War of words

Reuben Glynn examines the logic in the high-profile ruling in *Belsner*

Back in the early years of the current millennium, a great many inter partes costs disputes revolved around highly technical assaults upon the validity of the retainer between solicitor and client, with each case seemingly dealing with a more obscure point than the last.

This tried the patience of the senior judiciary, and the tide was stemmed with *Hollins v Russell* [2003] 1 WLR 2487, before the revocation of the CFA Regulations 2000 removed the basis on which many such challenges were made. With the rise of fixed costs between the parties, inter partes costs assessments in low-value personal injury matters have become rare, but we have seen a rise in recent years of what was previously an extremely rare beast indeed: assessments between solicitor and client. Technical retainer points are increasingly a feature of such proceedings.

BELSNER

In *Belsner v Cam Legal Services Limited* [2020] EWHC 27755 (QB), Lavender J found that the defendant, a firm of solicitors who had previously acted for the claimant in an RTA claim, was unable to charge the claimant costs that were not recoverable from the paying party, owing to a failure to secure the claimant's informed consent to paying those professional fees.

Why is this even an issue? Contract agreed, services provided, fees are surely payable, you would think. The reason that matters are not straightforward stems from s74(3) of the Solicitors Act 1974 which, inter alia, prevents recovery from the client of costs that could not be recovered between the parties in contentious business in the county court. This provision is qualified by CPR 46.9(2), which allows solicitor and client to enter into a written agreement expressly permitting payment to the solicitors of a greater sum than could be recovered between the parties.

In *Belsner*, it was common ground that the CFA between solicitor and client contained such a clause, and that S74(3) was engaged, despite no proceedings having been issued in respect of the underlying RTA claim (a point queried by members of the bar almost as soon as the decision became public – how is a case that has never been near a court automatically county court business). The defendant's case was that the CFA represented the written agreement permitted by CPR 46.9(2), and so costs were payable over and above those recoverable inter partes. The claimant argued that this did not suffice, as the claimant's informed consent had not been obtained (for the purposes of this article, the defendant's unsuccessful cross-appeal is ignored).

At first instance, the district judge rejected the claimant's contention, granting permission to appeal as he did so, resulting in the claimant's appeal to the High Court and Lavender J's finding in the claimant's favour on the basis that he considered the relationship between solicitor and client at the point of entering into the retainer was a fiduciary one; and that the advice provided by the defendant fell short of that needed to obtain informed consent. The suggestion of fiduciary duties existing prior to a member of the public becoming a client of a solicitor has generated considerable comment already, largely centring on the point at which a solicitor begins to act as a fiduciary – the argument being that they do not do so when negotiating terms prior to contracting to act for the client.

It may be the case that the reference to 'fiduciary duties' has muddied the waters somewhat. Established case law in solicitor / own client assessments, namely Holland J's decision in *MacDougall v Boote Edgar Estekin* [2001] 1 Costs LR 118 - a decision based on pre-CPR rules that was referenced with approval by Soole J in *Herbert v HH Law* [2018] EWHC 580 (QB), both of which are touched upon in the *Belsner* judgment - refers to informed consent being required to permit a qualified departure from the client's rights under s74(3) of the Solicitors Act 1974.

This position appears to be reflected in the Practice Direction to CPR 46. PD 46 6.1 states: 'A client and solicitor may agree whatever terms they consider appropriate about the payment of the solicitor's charges. If, however, the costs are of an unusual nature, either in amount or the type of costs incurred, those costs will be presumed to have been unreasonably incurred unless the solicitor satisfies the court that the client was informed that they were unusual, and that they might not be allowed on an assessment of costs between the parties.

> Do low-value matters that were not litigated constitute contentious business in the county court?

