

Virtual Roundtable with PJ Kirby KC

12 December 2022



Parties attending:

PJ Kirby KC (PJKKC)
Jeremy Morgan KC (JMKC)
Andy Ellis (AE)

JMKC:

We're delighted to welcome PJ Kirby KC of Gatehouse Chambers who shares with me the history of being a solicitor before moving to the Bar and thus knowing far more than anyone else about costs at the Bar.

The first topic covered is the Court of Appeal decision in [Belsner v Cam](#). We also look at an upcoming case which will consider whether a third party funding agreement is an unlawful damages based agreement, and the discussion ends with a consideration of recent comments by Lord Justice Birss that the days of detailed assessments might be numbered.

PJKKC:

Thanks very much Jeremy. Just a couple of points on what you've said. Firstly, yes, I did used to be a solicitor but when I came to the Bar back in those days they had the old

fashioned senior clerk who said things like 'Oh sir you used to be a solicitor, you'll know all about costs' and I thought, well no I didn't because someone else dealt with the costs. It went off to Andy or someone else but that was my intro into the world of costs at the Bar just because I had been a solicitor.

[03:42] Belsner is one of those cases where there's no getting around it, I came second. In the Court of Appeal we were representing Miss Belsner and it was an appeal by her solicitors arising out of costs claimed under the Portal but as Jeremy has said, there are points of general importance, not just for Portal claims. This claim which was for all of about £300 ended up taking five days of the Court of Appeal's time in front of the Master of the Rolls, the Chancellor and for the first two days of the sitting, Lord Justice Arnold and then when we reconvened in October, Lord Justice Nugee. So, as they say, a strong bench and it was obviously a test case. What it was testing was the somewhat obscure Section 74.3 of the Solicitors Act and the extent to which costs in the County Court would be limited to the sums that are payable by the other side.

I used to be a solicitor back in the eighties. I can't pretend that Section 74.3 was something that I took great notice of when I was practicing litigation in those days and to

some extent it was emasculated by the fact that there were scale costs, just showing how old I am. For the costs that were recovered from the other side, there was a discretionary element so they weren't fixed costs, they were a scale – and you could go beyond a scale. What has come about, as a result of the introduction of fixed recoverable costs, is that there is a fixed amount that is recovered in certain actions and that includes matters under the Road Traffic Accident Portal. Section 74.3 would, on the face of it, limit the costs that you can recover from the other side to those fixed recoverable costs under the Portal unless, by reason of the CPR, there was a written agreement between the solicitor and client allowing the solicitor to be paid more than the sums that were recovered under the Portal.

The case got to the Court of Appeal by taking the long route. There had originally been an assessment of costs by the regional costs judge. It had then gone on appeal to Mr Justice Lavender. Mr Justice Lavender had decided that the solicitors would be limited to the fixed recoverable costs, but his basis for deciding that was that the solicitor owed a fiduciary duty to the client to explain to the client that the fixed recoverable costs in this particular case would only be £500. If the solicitor hadn't explained to the client that the costs the solicitor was wanting to charge the client were significantly in excess of that, then that was a breach of his fiduciary duty to the client.

“The Master of the Rolls is very keen on Protocols and very keen on using IT with regard to the resolution of disputes.”

The Court of Appeal decided eventually, and I'll explain some of the history in a moment, that fiduciary duty had nothing to do with it. It also decided that Section 74.3 had no application anyway because, despite the fact that you had to bring a claim within the Portal, that did not amount to proceedings in the County Court. It was only if you got to what's called stage three of the Protocol that there were proceedings and it was only then that you had to issue a claim in the county court as opposed to having to follow the

Protocol. Now the Protocol is subject to certain provisions of the CPR. It's a procedure which, in effect, you've got to follow and is obviously a modern way of dealing with things. The Master of the Rolls is very keen on Protocols and very keen on using IT with regard to the resolution of disputes. He was very interested in this matter from the word go.

“... this distinction between contentious and non-contentious costs was absurd.”

