

HXA and YXA failure to remove cases: Key considerations in anticipation of the Supreme Court judgment

15 March 2023

Most stakeholders will now be aware that the Supreme Court has granted permission to appeal in failure to remove cases [YXA v Wolverhampton City Council and HXA v Surrey County Council](#). The Appeals will be heard in the autumn of 2023 with judgment likely not out until the spring of the following year.

That's a further year's delay and raises important considerations around witnesses and limitation moratoriums. The questions for most public bodies affected will be:

Whether the time has come to collect witness evidence?

In most failure to remove cases there is no care order and as matters currently stand it will be the account of social workers, who worked with the individuals and their families, that provides the factual detail required to analyse both whether a duty of care was owed and whether that duty was breached. You may wish to consider whether it is appropriate to prioritise the collection of written evidence now so that if your cases go to trial, you have not lost the accounts of social workers and practitioners, particularly as [reports](#) estimate that 67% are considering leaving the profession.

Whether the claimant's solicitors who now, less confident about their prospects of success, want to accept Part 36 offers which may be now several years out of time

We have seen many raising arguments that the usual costs consequences of late acceptance ought not to apply. Their argument is frequently that it would be unjust to make just for the usual late acceptance of Part 36 offer costs consequences fall against infant claimants who have the benefit of Legal Aid funding. So far those arguments have not been tested, but last month also brought another factor to the table – the amendment of CPR 44.14.

Amendments to the Civil Procedure Rules (CPR) will come into force from 6 April 2023. CPR Rule 44.14 (effect of qualified one-way costs shifting) will be amended to allow the court to order that the parties' costs (not just damages) liabilities be set-off against each other. This raises the question as to whether claimant firms will be revisiting their position on risk, and potentially issuing claim forms before 6 April 2023 in order to avoid the impact of this rule change.

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