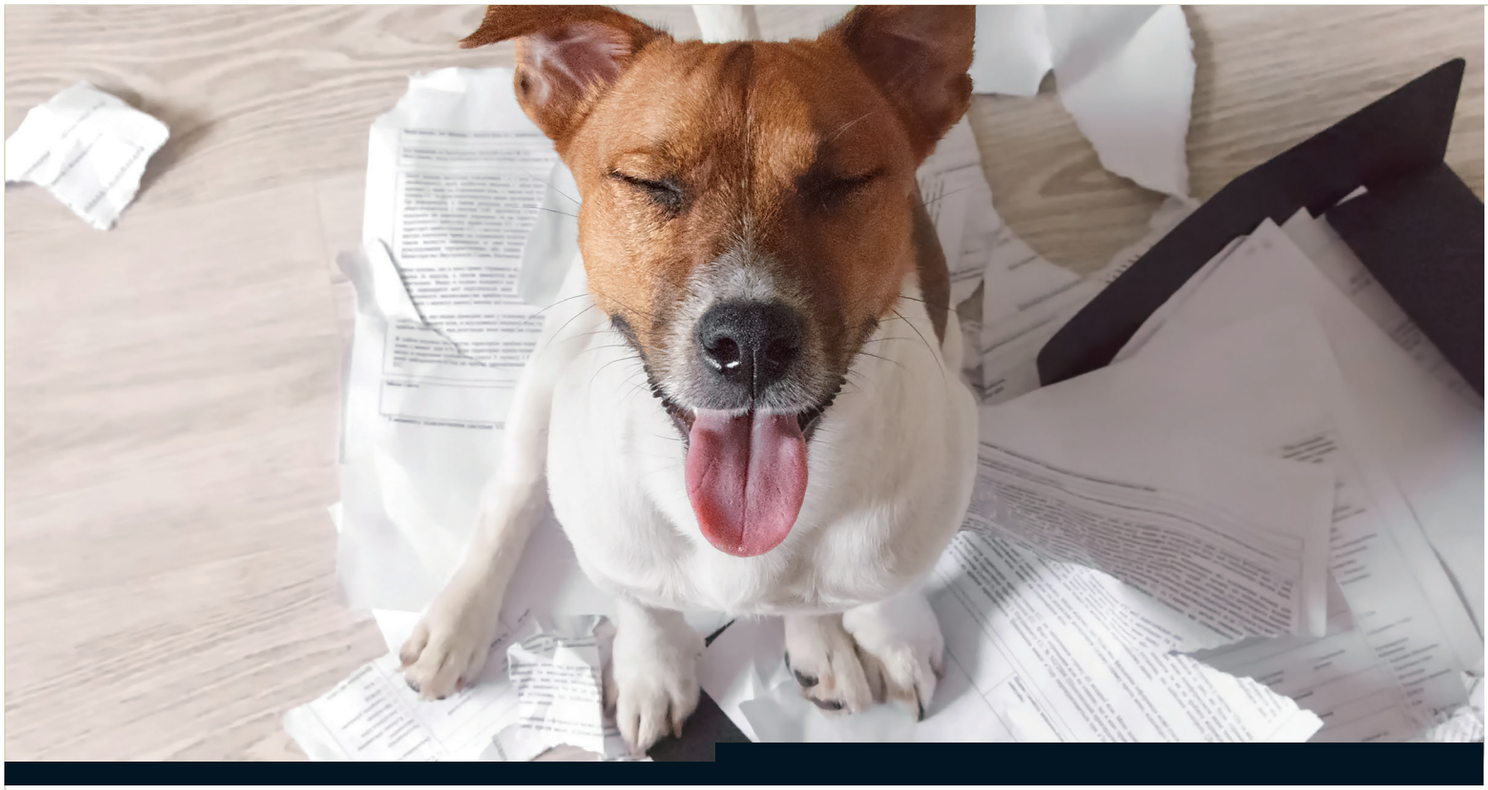
Time to let rip

Post-*Belsner*, **Andrew Hogan** asks if we should now tear up the Solicitors Act and start again



The ripples from the Court of Appeal's decisions in *Belsner v Cam Legal Services* [2022] EWCA Civ 1387 and *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388 are still rolling out across the legal pond. A great number of cases in the Senior Courts Costs Office and various District Registries were stayed pending the *Belsner* ruling. These will no doubt come to life to be resolved one way or another in the near future.