Anyone who has suffered from watching these hearings, both in February and October, would have noted a complete volte face on the part of the indications given by the Court of Appeal between February and October. In February the Master of the Rolls was saying that this distinction between contentious and non-contentious costs was absurd. If my opponent, Ben Williams KC, was right then the whole thing had to change because this was an absurd way of going about things. The Chancellor raised a particular point that I had considered with my instructing solicitors and I thought it was a bad point but I thought he's raised it so I'd better go with that. On day two of the hearing in February, the Master of the Rolls had given certain indications which I thought had gone too far and which were unfairly put to Ben. I was thinking how am I going to deal with this when I'm on my feet, because I can't support some of the things that the Master of the Rolls had been indicating. By day two, it would appear, following further written submissions overnight and possibly following discussions with Lord Justice Arnold who had perhaps taken a slightly different view, the Court came in and said that they had realised that this had far greater implications of far more importance than perhaps they had first appreciated and there were a number of issues that they wanted covered. Could we go away and come back later in the year – which is what we did. At that point the Court of Appeal's view was very different, and it was me who was on the receiving end of certain difficult points that were being raised by the Court of Appeal. It's not done, by the way, to simply say “well it wasn't my point in the first place. You raised this back in

February". That's probably not the best advocacy in the Court of Appeal.

"... unless and until proceedings are actually issued, you are dealing with non-contentious costs."

What has the Court of Appeal actually decided in Belsner? First of all this distinction between contentious and non-contentious costs. The Court of Appeal has decided what was in fact the traditional position anyway that unless and until proceedings are actually issued, you are dealing with non-contentious costs. That means that if you settle a matter before you actually issue proceedings then so far as the costs between you and your client are concerned, those should be assessed as non-contentious costs and not as contentious costs. What difference does that make you ask? That's one of the things we're going to be finding out over the coming weeks and months in the light of the decision in Belsner. The main difference is that under the [Solicitors' (Non-Contentious Business) Remuneration Order 2009], costs are assessed and they have to be fair and reasonable. It's not just reasonable, they have to be fair and reasonable. Now that's an additional requirement to costs that have been assessed which are contentious costs which have to be reasonable.

"The main difference is that ... costs ... have to be fair and reasonable."

I can envisage plenty of arguments that the requirement for those costs to be fair could mean that you could have perfectly reasonable costs which are nevertheless unfair. That could bring in, for example, the question of costs under a Portal or where there is a case which involves fixed recoverable costs. If you haven't told your client that certain costs are not going to be recovered from the other side or have led your client to believe that most of those costs will be recovered, which indeed was the position under the CFA in Belsner, but at the end of the case you only recover a fixed amount and that fixed amount was always known because it's set out in the rules, then whilst the costs that you have incurred may

well have been reasonable, they may not be fair.

I can hear some of you say, well is that any different from the test in *Mastercigars* – what is the sum that it's reasonable to expect the client to pay? I can see that this may be fair, there may be an element of reasonableness anyway. That's where we are in the light of the Court of Appeal decision. Unless you've issued a Claim Form there are no proceedings and you are therefore dealing with non-contentious costs. There is a question mark as to whether you can have a gross sum bill in relation to non-contentious costs or whether you have to have a detailed bill. I'm not sure too many Costs Judges are going to give that argument too much weight but it's certainly something that's got to be determined. Also, if you are dealing with litigation under a CFA and the matter is resolved before proceedings are issued, does that mean that that CFA is in fact a non-contentious business agreement? In which case can the client challenge the recovery of costs under the non-contentious business agreement? Can they suggest that the non-contentious business agreement itself is unfair?

There are plenty of points that are going to arise in light of the Court of Appeal's decision. The Court of Appeal was critical of quite a number of players in this matter, fortunately not me. It was critical, first of all although it's not a player, of the Solicitors Act. The Solicitors Act and the distinction between contentious and non-contentious costs, the Court of Appeal said that's illogical, it needs updating, the Solicitors Act itself needs updating. It was critical of the solicitors who were the successful appellants in the case because what they had said to the client in the CFA and in their client care letter was that a case of your type will normally settle at this particular point and if it settles at this particular point we think your likely damages are going to be £2,000 or £1,500, or whatever it was. If it settles at that point we would estimate that our costs would be £2,500 plus VAT and disbursements. You've then got buried away in pages and pages of information as we often see, bits that say you'll be able to recover 'some'

or in some places it said ‘most if not all of your costs’. In other places it said the Court would determine what costs you should recover from the other side. Nowhere do they say to the client that whilst in our view your case would probably settle at this particular point, you’ll probably recover this particular amount of money and the [recoverable] costs at that point would be £500 plus VAT. They’ve given a costs estimate of £2,500 which is five times the amount of the fixed recoverable costs. At the end of the case, the amount they took from the client’s damages was the success fee based upon, if you like, the big bill, i.e. the bill of £2,000. That was then capped at 25% of the damages, so they deducted from her damages the sum of £380, whereas if they had had a success fee of 15% because that is what they had agreed would have to be the success fee (the CFA itself had claimed a 100% success fee), but on a detailed assessment they said that in the light of the case of Herbert the most that they probably could get would be 15%. If they had only got 15% on the £500, then that would’ve been £75. This is why we were arguing about a difference of £300 being the difference between £75 and about £380 because of the sum against which the success fee was being calculated.

