Complete Counsel

Newsletter | **June 2020**

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June 2020
An Update from Complete Counsel

Claire Labio Practice Director

Hi Everyone,

Some of you will know that about 4 years ago I completed the CEDR mediation course alongside Charles Feeny and Professor Gus Baker before creating Complete Mediation.

It is interesting that mediation providers operate in a flexible and collaborative way as opposed to the rigidity which is shown by some law firms and chambers. Mediation is in itself flexible and this is reflected in the way it is provided. More on this in our news items below.

Meanwhile, we are continuing to grow the Barrister Practice Management business which is also a flexible model I have spoken on social media and previous newsletters during lockdown about how Chambers and Barristers had to adapt quickly to everyone working digitally, something which we have of course been doing for 5 years now. There is no requirement to have expensive buildings, a huge buy in or capital commitment. We offer 24hr service with support from experienced clerks including practice management and fee collection. Charging is also flexible with an unbundled option or a simple percentage of fees received starting at 10%. So if any lawyers reading this have Barrister friends who may have come to the realisation over this period that it is time for change, then please pass this newsletter on to and encourage them to email me for a confidential discussion.

We have re-named our annual 'Dog Day' drinks this year to 'Le Jour d'Apres' which is how President Macron has described the return to semi-normality. Date yet to be fixed given the bars are not yet open (!) and our desire to support social distancing, but rest assured that we cannot wait to see you all.

Claire

Will the Bar be different on Le Jour d'Apres ?

Charles Feeny Barrister

Le Jour d'Apres is President Macron's label for the inevitable change that he at least perceives as being necessary in the wake of the Coronavirus crisis. In the United Kingdom, mention has been made of the effects of the Second World War and how society emerged changed from it. However, this analogy is unrealistic. The war lasted six years and affected most people's lives in a profound way. It followed a decade of recession and hardship. If all that did not cause change, probably nothing would.

By contrast, the Coronavirus crisis will affect a much smaller group of people in a profound way, and only most in terms of anxiety or boredom. The prevalent reactions appear to focus on self-preservation and speculation as to when life will return to normal. There appears to be a sense of mutual congratulation in having the ability to adapt to the Lockdown . The anticipation is a return to normal . However, in reality, the position is best summarised by a piece of graffiti seen in Hong Kong:

"There can be no return to normal because normal was the problem in the first place."

The response of the Bar, both at national and circuit level, appears to centre on a perception of an acute crisis In fairness, those involved could say that they have been at the fire-fighting stage and that more reflection will follow. However, this seems unlikely. Commenting on a survey of the Bar which indicated that 55% of Chambers could not survive for more than six months and 81% more than 12 months, without financial aid, the Bar Council said:

"The survival of Chambers is integral to ensuring access to justice. Financial support is required if the collapse of Chambers is to be avoided."

The premise of this statement appears to be an unquestionable assumption as to the value of the Chambers structure in its current form as a way of operating for the Bar. It reflects a prevalent attitude in a society that has failed to modernise. In my lifetime, UK society has ghost-walked from post-imperialism to multiculturalism without seemingly taking any time to establish where we're up to – and, more importantly, where we want to go. The institution of Chambers seems to have walked this path.

When I started at the Bar, chambers operated in a way that reflected the perceptions and views of their members, most of whom were middle class privately educated men. The ethos was really a mixture of a regiment and a gentlemen's club with a strong element of the class system operating in terms of relationships with employees. There were some positive features , including a genuine collegiate atmosphere, and a requirement of mutual respect amongst members of chambers.

Chambers have had to address change, but this has occurred in a piecemeal or bolt-on way. Gus Baker, Sam Irving and I have recently been published in the Journal of Patient Safety and Risk Management in our article "Medical accidents: a Socratic resolution?" We argue that the response to medical accidents has reflected a similar piecemeal approach without overview, which is clearly needed now. The similarities with the legal profession are clear.

Perhaps the best example of the way that Chambers have failed to address change sufficiently is in their approach to IT. Whilst Chambers have inevitably come to use IT in their business systems, they have done so without taking advantage of the changes in working methods

Charles Feeny Barrister

that this would facilitate. Rather, the IT is operated by the clerks, with the barristers generally being judged either too important or too eccentric to be trusted with this operation. This creates unnecessary expenditure and staff requirement, with a knock-on need for management to supervise these unnecessary employees.

