The insider

Judiciary on the warpath? Dominic Regan provides an update on client contributions & a costs management bombshell on the horizon

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At last, the long vacation is around the corner. Members of the High Court and their superiors clear off and enjoy two months of paid holiday. The run-up to the end of the month has been anything but quiet. On 11 July, the Court of Appeal (Vos MR, Flaux and Nugee LLJ) was to have begun a fresh three-day long stab at *Belsner v Cam*, after a notorious false start back in February. Sadly, one silk was struck down with Covid and lost his voice. The hearing is now to take place on the first available date after 1 October.

We have a fresh list of issues which mean that this will be the costs and funding case of the year. The prime issue set to affect every practitioner is what duty, if any, does one owe a putative client when setting out terms of engagement? Is there already a fiduciary obligation in place? Might there be some other obligation to put the interests of the client above those of your practice? Sir Geoffrey Vos insists that judgments always be delivered within three months, so expect a decision this side of Christmas.

Belsner started its judicial run as a case about deductions made by a solicitor from damages recovered on behalf of a client. This is itself a hot topic, as evidenced by the fact that 900 other cases on the same point are stayed pending judgment.

Hand it over

The judiciary is on the warpath when it comes to solicitors taking money from a client. Sir Rupert Jackson made it clear in his 2009 report that it was legitimate to take a costs contribution from the client. Indeed, he positively wanted the client to have involvement, or 'skin in the game'. His approach was condoned by the Court of Appeal in *Simmons v Castle* [2012] EWCA Civ 1288, [2012] All ER (D) 90 (Oct), which obliged by declaring that general damages be enhanced by 10%. That uplift was a contribution towards funds, enabling the client to hand something over. The problem is that there is often doubt as to how much should fairly be deducted and also whether the client gave informed consent to this. See *Herbert v HH Law Ltd* [2019] EWCA Civ 527, [2019] All ER (D) 123 (Apr) where the court explained the difference between mere consent, which wasn't good enough, and informed consent, which was.

In *EVX v Smith* [2022] EWHC 1607 (SCCO), a clinical negligence action brought on behalf of a child claimant settled for £225,000. The mother of the child acted as the requisite litigation friend and was content for the solicitors to deduct £28,000 from damages as a costs contribution. The settlement had to be approved by the court. Costs Judge Brown, on his own initiative, decided that the hourly rates underpinning the bill were excessive, and he was unsure what a 'quantum analyst' did (para [72]). The judge gave the solicitors a last chance to clarify aspects of the bill, but the tenor of the judgment suggests that the deduction is not going to be allowed in full, if at all. The judge also threw in an absence of informed consent to the rates being charged (para [62]).

What is a bill? Few citizens have any problem in recognising one, but in law it is another story. Thanks in large part to Victorian case law, we have lots of types of bill. Is it final, interim or perhaps a Chamberlain (look it up—I had to)? The nature of a bill can dictate when and whether it is susceptible to court scrutiny at the request of the paying client. So many of these problems are generated by the Solicitors Act 1974, which is in fact a construct of authorities when Queen Victoria was holidaying on the Isle of Wight as a giddy young lady. I had the honour of working this month with Deputy Master Campbell—such an experienced costs judge. Colin is always upbeat and optimistic, but one mention of the 1974 Act and his defences tumbled. It is an embarrassing anachronism that the Ministry of Justice should prioritise for reform.

Costs management: what future?

Finally, talking of civil reform, the Civil Justice Council has unleashed a consultation which runs until the end of September. Three broad areas to be considered are: the future and function of guideline hourly rates; fixed costs; and pre-action costs with many more portal and protocol settlements envisaged. The bombshell is a review of the Jackson passion: costs management! Is it cost effective? Does it make a difference? In truth, is it any more effective than conventional detailed assessment?

The unmentionable possibility of outright abolition is mentioned. I have written before about specific criticisms of the process. Sir Geoffrey Vos is bewildered as to why it applies to defendants in clinical negligence and personal injury cases. The protection afforded by qualified one-way costs shifting means that a defendant who seriously thinks they are going to get a costs order can be sectioned without examination. Several judges consider the process to be a waste of their time and talent. Even the consultation recounts that judges think budgets are benevolent in London and stingy elsewhere. I think budgeting will not be left untouched. Some changes are certain but outright abolition would only open up arguments about extending fixed costs to many more cases of great value.

Happy holidays! NLJ

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