JMKC:

Do you think they would have been better off if they hadn’t given the client in the client care letter an estimate of their own costs at the stage the case was likely to settle? It was having done that, that their failure to say how much you might get back at that stage in inter partes costs became absolutely a glaring contradiction. If they just said “We can never tell in these cases. We don’t know when it’ll settle and how much it’ll cost” would they have been any better off?

PJKKC:

They would be obliged in terms of their regulatory obligations to provide the best information they could with regard to costs and that’s why the Court of Appeal was criticising them. They were subject to considerable criticism because they were

not giving the best information with regard to costs.

It wouldn’t have made any difference on the facts of this case because they did cap their costs at, effectively, the amount that was recovered by the other side but then calculating their success fee on the larger sum. I think the Court of Appeal would still have said that they should have told her what the recoverable costs would be. Lord Justice Jackson in his report said that one of the things that you should be able to say to the client is, here is a grid. If you recover this, this is what you’ll recover by way of costs. If you recover this by way of damages, this is what you’ll recover by way of costs. It’s not that difficult to do that. One of the arguments that had been raised before Mr Justice Lavender which wasn’t really pursued in the Court of Appeal was, oh it’s all too complicated but it’s not actually all that complicated to show what the figures would be.

It wasn’t just the solicitors who criticised, my instructing solicitors who were checkmylegalfees.com, came under considerable criticism. In the words of Mandy Rice-Davies, I would say this wouldn’t I. I thought somewhat unfairly because their business model was criticised for bringing these claims which are all for modest amounts. I think possibly the Master of the Rolls might have referred at one point to trivial amounts. Whether an amount of money is trivial or not rather depends upon how much money you have in the first place. If you are a person who doesn’t have very much money, £300 is not trivial. If you are someone who might be able to spend £300 going out for dinner, then perhaps it is trivial.

I accept that in the scheme of things when we look at the legal costs involved it may be trivial. The solicitors who were bringing these claims were bringing them in the High Court but there was a good reason for that – it was the only place they could bring them. To criticise them for bringing them in the High Court seemed to be a little unfair.

The alternative which is what the Court of Appeal suggested in both Belsner, and perhaps in more forceful terms in Karatysz, was that these matters could be brought more economically and more efficiently to the Legal Ombudsman. Well, there was no actual evidence as to the Legal Ombudsman's ability or capability of dealing with these claims and the prospect of the Legal Ombudsman now having hundreds of these sorts of small claims seems to me a little worrying because the Legal Ombudsman's record which is published every year in a report is not that great in terms of the timescales in which matters are dealt with. I think it's also fair to say that matters in relation to solicitors' costs are not particularly straightforward.

"... one of the consequences of the Court of Appeal's decision in Belsner and Karatysz is that that right to have the bill considered by a judge has, to some extent, been lost."

Dare I say it in this recording? Yes, I dare. That perhaps the Court of Appeal's views which changed between February and October illustrate the fact that an understanding of solicitors' costs is not entirely common to the whole of the legal profession let alone to unqualified persons who are going to be dealing with the original complaints to the Ombudsman. I am aware of a recent matter where the Ombudsman appears to have refused a complaint with regard to an unwritten damages based agreement. You can't have an unwritten damages based agreement and yet a complaint with regard to that appears to have been dismissed, certainly before it's gone to the next level. The Court of Appeal is saying that all these matters should go off to the Legal Ombudsman. I am worried about that because I'm not sure that clients will get a fair and proper consideration of their appeals there. It's not as if this is a new entitlement. The right of a client to challenge their solicitor's bill by way of what in the old days was called taxation and now assessment, goes back literally hundreds of years. It was a way in which as officers of the Court their bills were considered. Historically there was always consideration of the relationship between the solicitor and

client which was one that was subject to particular duties and particular concerns and a particular concern about undue influence etc. It was right that the client should have the right to have the bill considered by a judge. What appears to me to be one of the consequences of the Court of Appeal's decision in Belsner and Karatysz is that that right to have the bill considered by a judge has, to some extent, been lost.

JMKC:

In terms of sanction, it doesn't sound as though they thought they could say that the Court should refuse to accept these applications for assessment on proportionality grounds. That would be quite a major step to effectively undermine a piece of primary legislation, but they did suggest that you wouldn't get your costs even if you were successful in doing so, thereby undermining the model of your professional clients.

