CJC costs working group- consultation paper

Strategic review of cost- Supplementary paper on the implications of the Court of Appeal judgment in Belsner v CAM Legal [2022] EWCA Civ 1387

A response by the Association of Personal Injury Lawyers

December 2022

Introduction

APIL welcomes the opportunity to respond to the Civil Justice Council's (CJC) further consultation on the implications of *Belsner*[1]. This supplementary response should be read in conjunction with our October paper.

There was significant criticism by the Court of Appeal in *Belsner* regarding the way in which portal or lower value personal injury cases were being run, *"…solicitors seem to be signing up their clients to a costs regime that allows them to charge significantly more than the claim is known in advance to be likely to be worth. The unsatisfactory nature of these arrangements is not appropriately alleviated by solicitors deciding, at their own discretion, to charge their clients whatever lesser (and more reasonable) sum they may choose with the benefit of hindsight."*[2].

Background

APIL argued, ahead of the reforms in 2013, that it was highly unsatisfactory a client's damages should be eroded by costs. However, the changes made at that stage reflected a policy decision of the Coalition Government that injured claimants should be expected to contribute to their costs. Consequently, solicitors had to adapt so that claimants were contributing to costs so that access to justice could be maintained within the new environment. Accordingly, the 2013 reforms were opposed by APIL, for all the reasons that will remain familiar to the CJC Costs Steering Group. APIL are concerned that the introduction of any further fixed recoverable costs, and the lack of uprating of existing fixed recoverable costs by an appropriate index to reflect inflation in relation to the cost of legal services[3] has exacerbated the issues identified by the Court of Appeal.

The issue is further compounded by the difficulty to value a claim fully at the outset of a claim. Personal injury cases are unpredictable. Advising a client in the very early stages of the injury and, at the outset of the claim, what their claim is worth and what their costs will be

[1] Belsner v CAM Legal [2022] EWCA Civ 1387
https://caselaw.nationalarchives.gov.uk/ewca/civ/2022/1387

[2] Belsner v CAM Legal [2022] EWCA Civ 1387 paragraph 15

[3] See APIL's earlier comments on this in its October response.

is problematic. Personal injury cases are not predictable, one individual will react differently to another with a similar injury. It is also difficult to know at the outset of a claim at what stage the case will settle.

Fixed cost and damages

Since the Legal Aid, Sentencing and Punishment of Offenders Act 2012[4] (LASPO) came into force deductions from client's damages have become a necessity to fund success fees, after the event insurance policies and any short fall in base costs. These issues are exacerbated in low level fixed recoverable costs work. In those lower value cases where fixed recoverable costs apply the work required to be undertaken to process the claim, advise the client and comply with the necessary professional duties means that, more likely than not, a deduction will have to be made for the cost's shortfall. It is crucial that fixed recoverable costs are reviewed and regularly uprated. Whilst there has been some resistance to this from the MoJ because of policy reasons, we fail to see how, especially in the case of those set out in CPR 45.18, they can fail to address this. As we previously explained, APIL members are now finding that fixed costs do not reflect work required, even on a swings and roundabouts basis.

We appreciate that the argument may not appear to be as straightforward where fixed costs include a figure for costs based on a percentage of damages. The suggestion here that damages have increase so in turn, so will have the amount of costs recoverable is unfounded. Firstly, there is an element of costs that are not linked to damages. Secondly, we question if damages have risen in line with inflation, we know that the judicial college increase the recommended bandings for damages but do we know what claimants are actually able to recover? In 2019 Fenn and Rickman examined the impact of LASPO[5]. The report showed that when comparing pre and post LASPO clinical negligence claims valued at £1,000 - £250,000, damages were 22 per cent lower in post-LASPO claims. When comparing pre and post LASPO personal injury claims valued over £25,000 it found that damages were 17 per cent lower in post-LASPO claims, suggesting that significant further consideration is needed on that point.

There are other issues that need further thought here too, not all heads of loss will have increased with inflation and this too will have an impact on the rise or otherwise of costs where they are linked to damages. There is also the impact of the Civil Liability Act 2018 on damages for children, pedestrians', and cyclists, because damages have been artificially compressed by the whiplash reforms. Finally, counsels' fees permitted under the FRC regime have not risen in line with inflation either. The figures allowed, have remained the same since 2013. The government gave a commitment during the portal fixed costs negotiations to review the figures. This has only happened once since inception. Committing to a review without clearly defined timelines and parameters is not enough.

[4] https://www.legislation.gov.uk/ukpga/2012/10/contents/enacted
[5] THE IMPACT OF LEGISLATION ON THE OUTCOMES OF CIVIL LITIGATION: AN EMPIRICAL ANALYSIS OF THE LEGAL AID SENTENCING AND PUNISHMENT OF OFFENDERS ACT 20121 Paul Fenn (Nottingham University Business School) Neil Rickman (University of Surrey)

Contentious and non-contentious business

The judgment from the Court of Appeal made it clear that it was of the view that the distinction between contentious and non-contentious business is illogical. APIL agrees that there is a need for change as the Solicitors Act 1974 is outdated and does not reflect modern practice. We also believe that defining work undertaken in the pre-action space as non-contentious business up until proceedings are issued, at which point they convert to contentious business, makes advising a client on the potential cost of their case nigh on impossible.

That said, we would also reiterate that there is the potential for many unintended consequences in reforming this area. It is not something that should be decided in civil justice alone and there would need to be a full consultation with the wider profession.

We understand from the CJC forum event that one idea being considered to address this is to bring forward the date when proceedings are considered issued. Essentially shifting the 'issue date' into the current pre-action space. This would link with the 'portalisation' of claims, namely that all claims would proceed through a digital portal or funnel. Whilst APIL can see considerable advantages to digitisation, we highlighted in our previous paper the failings of the most recent reforms and the lessons that needed to be learned from that work. We accept that digital technology has the potential to make justice systems more accessible and efficient, however, we maintained that it is essential that reforms have a user focused approach, they are inclusive and when necessary, users are assisted. It is also crucial that any reform should focus on the user's needs, learn from their experiences, and be rigorously tested. There is also the need for greater consideration to the hidden cost of reform for solicitors implementing these systems. There are technical work streams and IT work streams that must be looked at and these costs are not limited to initial outlay, they impact the business every time there is a change to the IT platform or process.

We have previously said that:

- There must be proper engagement with the profession.
- Extensive user testing.
- User feedback from a range of stakeholders affected.
- Full integration with law firm's systems.
- Reform must not be piecemeal.

It is also important to recognise that there is already significant work being done in many interlocking areas at the moment, including fixed recoverable costs, a review of the pre-action protocols, alternative dispute resolution and the court reform program. It is essential that reforms are approached in a co-ordinated way. All those areas are interconnected and there is a significant risk of unintended consequences if this is not the case. Shifting the issue date to earlier in the life of the case could have several consequences. An increase in costs, and the issues associated with that. Namely the earlier payment of an issue fee, the help with fees process and additional potential liabilities of the claimant in insuring against that. The impact on before the event insurance and the issue of freedom of choice[6]. The

[6] The law and practicalities of before the event insurance, an information study CJC November 2017. https://www.judiciary.uk/wp-content/uploads/2017/11/cjc-bte-report.pdf

impact on what constitutes regulated business and who can advise and represent claimants in this space.

Whilst the government has indicated that legislative reform is unlikely, we would caution against a quick fix solution.

Any queries relating to this response should, in the first instance, be directed to:

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