Chambers have not changed to the extent that they still profess a collegiate approach. On this basis, all members need to be provided with work, even if they are under-performing and do little or nothing to promote their practices. This problem is compounded by chambers seemingly uniquely for a supposedly commercial operation, recruiting without any reference to workload. The net effect is that most chambers contain a significant number of under-employed barristers whose discontent often exhausts management resources. The need to provide work often results in chambers focusing their marketing on undercutting in relation to volume work.

Even before the Lockdown most barristers were in practical terms already working remotely resulting in most chambers occupy manifestly excessive space at significant cost.

Chambers have engaged in marketing, most of which represented a disciplinary offence when I started. Because chambers are predominantly inwardly focused as businesses, this has produced essentially spin. Many chambers now seem to make the cardinal mistake of believing their own propaganda and deeming themselves excellent in all respects.

In saying all this, I know that there are many chambers which are at least reasonably functional, that many barristers feel positively about their chambers, and that most will want to operate in some form of collective model. My issue relates to the unquestioned assumption that the continuation of chambers in their present form should be seen as the norm, or even as necessity. The mutual congratulation about adapting to the crisis is ironic because all that most barristers are doing is embracing working methods that they could have used up to 20 years ago. The question they need to ask themselves after the lockdown is over is why they should not continue, at least substantially, with these adapted working methods.

When Claire Labio and I set up Complete Counsel over five years ago it was, as would be anticipated, derided by many in conventional chambers with predictions that it would only last six months. We have shown that this model can operate in a way which enables individual barristers to be supported effectively and indeed thrive. The service is low-cost, but targets resources in a way that most effectively supports the barrister's practice. The model is, to quote an over-used phrase, lean and agile and operates in conjunction with similar digital businesses. There is flexibility in staffing and work methods with significant outsourcing. Whilst the current crisis represents a challenge, we are confident of our ability to come through it. A robust and independent bar is going to be needed more than ever in Le Jour d'Apres . There are undoubtedly challenging times ahead when individual rights in particular of the most vulnerable will need protecting . The barristers. who will rise to this challenge will need to be supported in the most effective way .

Further reading:
Medical accidents: A Socratic resolution?

Click here

The decision in Alred v Cham: more than meets the eye

Charles Austin Barrister

The Supreme Court recently refused permission to appeal in Alred v Cham [2019] EWCA Civ 1780. The Court of Appeal held that counsel's advice on quantum is not a particular feature of the case despite the advice being required under CPR Part 21. This was a blow to many claimant lawyers. The number of cases is staggering. Coulson LJ explained that over 6 million cases have proceeded through the RTA Pre-Action Protocol since its inception with over 50% of those claims being considered under Part IIIA.

Whilst the initial post-mortem has focused on the inability to recover outstanding fees moving forward, the decision has raised a more significant question: recovery of costs paid when they ought not to have been. The Supreme Court's recommendation that the Civil Procedure Rules Committee look into this issue may result in the former being addressed but it will not resolve the latter. This piece will consider the possibility of defendant insurers recovering previously paid counsels' opinions.

The scenario which has arisen due to the decision in Alred is simple. Defendant insurers have paid disbursements (either through agreement or court order) in which the rules did not necessitate payment. In allowing the disbursement, claimants, defendant insurers and the judiciary were mistaken as to the law. Does the law allow for recovery of this disbursement?

Mistake of law – Kleinwort Benson v Lincoln CC

The ability to recover sums paid following a change in the law was considered by the House of Lords in Kleinwort Benson v Lincoln CC [1999] 2 AC 349. The Law Lords abolished the previously held rule that a mistake of law did not permit restitution. The decision brought into sharp focus the long-held principle in English law that judges do not make law they simply declare what the law is (the declaratory theory). The principle operates by stipulating that when a court considers a matter and reverses a previous decision, or line of authority, it has in fact stated what the law always was. This will operate retrospectively.

The facts of Kleinwort Benson are well known. Briefly, the claimant bank had paid money to the defendant local authority pursuant to an interest rate swap transaction. The payment was made in the 1980s. In 1990 the House of Lords held that such transactions were ultra vires and therefore void. The claimant sought restitution. The central question before the House of Lords was whether the claimant could demonstrate that the money was paid as a result of mistake. The majority concluded that where a party relies upon a judicial decision to transfer money to another which is subsequently overruled this is sufficient to establish a mistake. Recovery of the money through restitution was therefore permissible.