PJKKC:

Primary legislation deals with the one fifth rule and in effect the Court of Appeal is saying that this is special circumstances.

But where do the special circumstances kick in? If it is a £300 bill it might be said that it's disproportionate to bring proceedings but if you're having to bring the claim in the High Court because of, again, primary legislation, where is the cut-off point?

Where's the point where you can say, yes, I can have my bill considered by the SCCO, is it £5,000? Is it £50,000? Is it £100,000, bearing in mind that you're in the High Court? There is certainly what appears to be a restriction on client's rights with regard to challenging bills. Strictly speaking the bits about the Legal Ombudsman etc. are obiter, but if you are a District Judge sitting in your local County Court you're going to take very serious notice of what the Master of the Rolls says and quite rightly. Clearly he said it because he wanted this to be the way in which these matters are dealt with in the future.

You have also got the problem that if you go to the Legal Ombudsman, the Legal Ombudsman's decision is not binding on the client unless the client accepts it. If, as appears to be the case at the moment, cases before the Legal Ombudsman are taking up to a year, if the case is all about monies that have been deducted from an award of damages, that probably amounts to payment of the bill. If it's one year on, you're too late to challenge the bill anyway. When do you actually issue your claim? Do you say to the Ombudsman "hurry up because I'm about to run about of time" or are you effectively then stuck with the Ombudsman's decision?

JMKC:

I may be wrong, but my recollection is that the Ombudsman is not strictly bound to apply legal principles but more what is fair and reasonable in the view of the Ombudsman.

PJKKC:

You are absolutely right.

JMKC:

So that makes it even more complicated when you have quite important legal issues at times.

PJKKC:

Within about a week of the decision in Belsner, the Ombudsman announced that they would now be imposing a one-year period for the bringing of complaints. If they're then taking 10 months/12 months to decide matters, assuming you bring your claim before the Ombudsman within that year, the chances are that you will be out of time if you then disagree with the Ombudsman's decision for then bringing a claim to the SCCO.

"Generally speaking, in negotiating the terms of the retainer at that point you don't owe a fiduciary duty to the client."

I was going to mention because it seemed to me this is very important for all solicitors in

whatever area of practice, the Court of Appeal disagreed with Mr Justice Lavender's consideration of fiduciary duties. The Court of Appeal made quite clear that whilst solicitors do owe fiduciary duties to a client, they don't owe a fiduciary duty with regard to the negotiation of their retainer. Obviously, you could within the negotiation of a retainer impose something that amounted to the solicitor receiving some sort of secret profit and that would be breach of fiduciary and any other number of duties. Generally speaking, in negotiating the terms of the retainer, at that point you don't owe a fiduciary duty to the client. That was another reason why the appeal was allowed.

The appeal was allowed primarily because Section 74 didn't apply, because these were not proceedings in the County Court because they were non-contentious costs. In any event the basis upon which Mr Justice Lavender had found in favour of the client that the fiduciary duty was owed and not to explain to the client the difference between the recoverable costs and the costs that they would be charging was a breach of that duty. No such duty was owed at the point of the negotiation of the retainer.

JMKC:

That's the point I was going to say. It is of general application and really quite interesting. I don't think it's a totally novel point but it's very useful to have it spelled out in a recent and authoritative decision. The idea that the client has no reasonable grounds to believe that the solicitor's not looking after his or her own interest at the point when they negotiate a retainer is actually a rather important point.

PJKKC:

Indeed. So we're all going off to the Legal Ombudsman now and I hope they've recruited lots more people to help them sort out these matters.

The point you were making Jeremy that [LEO] is not obliged to follow strict legal principles, it's going to be very interesting. Are we going to get a judicial review of the

Legal Ombudsman's decision or what's going to happen when a client says, I disagree with what the Legal Ombudsman has offered and then goes off for a Solicitors Act detailed assessment. Presumably the Court can't turn around and say "you should have gone to the Legal Ombudsman" because the client will say "well I did go to the Legal Ombudsman. I didn't like what he or she said and that's why I've now brought this matter".

JMKC:

And you could also get, couldn't you, clients who are concerned about the costs of detailed assessment, going to see the Legal Ombudsman in the hope of a nice, friendly, warm and cuddly decision from this nice person who doesn't apply too much legal principle to get the bill reduced in much larger cases than these very simple Portal ones and that's a scary thought for solicitors generally.