In the longer term, the Solicitors Act 1974 and surrounding law came in for sustained criticism in the Court of Appeal. The master of the rolls said the current position was 'unsatisfactory in a number of respects'. First, he said the distinction between contentious and non-contentious costs was 'outdated and illogical', and urgently needed 'legislative attention'. Second, the MR saw 'no logical reason' why section 74(3) of the act and CPR Part 46.9(2) should apply to cases where proceedings are issued in the County Court, but not those pursued through the pre-action portals.

Third, he found it 'unsatisfactory' that in claims pursued through the RTA portal (and perhaps the whiplash portal), solicitors were signing clients up to a costs regime that allowed them to charge much more than the claim was ever likely to be worth. The fact that solicitors were then deciding, at their own discretion and with the benefit of hindsight, to charge their clients a lesser sum did not alleviate the problem in an appropriate way, he said.

Fourth, the MR said: 'It is illogical that, while the distinction between contentious and non-contentious business survives, the CPR should make mandatory costs and other (eg. Part 36 and PD8B) provisions for pre-action online portals, but otherwise deal only with proceedings once issued. Section 24 of the Judicial Review and Courts Act 2022 will allow the new Online Procedure Rules Committee (OPRC), in due course, to make rules that affect claims made in the online pre-action portal space. It would obviously be more coherent for the OPRC to make all the rules for the online pre-action portals and for claims progressed online.'

He added: 'Finally, it is also unsatisfactory that solicitors like checkmylegalfees.com can adopt a business model that allows them to bring expensive High Court litigation to assess modest solicitors' bills in cases of this kind. The Legal Ombudsman scheme would be a cheaper and more effective method of querying solicitors' bills in these circumstances, but the whole court process of assessment of solicitors' bills in contentious and non-contentious business requires careful review and significant reform.'

POTENTIAL REFORM

Are the MR's criticisms of these arcane costs rules justified? The answer is undoubtedly yes, viewed through any rational assessment of how solicitors bill and charge their clients, how dispute resolution (rather than litigation) is conducted and will be conducted in the age of the Fourth Industrial revolution; and the current remedies open to a client seeking to challenge a bill. I will consider each of the MR's criticisms in turn.

First, the Solicitors Act 1974 draws a line between contentious and non-contentious business and treats costs differently in each category. The civil justice system is slowly and painfully moving from the 1970s into the 21st century, making the transition from a paper-based system with rules apt for paper-based transactions, to a digital system. On 28 April 2022 the Judicial Review and Courts Act 2022

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received royal assent and became law. Chapter 2 of that act provides the raw sinews for the digitisation of civil and family justice in England and Wales. It provides the broad framework by which the resolution of disputes will be moved online and resolved digitally, using newly created Online Procedure Rules; and provides a statutory basis for an Online Procedure Rule Committee to come into existence.

This body will have extremely broad powers indeed to set rules for the online resolution of disputes. What is envisaged has been described as a three-layered 'funnel': the first layer will be a website and app to which any would-be claimant can go, to find out how to progress a claim of any kind. Claimants will then be signposted to a series of pre-action portals and ombudsman processes to identify and seek to resolve their claim.

Any claim not resolved within the appropriate pre-action space will have a data set that will then be transmitted to the third layer of the funnel, which is a court-based online justice process, such as Online Civil Money Claims and Damages Claims online. That may lead to a court hearing, a remote court hearing by video, or a 'digital paper' based determination.

This means that the 'hard division' between work done before court proceedings and work done after the commencement of proceedings – the division between non-contentious and contentious business – becomes meaningless. There is a seamless digital space, and the costs rules should reflect that reality.

Already the divide between non-contentious and contentious costs has been eroded by the provision for payment of costs in cases involving the MoJ Portal. It has effectively been destroyed in whiplash claims in the Official Injury Claim Portal, with its complicated and involved provisions for cases to fall out of the portal and then fall back in, with court hearings on liability in between.