Applying the principles derived from Kleinwort Benson to counsels' fees paid under CPR Part 45.29I, it would appear that there is a prima facie case for recovery by defendant insurers. Simply put, the money was transferred based upon an understanding of the rules which the Court of Appeal has disavowed. The decision in Alred v Cham will have retrospective effect. Therefore, since the rule came into force it was not the case that counsels' fees were recoverable simply because Part 21 required such an advice.

Who received the benefit of payment?

If there has been an actionable mistake the court must consider who has benefited from the payment of counsel's fee; the individual litigant or firm of solicitors? This is a complex question when applied to the counsels' fees against the backdrop of a CFA. Clearly the litigant has benefited as the disbursement has been erroneously paid. The indemnity principle stipulates that the costs are the liability of the litigant. They alone are responsible for the same but can seek an indemnity from the unsuccessful party.

Arguably, it can be said that the solicitors benefited as had the disbursement not been recovered they would, presumably, have covered the cost given the requirement for an advice under Part 21. This can be characterised as a negative enrichment which is capable of founding a claim in unjust enrichment (Craven-Ellis v Canons Ltd [1936] 2

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KB 403). The net result is that the firm has avoided a cost they otherwise would have incurred.

Whilst it can be said that the firm of solicitors received a negative benefit that is not enough to compel repayment. There must be a causal connection between receipt of the benefit and detriment to the insurer. This is especially important given the indemnity principle. If the benefit is considered to be the individual litigant's then any enrichment to the solicitor can only be indirect. Indirect benefit is permissible but it is tightly controlled by the courts. The Supreme Court made it clear in Investment Trust Companies v HMRC [2017] UKSC 29 that an incidental or collateral benefit would not suffice. The court did recognise that there would be situations where an indirect benefit could be recoverable:

'There are, however, situations in which the parties have not dealt directly with one another, or with one another's property, but in which the defendant has nevertheless received a benefit from the claimant, and the claimant has incurred a loss through the provision of that benefit. These are generally situations in which the difference from the direct provision of a benefit by the claimant to the defendant is more apparent than real.'

It is arguable that a retainer based upon a CFA satisfies this test. The economic reality is that the solicitor would have paid counsel's fee as it is required for approval. There is a close causal connection between payment by the insurer and enrichment by the solicitors. The argument that the costs are really the individual litigant's is a legal fiction in this regard.

Change of position

Assuming the defendant insurer succeeded in persuading a court as to the basis of the claim (against either the firm of solicitors or individual litigant) a robust defence of change of position would be put forward. The basis of the change of position defence is rooted in equity and what is considered unconscionable. Notwithstanding the broad basis of the defence two criterion must be satisfied. First, it is necessary to demonstrate a causative link between receipt of the benefit and the change of position. Second, that the position has changed in circumstances in which restitution would be inequitable.

The defending party may face difficulty demonstrating that they have in fact changed their position. For example, consider the case of Scottish Equitable plc v Derby [2001] 3 All ER 818 where the claimant received an additional £11,000 per year on his pension than he was entitled to by virtue of a mistake. The claimant used the additional money received to reduce his mortgage. Given that the benefit was used to discharge a specifically incurred disbursement, it is difficult to demonstrate how it was used to change their position. It is more likely the court would focus on the perceived fairness of ordering restitution.

Is seeking a return practical?

Separate to the substantive legal issues at play, the practical consideration of revisiting an order of the court must be addressed. This, again, is a complex question and must be considered against the principle of finality of litigation. The courts are reluctant to reopen matters that have been concluded. In seeking to recover the disbursement, the defendant insurer could rely upon the court's power to vary or revoke an order under CPR 3.1(7). Rix LJ reviewed the relevant jurisprudence in Tibbles v SIG Plc [2012] EWCA Civ 518 and summarised the instances where such an order court be sought:

'The jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.

…there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the

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circumstances of each case.'

Mistake of the legal position arguably could satisfy this test. An interesting question is whether there has been a material change of circumstances? The declaratory theory stipulates that the law has not changed. However, this is a legal fiction and it is clear all parties involved have materially altered their approach to the law.