PJKKC:

One thing about the Legal Ombudsman or certainly other ombudsmen I have dealt with, is they will also award £200/£300/£400 for distress or the upset caused. It would be interesting to see whether there would end up being a tariff with regards to solicitor's costs of whatever nature, whether they're Portal, whether they're commercial, family or whatever.

Belsner is probably not the end of the road, but it obviously has dealt a very significant blow to people like those who were instructing me and who were seeking to challenge bills in that way.

JMKC:

I can't ask you this question, but I will, what is the future of their business model?

PJKKC:

Well, they'd have to answer that themselves but according to the Master of the Rolls, it can't carry on because that's effectively what he said. I have not been asked to advise on

it, but I've no doubt that they've read the judgment and taken advice on it.

AE:

Isn't it just a step on the road to reform and it might take a long time to reform but even the checkmylegalfees.com business model is that way too. If it's a call to action for government and those that advise them on legislation to tidy up and modernise the Solicitors Act and while we're at it have a quicker and cheaper way of resolving disputes between solicitors and clients about their fees, then that's the work that needs to be done and everything goes into the pot, including should the Legal Ombudsman get involved. If we ever get to the point where there is a simpler way of resolving these disputes, then the sort of cases that checkmylegalfees.com would prosecute fall away anyway don't they?

"... the Solicitors Act needs reconsidering and needs amending"

PJKKC:

In the light of the judgments in both Belsner and Karatysz, the Court of Appeal made it absolutely clear that the Solicitors Act needs reconsidering and needs amending or just completely reworking. That has been said for quite some time by judges in the SCCO. Whether this government or the next government is going to have the time or the inclination to get involved in the Solicitors Act and a complete rewriting of it remains to be seen.

They ought to because it is wholly illogical, it doesn't fit in with all the new Portals they want to introduce with regard to all sorts of claims and it's not fit for current purpose. Although it's the Solicitors Act 1974, 1974 believe it or not is 48 years ago but the Solicitors Act itself was simply a repeat of earlier Solicitors Acts so it goes back hundreds of years and a lot of it really hasn't changed in that period of time.

JMKC:

I suppose one risk of this decision is that if the [Ministry] of Justice took the hint and said we do need to do something about reforming the Solicitors Act, there might be a whole carve out of lower value bills, 'trivial' in the view of the Master of the Rolls and say, well they can be dealt with by the Ombudsman. In fact, a whole lot of stuff might be referred to the Ombudsman under new powers which would possibly be problematic for the reasons we've discussed.

AE:

I'm not sure I've ever really got to the bottom of a chicken and egg argument that has come up a few times on detailed assessment between the parties, which is that if there's a prospect of a solicitor client maybe challenging what they don't like about their solicitor's fees, haven't they got to get rid of all that before you have a between the inter partes assessment? Really the client wants to say, I'll say that I'm liable for it just to get us over the line of having the detailed assessment and I'll make my mind up afterwards as to whether I'm going to have a go.

PJKKC:

I agree Andy. I suspect Jeremy has, but I've never really had to argue that because if the indemnity principle bites, which of course it does, what does happen on a solicitor and client assessment where subsequently the costs are assessed at a lower amount than the amount you even recover.

JMKC:

I've had that discussion for sure.

PJKKC:

I've had the discussion. I've never actually had the argument, but one day someone's going to have that and there'll be a problem.

AE:

You can have it separately about elements of success fees now that are not recoverable, that's irrelevant to inter partes assessments now isn't it.

PJKKC:

Interestingly just going back to Belsner, at the end of the case, the Court of Appeal decided that the bill in any event had originally been assessed on the wrong basis because it had been assessed as if it was contentious business whereas in fact it was non-contentious business. The Master of the Rolls then proceeded in his judgment to do an assessment of the bill which, funnily enough, came out at the amount the solicitors had received. He assessed the bill at £500 being the recoverable costs but assessed the success fee, again, based on the larger amount. We weren't going to go off to the Supreme Court seeking to challenge the Master of the Roll's summary assessment of those costs, but it does seem to me there's a certain illogicality there.

JMKC:

I suppose he was acting as the Ombudsman.

PJKKC:

Well, he was probably in the light of the judgment doing the right thing but whether it's susceptible to criticism is another thing.

AE:

It struck me, and it's only speculation on my part, that the reason that the solicitors didn't pin their CFA on CFAL lite system or matrix was to keep their options open about the success fee. They want to find a way of keeping their options open to make sure that they can at least get 25% of the damages.

