claims against solicitors and surveyors, establishing the UK’s largest specialist team, he founded Eversheds’ first national team specialising in legal costs and funding, which he led and ran. Then in 2005, he created his own solicitor’s firm that specialised in legal costs. At its peak, this firm had over 100 staff and hundreds of solicitor firm clients. He dealt with cases up to and including in the Court of Appeal. Paul was the lead advocate in many cases. He has lectured on third party funding for over 15 years.

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