Second, section 74(3) of the Solicitors Act 1974 is the provision that provides some protection for clients who may retain solicitors on an hourly rate basis, but in the context of claims where much lower sums of fixed costs are likely to be recovered on an inter partes basis. As noted in *Belsner*, Section 74 is entitled 'Special provisions as to contentious business done in county courts'. In subsection (3) it says 'the amount which may be allowed on the assessment of any costs… in respect of any item relating to proceedings in the county court' shall not 'exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings'.

Why should that protection be limited to clients whose cases must be issued, excluding – I would suggest – the majority, whose cases settle without the need to issue proceedings? But the bigger question is not whether section 74 should be extended to non-contentious work, but to what extent, in the digital age, clients need consumer protection measures in legislation at all; or whether these matters should be treated as regulatory issues for solicitors, and whether soft law remedies such as the right to complain to the Legal Ombudsman would adequately fill the same space.

The third criticism in *Belsner* related to the fact that the solicitor's retainer permitted them to charge uncapped basic charges, in circumstances where no explanation of the likely recoverable costs was given. In the event, the solicitors had only charged a fair and reasonable fee, but this was due to their concession.

This raises interesting issues. Costs information and costs estimates are treated as regulatory matters, with the obligations to give information and advice on costs matters contained in the Code of Conduct. If legislation was thought to be needed, then one option would be to require solicitors to provide this information.

The difficulty with that proposal is that it has been tried before: the Conditional Fee Agreements Regulations 2000 sparked the Costs Wars, some 20 years ago. A better option in my view would be to introduce hybrid conditional fee agreements: what solicitors really want to do is to charge the client the costs they recover from the other side, and a percentage of the damages they recover. Yet despite the alphabet soup of potential retainers, including CFAs, CCFAs, CFA-Lites and DBAs, this is the one type of retainer they are forbidden by law from making. I have yet to hear a convincing explanation as to why it should not be introduced in law. The truth is that the current insistence on hourly billing is simply designed to engineer an outcome where the solicitor can lawfully charge the costs they recover from the other side, and 25% of the damages.

The fourth criticism relates to the rulemaking bodies and their division of responsibilities. The reality is that there should not be two rule making bodies. It is redundancy of a high order. It reflects the historical position that the CPRC deals with the paper-based rules order, and the OPRC will deal with the Brave New World. But large swathes of the CPR are either effectively redundant or about to become so. Take the rules on service, with their touching reliance on Snail Mail. Service by email or other electronic transfer should be the norm or default position. But I am not sure that the CPRC is going to voluntarily disband any time soon.

Finally, there is the procedure for assessing solicitors' costs. All these claims for solicitor-own client costs assessments are High Court claims. They are all costs bearing. Some of the claims are for a few hundred pounds. Yet if a solicitor sues a former client for an unpaid bill of up to £10,000 that is a small claim, and she is unlikely to recover her costs in the County Court.

There is no good reason why these claims must be by Part 8 on the multi-track, issued in the High Court, and given an elevated position over any other modestly valued consumer dispute. A true small claim for a few hundred pounds should be capable of being conducted by a litigant in person. That would meet the mischief identified by the master of the rolls, while ensuring more substantial disputes receive a fair measure of the court's resources.

But more fundamental reform is needed. I would suggest the current nonsense of interim statute bills, Chamberlain bills, requests for payments on account and final statute bills should be abolished, and replaced by an obligation on solicitors to serve a final statutory bill detailing all costs charged at the conclusion of a matter, with all invoices prior to that date simply being requests for payment on account. Only that final bill will be liable to assessment, and time limits for challenging the bill will run from the date of delivery. Delivery will be by electronic means such as email by default. For costs bearing cases, I suggest retaining the one fifth rule. This has the useful chilling effect of ensuring that solicitors, when contemplating their draft bill, give the client the benefit of the doubt, and reduces the scope for a dispute.

But the great tangle of provisions in the Solicitors Act 1974 is ripe for a far more radical pruning beyond the scope of this article. The proof of the pudding is that if many solicitors do not understand how it works or what their obligations are, how are their clients meant to either?

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