PJKKC:

Certain cynical people might think that under some of these CFAs, that the particular hourly rates etc. are such that whatever the outcome of the case and whatever stage it

settles at, that the solicitors will always, as a matter of course, receive 25% of the general damages and past specials and the success fee will be capped at that, but it will always be that.

You almost have, in a sense a disguised DBA. Effectively the model of a lot of Claimant's solicitors for these small claims is that they will limit their costs to, in effect, what is recovered from the other side including disbursements plus 25% of damages calculated by reference to a success fee based upon hourly rates etc. etc.

"... the Supreme Court is about to consider whether a third party funding agreement is in fact an unlawful DBA."

JMKC:

Having raised the spectre of DBAs perhaps we should move on. Belsner is a very important case and hopefully we've demonstrated to the wider audience the importance of it in general terms, but the Supreme Court is about to consider whether a third party funding agreement is in fact an unlawful DBA. Can you tell us anything about that?

PJKKC:

I can tell you a bit about it. I'm actually in it...

JMKC:

Oh, that's a help.

PJKKC:

[43:08] Hopefully I know a bit about it. This is going from one extreme to another in terms of size of case. This is a multi, multi, multi million pound claim in the Competition Appeal Tribunal so hundreds of millions of pounds of claim as opposed to a £1,000 personal injury claim.

Some of you may be aware that in the Competition Appeal Tribunal in order to get appointed as the representative for a group action, you have to show that you've got sufficient resources to pay your own costs

and that you've got sufficient resources to pay adverse costs if you're ordered to pay them. In this particular case I'm for a number of buyers and hirers of trucks who are bringing claims against truck manufacturers for an alleged cartel with regard to the prices at which the trucks are sold. One of the truck companies has taken the point, not the others but one of them - it's Hacker which is in fact DAF trucks which you'll probably be familiar with from driving up and down the motorway - that the Claimants who are funded through a third party funding agreement with one of the well-known third party funders (a member of ALF, the Association of Litigation Funders), that a third party funding agreement is in fact a damages based agreement. The argument is that when one looks at the definition of litigation services, it includes the provision of financial assistance in relation to the making of a claim. The third-party funder, we will accept in front of the Supreme Court, is obviously providing financial assistance in relation to the bringing of a claim. Hacker says, well in which case you fall fairly and squarely within the definition of litigation services and you fall fairly and squarely within the definition that is therefore covered by the damages based agreement regulations.

"... the definition of litigation services ... includes the provision of financial assistance in relation to the making of a claim."

If that's the case then the evidence on behalf of the Association of the Litigation funders is that all litigation funding agreements by the major players for the last 15 years have all been contrary to the DBA regs and would all fall within the definition of a DBA. The impact of that on current litigation, not only in the Competition Appeal Tribunal but large commercial litigation would be extraordinary because it would suddenly be found that the litigation funding agreements were unlawful and unenforceable.

"If that's the case ... all litigation funding agreements by the major players for the last 15 years have all been contrary to the DBA regs..."

What do you do about that litigation that's already completed where the clients have paid 30/40% to the funder under an agreement which it would turn out was unenforceable. The argument was rejected by the Competition Appeal Tribunal and Mr Justice Roth was the chair of that. It was then rejected by the Divisional Court which was also sitting as the Court of Appeal if necessary because there was an issue about the jurisdiction to hear an appeal on this point from the Competition Appeal Tribunal. They decided they didn't have jurisdiction as the Court of Appeal but could deal with it as the Divisional Court. They then gave a leapfrog certificate to go straight to the Supreme Court. The Supreme Court didn't give permission for the leapfrog. The Supreme Court then took about 13 months to decide that it would give permission for the appeal.

The appeal's going to be heard on the 16 February 2023 and the Association of Litigation Funders are intervening. Which, the consumers association are wanting to intervene just in writing. Professor Mulheron is wanting to intervene in writing because she and Nick Bacon KC, who you'll be very familiar with, drafted proposed amended DBA regulations which in fact sought to put this argument to bed. It had been recognised that this argument could be raised albeit that she and other commentators had described the argument as hopeless but the proposed amended DBA regs would have meant that it was completely unarguable. The only trouble is, going back to the point we were talking earlier about amending the Solicitors Act, the Ministry of Justice hasn't taken up these draft amended regulations which came out, I think, in October 2019. They still sit there and indeed the indications are that they're not going to introduce them.

JMKC:

When the DBA regs were in draft it occurred to me that there was this possible argument, and you could sort it by clearer wording. Representations were made, I shan't say who by, to the Ministry of Justice to amend the regulations before they were even made

into law to get rid of that potential argument. They were ignored, absolutely.