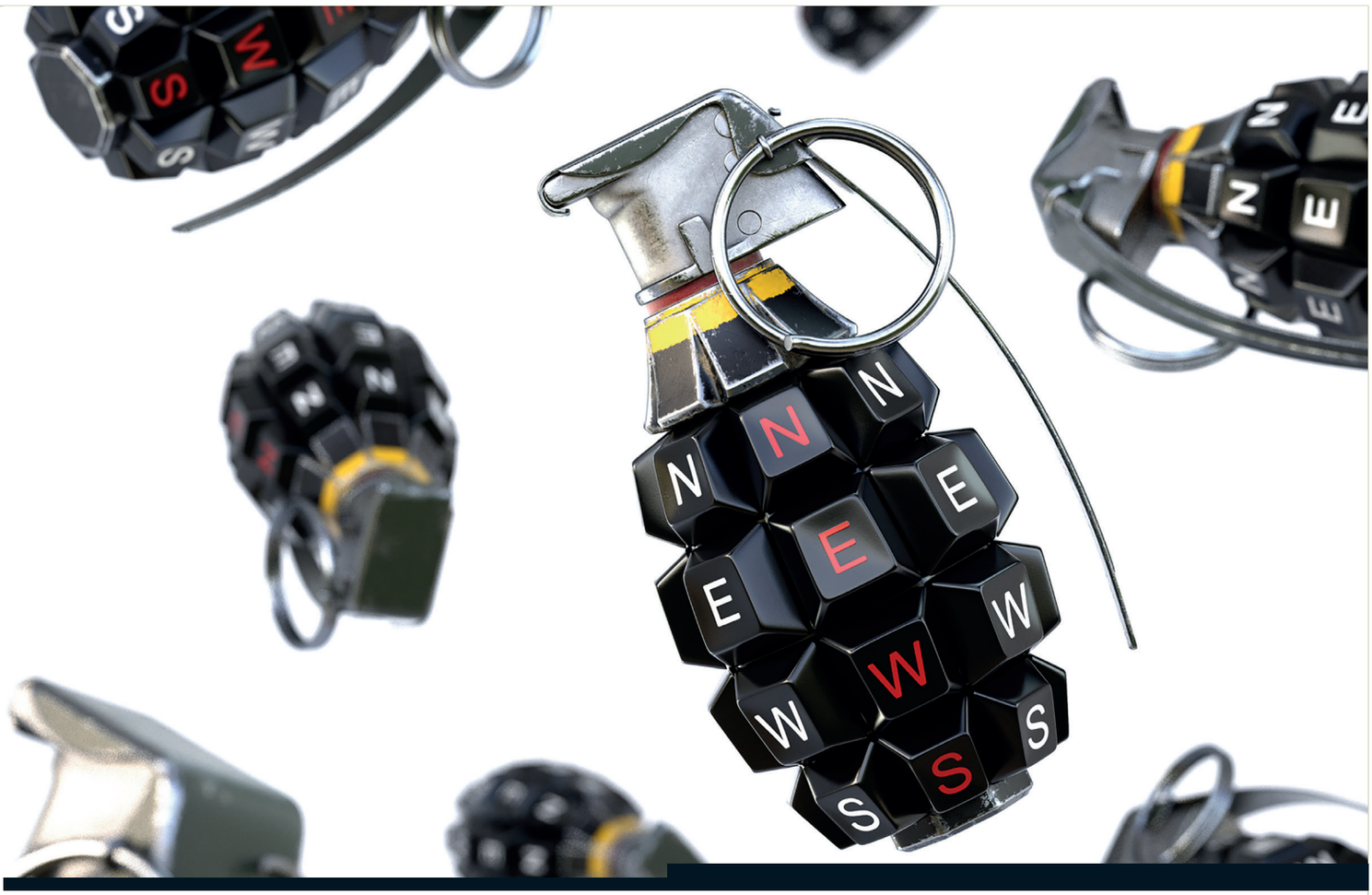
That information must have been given to the client before the costs were incurred.'

While practice directions are not law, being at best a guide to interpretation, this seems (in slightly clumsy language) to demonstrate that informed consent is a requirement of an agreement under CPR 46.9(2) which is designed to sign away a client's statutory right. On that basis, this decision appears entirely conventional and in line with previous decisions on very similar points. Yet it has created uproar, and is spoken of as an important test case. It could well become that if the point is taken to its logical, if extreme, conclusion, so as to require informed consent relative to s74(3) of the Solicitors Act to deduct any costs from damages that are not recoverable inter partes, such as success fees. From that standpoint, the finding in *Herbert* that after-the-event insurance premiums are not solicitors' disbursements looks even more important.

It is worth noting that, technically, had the retainer been allowed to stand unmolested, the theoretical extent of the claimant's liability to her solicitors would have extinguished her damages and left her to pay the further sum of £605.90 – a very poor bargain indeed to successfully bringing a personal injury claim.

IMPACT OF AN OVERALL CAP

It has been suggested that, had the CFA contained an overall cap on the amount to be recovered from damages, over and above those costs recovered from the other side, then the client would have had certainty as to the potential cost of the arrangement, and informed consent thus obtained. There seems to be considerable merit in such arguments, but it does occur to the writer that the client is signing away the right to have their costs liability limited to that which could be recovered between the parties; not their right as to certainty of the



level of deduction beyond that point. Is it necessary to advise the client that the starting point, absent their agreement, would be that nothing could be charged above and beyond that which could be recovered from the other side ('could' rather than 'will be'); but that their agreement was necessary to make the bargain attractive to the solicitors? It should be remembered that the average member of the public (and, no doubt, many lawyers) will not have the slightest clue that 74(3) of the Solicitors Act exists, much less what their rights are in relation to it. That advice, making clear that other solicitors might limit their fees to those recovered from the other side plus a success fee capped at 25% of general damages and past losses, might potentially prove sufficient; although whether it proves viable for solicitors to work at such rates – and whether it is actually to their client's advantage – seems questionable, especially in personal injury cases where those defending the claim often have far deeper pockets; a point which highlights the fundamental hypocrisy underlying fixed costs.

UNRESOLVED PROBLEM

That s74(3) of the Solicitors Act 1974 was agreed to have been engaged in this matter leaves us with something of an unresolved problem. Do low-value matters that were not litigated constitute contentious business in the county court? We may well have to wait for the point to come up in another case to get a definitive answer.

The county court has traditionally dealt with lower value cases of limited complexity, which the underlying claim in *Belsner* can certainly be categorised as. Looking purposively at where proceedings might have been issued seems to lead us to the conclusion that this was a county court matter, rather than something which would have troubled the High Court (absent the appeal on costs).

That all fits very neatly, but the matter was not resolved in the county court and, in any event, why is there a seemingly artificial distinction between matters in the county court, and those in the High Court? It may be that the authors of the Solicitors Act took a very broad view and considered that those litigating in the High Court were likely to be at the more sophisticated / wealthy end of the spectrum, and so less in need of statutory protection from their solicitors, as they would understand that an order for costs falls someway short of providing a complete indemnity, even where solicitor and client have behaved reasonably. But this interpretation seems something of a stretch. It may simply hark back to the limits on costs recovery under the old county court scales. If that is the case, *Belsner* appears an ever more orthodox decision, given the way some of the limitations of recovery under Scale Costs are replicated (and exacerbated) by CPR 45.

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