A stronger argument would be that an innocent representation was made as to the legal position. The fact that it is a cost order which is subject to challenge presents no unique difficulty and was allowed in the case of Latimer Management Consultants Ltd v Ellingham Investments Ltd [2006] EWHC 3662 (Ch).

A further feature of any application to set aside is delay. This is fundamentally important to any application. No hard and fast rules can be given on what amounts to a delay and it will always depend on the individual case. The significant point is that the delay can only, reasonably, be said to run from when the Supreme Court refused permission to appeal.

In seeking to set aside the court order defendant insurers would face considerable difficulty. Whilst, in theory, an argument could be put forward that satisfied CPR 3.1(7) and Tibbles this must be viewed against the backdrop of finality of litigation and the public policy reasons in not allowing historic orders to be set aside.

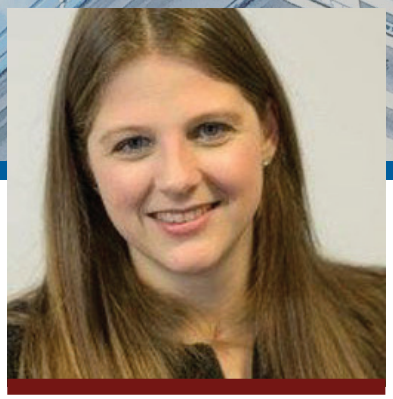
Concluding thoughts

Whether the decision in Alred has led to a situation where defendant insurers can recover counsels' fees has yet to be answered. What is clear is that an actionable mistake was made and that is capable of forming the basis of a claim for restitution.

There is an obvious advantage in pursuing firms of solicitors for counsels' fees. This is primarily the ease at which multiple fees could be recovered against individual firms. Any claim against solicitors must be considered risky not least because of the indemnity principle and the challenge of setting aside court orders.

A claim against individual litigants would have better prospects as it removes the obstacle presented by the indemnity principle. The economics of litigation would be brought into sharp focus as the action would most likely be disproportionately laborious for a sum of £150 plus VAT.

Ana Samuel joins the CEDR Commercial Panel



Ana Samuel Barrister

Complete Counsel Barrister, Ana Samuel has now joined the CEDR Commercial Panel. She joins Charles Feeny and Tony Wilson who have practiced through CEDR for a while now. Ana, also Assistant Coroner for Birmingham, is already a Mediator with Complete Mediation.

The move coincides with the renewal of the CEDR contract with NHS Resolution to provide mediation services. This contract has been renewed for three years. Over 400 cases were mediated in the year 2019/2020 and the intention of NHS Resolution is to refer even more cases to mediation. This has created the need for a larger panel of Mediators, in particular with experience in clinical negligence.

We looked at the NHS Resolution tender, but the level of national commitment we felt was too big a demand for us, particularly as a number of our Mediators have busy legal practices. Charles has been a Mediator with CEDR since 2017 and has enjoyed working with them, in particular having the benefit of their training and networking events.

Ana has considerable experience in clinical negligence as a litigator and Tony was for a number of years Senior Partner of Hill Dickinson, a major insurance practice, with a particular interest in professional negligence.

Ana said:

'I am delighted to join the CEDR Commercial panel and welcome the recent news that NHS Resolution has renewed the mediation contact with them.

As a Barrister representing both Claimants and Defendants I have had first-hand experience of the invaluable opportunity that mediation presents in the context of dispute resolution. The process, whilst resolving litigation, is also seen as a therapeutic process allowing parties to move forward post dispute. The ability to be in control of the process, as opposed to having a decision imposed by the Courts, is not to be underestimated. My experience both as a practising Barrister in this field, together with my role as Assistant Coroner hopefully provides reassurance to parties that the mediation is in safe hands.'

Complete Mediation

Do you have a dispute which could be resolved through mediation?

We will be conducting our mediations throughout this period using the Zoom platform. Learn more about our mediators at completemediation.co.uk

The lockdown represents an opportunity to try and develop online mediation. Early results are encouraging. It has been observed that they have a distinct advantage for vulnerable parties who can participate in a familiar and secure setting and are able to disengage when they want. The reduced activity is a window for referring long standing disputes to mediation.

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