PJKKC:

So now there are hundreds and hundreds of millions of pounds worth of funding out there in relation to current claims and goodness knows how many hundreds of millions of pounds in relation to already determined claims which is possibly all being done pursuant to unenforceable agreements.

JMKC:

They might need a new concept like they have in European law of an appellate decision which only takes effect in relation to the case before it and maybe future cases but isn't backdated. That would be novel in English law but otherwise the skies will fall in won't they.

PJKKC:

No pressure there on that, guys. I'll be sleeping well on the night of the 15 February. Maybe I'll go out for a belated Valentine's Day. That's going to be very interesting and the appellant's written statement of case is due on, of all days, the 22 December. That then gives us a great Christmas and New Year to consider it before we have to respond to it. We have been given a further seven days, so we haven't got to do it by 5 January which is what we were originally required to do. We've just got to do it by the 12 January, so no problem.

JMKC:

People always feel that whatever time they're given, that ruins your Christmas anyway, even with another seven days doesn't it.

PJKKC:

In fairness we know what their arguments are going to be, so at the moment we're drafting bits of our written case. Hopefully it will be a bit of a cut and paste job over Christmas.

JMKC:

That will be a fascinating decision, it really will. Moving on, the final point as we contemplate the legal horizon is, are the days of detailed assessments numbered? They might be if Lord Justice Birss has anything to do with it.

PJKKC:

Jeremy, you and I have been doing costs for quite a long time and you were obviously the godfather of the law in relation to costs and the costs bar, very much so.

"... are the days of detailed assessments numbered?"

There was a time when you could see in authorities, references to barristers arguing about costs as if it was a bit of poo on the bottom of your shoe and really shouldn't be something that the Bar should be concerning itself with.

My concern is, are we moving again to a situation where we really don't want to be troubled with these things about costs. Costs is not something that the Bar should be doing. Costs is not something which should be taking up the Court's time and yet at the end of the case, a client who has incurred x thousand pounds of costs is going to want to try and recover as much of that x thousand as they can. They will understandably feel that justice is not done if they get x thousand divided by four, i.e. a quarter of x thousand, after all the dispute may have been for less than that.

"Costs is not something which should be taking up the Court's time"

Obviously I accept that costs often run away in terms of the size. Obviously I accept that clients need to have some greater idea about what it's going to cost them, but my concern is that we may be moving again to a situation where the Courts are saying, sort out your costs somewhere else and don't darken our doors with these highfaluting arguments about costs and what they should be and

what technical arguments there should be in relation to them.

"... in so many cases the costs are at least as much and very often more than the value of the underlying subject matter in a case. You cannot just relegate that amount of money ... to five minutes at the end of a trial."

JMKC:

I completely agree. This is where Rupert Jackson was really good. He nailed this point and said – in so many cases the costs are at least as much and very often more than the value of the underlying subject matter in a case. You cannot just relegate that amount of money, that proportion if you like, of the value of a case to five minutes at the end of a trial. If you then say, we'll make it ten minutes and we'll summarily assess the costs in those extra five minutes, you are not doing justice to anybody because you are removing any element of certainty that there is in the current position.

AE:

With all the caveats that we're only seeing a few selective quotes, I wasn't at the conference he spoke at. Nevertheless, the idea that he hasn't spoken to anybody who's given him a really good reason for why it should stay as it is, or the difference between budgets and estimates and why there really is a difference, I wonder who he's been speaking to really? The one that sprang out at me is that you're going back to arguments about whether there should be summary assessment as opposed to detailed assessment on the assumption that all cases end in a trial and that there's going to be a judge at the end of it who's heard everything and is going to be able to make a decision. The vast majority of cases don't finish that way.

I may be wrong on this, but the idea that you could just use the costs estimate that you give to your client as the costs budget for the case. Normally [estimates] happen a lot earlier than they're required to for the purposes of budgeting. I'm not saying status quo, he seemed to be training his sights quite

a bit on the costs of detailed assessment of costs.

PJKKC:

But it's such a small number of cases. How many times have the three of us been at detailed assessment where a solicitor, a well experienced solicitor will say "I've got to tell you PJ, this is the first detailed assessment I've ever had."

I've had that on a number of occasions from partners in city firms. I don't criticise them for that, I congratulate them for that because they sort out the costs. The detailed assessment cases are few and far between in terms of the number of cases that have concluded.

So I don't know where we're going.

"If you're a barrister representing your client you should know about costs and you should at the very least know the basics."

JMKC:

He raised this in front of the [Association of Costs Lawyers], I think it was, but he didn't have the nerve to raise it at Practico's breakfast meeting where he was a guest because he knew that that was a weighty audience that would have shot him down.

AE:

He just said he was already getting some stick for ex barristers making decisions about costs when they don't really know anything about it.

PJKKC:

This is an old point and it still really gets me, which is that back in the day a lot of barristers would say "Oh I don't know anything about costs" as if that was something to be proud of.

Well no. If you're a barrister representing your client you should know about costs and you should at the very least know the basics.

It's almost as if some of the current judiciary are from that stable and said "well I don't really know anything about costs. Costs is not something that I ever deal with" and therefore haven't liked costs budgeting and now don't like the thought that the costs have to be assessed by some means or other.

AE:

It's moved down. Years ago the Supreme Court said, we don't really want to be dealing with costs, the Court of Appeal is the place to deal with that. Now the Court of Appeal is saying we don't want it either, it should be somewhere else. Really, you know, where does it go?

JMKC:

The Ombudsman.

AE:

I don't want to loop back to that particularly.

I think it's unfortunate. All around I'm sure some people will be trying to look for their very smallest violins, you know, if they're going to be worrying about our future, I understand all of that. Nevertheless, why don't they just accept that a lot of this is to do with the squeeze on judicial resource and this is just a part of that and it's horrendous. Not only is there a big difference between the standard of access to justice you get in the Rolls Building compared to the local County Court and we've discussed that on previous editions of this discussion as well, but the snobbishness aspect of it, that it's a bit gauche to be talking about money, seems to me to be just completely wrong and I don't think that that's a very modern view either.

"People are getting on with resolving their disputes about costs in the commercial world in a proportionate way because the ultimate clients have got no interest in spending money on matters of principle at all."

PJKKC:

I can understand bringing in more fixed costs for certain levels of cases. I can understand

that and for larger cases I would have thought budgeting has actually helped with regard to dealing with costs at the end of the case. Obviously that was intended and I would have thought that to a reasonable extent it has. A lot of judges have not enjoyed doing costs budgeting, but you won't find many cases in the SCCO or anywhere else where parties have been particularly successful in saying that there should be a departure from the costs budget.

AE:

Exactly, you've only got to look at the number of detailed assessments that settle before they get to court as well. People are getting on with resolving their disputes about costs in the commercial world in a proportionate way because the ultimate clients have got no interest in spending money on matters of principle at all.

PJKKC:

In large corporate commercial disputes, the solicitors undoubtedly resolve the costs without it going to detailed assessment.

JMKC:

I think we can sum this up by saying - Lord Justice Birss, it may be some time before you get invited back for a bacon sandwich at Practico's breakfast meetings.

AE:

He may be invited back to be cross examined, but we'll see.

We can't finish without one thing Jeremy.

I've heard that you had a very pleasant day out the other day, so tell us all about it and as with some football managers, show us your medals.

JMKC:

The medal is in the safe because it's so valuable. Just for those who are remotely interested in this, it's a great time to switch off for most of you. I got an MBE for the

campaign that we fought for British citizens in Europe and European citizens in Britain after Brexit to try and conserve our rights. It probably suggests that we did a lousy job because we didn't upset the government enough so they gave us MBEs and some of the others OBEs - we can't have fought very hard. I think we take it the other way which is at that we had a very effective campaign and we engaged at the right level and used the right degree of assertiveness, but not going over the top to try and get the rights we did. It was a fascinating campaign and, I think, really important and there are still issues arising - as I told the king.

AE:

I'm sure he was interested. I take it you're not allowed to talk about your discussion with the king, are you?

JMKC:

I've got a wonderful picture of me gesticulating, I live in Italy now so the hands come into these things, but it was a lovely day. PJ, it's just like taking silk, everyone's nice to you. It's not often that everyone's nice to you in your life but everyone is and I was not alone. There were 90 people getting awards the same day including Emma Raducanu. I was really upset not to have seen her, but there you go.

PJKKC:

Congratulations Jeremy, well deserved.

JMKC:

Thank you very much.

On that last note, that's the last of these chats for this year.

AE:

It will be.

JMKC:

I hope everyone has a good Christmas break – apart from PJ of course who will be deep in submissions for the Supreme Court – but we wish you all very well and see you again next year.

PJKKC:

Thank you.

AE:

Thank you very much indeed.

ENDS



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