

An equitable solution

Andrew Hogan examines how beneficiaries can challenge solicitor's fees

More than a decade ago, *The Guardian* estimated that in 2009, high street banks and the solicitors' profession charged collectively £1.25bn a year in fees for dealing with the administration of estates through the grant of probate or letters of administration. Nominating a bank as an executor in a will is a very expensive option, as it can lead to charges as high as 4% of the value of an estate.

But solicitors' charges can also be high relative to the value of an estate; and in particular, a problem that has emerged in the case law is the apparent lack of an effective remedy for the beneficiaries of the estate, to challenge the reasonableness of a solicitor's charges. The problem is particularly acute where a will nominates a solicitor to act as an executor, and she then appoints her own firm to undertake the administration.

Probate is the term applied to the process of dealing with someone's property after their death. It involves proving a will, gathering in property, and perhaps having it valued, paying the estate's debts including taxes, and then distributing the value of the estate either according to the terms of the will, or in accordance with the laws of intestacy, if someone died without a will.

Let me consider first the position where a will does not name the solicitor as an executor, but she is appointed by the executor to undertake the work of administering the estate.

If the executor then finds that the solicitor's fees start to mount alarmingly, there should be a clear route to challenge the reasonableness of those fees. The starting point is to consider what agreement has been reached in relation to the solicitor's fees by the executors or administrators of the deceased's estate.

Solicitors undertake both contentious and non-contentious work. But a theme of the last 20 years, with the move to ever-increasing specialisation within the solicitors' profession, is that many solicitors will never have undertaken contentious work, and vice-versa.

The difference matters, because there are separate legal rules governing how solicitors can charge depending on whether work is classed on contentious or non-contentious work. Section 87 of the Solicitors Act 1974 defines the two areas of work in these terms: "Contentious business" means business done, whether as a solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator, not being business which falls within the definition of non-contentious or common form probate business contained in section 128 of the Senior Courts Act 1981... "non-contentious business" means any business done as a solicitor which is not contentious business as defined by this subsection.'

Probate work (for the most part) will be non-contentious work.

A contract of retainer for non-contentious business to be carried out may be a simple retainer, or it may be a non-contentious business agreement. Satisfaction of the requirements of section 57 of the Solicitors Act 1974 will serve to create a non-contentious business agreement.

It should be noted that sometimes a non-contentious business agreement is created accidentally: a client care letter signed by the client may suffice. Where a simple retainer has been made, or indeed is implied, which does not specify the amount or basis of the solicitor's remuneration, the Solicitors (Non Contentious Business) Remuneration Order 2009 implies a set of criteria for establishing the reasonable charges of a solicitor. Article 3 expressly allows a solicitor's charges to be related to the amount of any money or value of any

property involved.

In the case of *Jemma Trust Co Ltd v Liptrott and others* [2004] 1 WLR 646, the Court of Appeal established a set of principles for the basis of solicitors' charges in probate matters, and which may be of more general application for devising fair and reasonable charging structures for non-contentious work undertaken by solicitors.

In this case, the solicitors had sent to their client bills claiming time spent, and also a separate bill seeking costs calculated by reference to the value of the estate on a percentage basis.

The principles set out at paragraph 33 of the judgment of Longmore LJ were as follows:

'(1) Much the best practice is for a solicitor to obtain prior agreement as to the basis of his charges, not only from the executors but also, where appropriate, from any residuary beneficiary who is an entitled third party under the 1994 Order. This is encouraged in the 1995 booklet and letter 8 of appendix 2 to the 1999 booklet provides a good working draft of such agreement. We support that encouragement.

'(2) In any complicated administration, it will be prudent for solicitors to provide in their terms of retainer for interim bills to be rendered for payment on account; this is of course, subject to the solicitor's obligation to review the matter as a whole at the end of the business so as to ensure that he has claimed no more than is fair and reasonable, taking into account the factors set out in the 1994 Order.

'(3) There should be no hard and fast rule that charges cannot be made separately by reference to the value of the estate; value can, by contrast, be taken into account as part of the hourly rate; value can also be taken into account partly in one way and partly in the other. What is important is that (a) it should be transparent on the face of the bill how value is being taken into account; and (b) in no case should it be taken into account more than once.

'(4) In many cases, if a charge is separately made by reference to the value of the estate, it should usually be on a regressive scale. The bands and percentages will be for the costs judge in each case; the suggestion to the costs judge set out in para 31 may be thought by him to be appropriate for this case but different bands and percentages will be appropriate for other cases and the figures set out in para 31 cannot be more than a guideline.

'(5) It may be helpful at the end of the business for the solicitor or, if there is an assessment, for the costs judge, when a separate element of the bill is based on the value of the estate, to calculate the number of hours that would notionally be taken to achieve the amount of the separate charge. That may help to determine whether overall the remuneration claimed or assessed is fair and reasonable within the terms of the 1994 Order.

'(6) It may also be helpful to consider that the Law Society's guidance in cases where there is no relevant and ascertainable value factor which is given in the 1995 booklet at para 13.4. If the time spent on the matter is costed out at the solicitors' expense rate (which should be readily ascertainable from the solicitors' expense of time calculations), the difference between that sum (the cost to the solicitor of the time spent on the matter) and the final figure claimed will represent the markup. The markup (which should take into account the factors specified in the 1994 Order including value) when added to the cost of the time spent must then be judged by reference to the requirement that this total figure must represent "such sum as may be fair and reasonable to both solicitor and entitled person".'



It should be noted that some commentators might take the view that the Court of Appeal decision shows a degree of benevolence to solicitors when rendering bills where their fees have not been expressly agreed, which sits uneasily with the obligations in the Solicitors Code of Conduct in the year 2020.

In cases where there is a dispute about the amount of a solicitor's costs, whether in terms of the time spent on the case or the value element, an application to court can be made for a solicitor-own client assessment under the Solicitors Act 1974, though the terms of any assessment may be limited in accordance with section 57 of that Act.

Alternatively, a complaint can be made to the Legal Ombudsman. The question of which route a client should pursue will of course depend on the nature of the complaint about the solicitors work and the amount of the costs in dispute.

SOLICITORS AS EXECUTORS

What of the situation where a solicitor is appointed in the will as executor? This can be quite common: it can be done for proper reasons, such as where there is family division or discord, and a testator wishes to be sure his dispositions are carried out in practice by a disinterested professional. A will may contain a clause similar to this: 'Any trustee being a solicitor or other person engaged in any profession may be so employed or act and shall be entitled to charge and be paid all professional or other charges for any business or act done by him or his firm in connection with the trusts hereof including acts which a trustee

could have done personally.'

It should be noted that no such clause will expressly permit the charging of 'unreasonable' charges. But the dangers to the interests of the beneficiaries created by such a clause are acute. A rapacious solicitor-executor acting as 'the client' will at first blush be able to charge what she likes when appointing her own firm to do the work.

Moreover, what should be the logical route of an assessment under section 71 of the Solicitors Act 1974 for a third party assessment will be rendered nugatory by the decision of the Court of Appeal in *Tim Martin Interiors Ltd v Akin Gump LLP* [2011] EWCA Civ 1574, which confirms that agreement by the client to the fees charged, largely trumps the rights of third parties to dispute them.

A more recent case, that of *Mussell v Patience* [2018] 4 WLR 57 may also seem to render nugatory the seeking of an account of the executors' fees, as the executor simply has to prove that the money was spent on fees relating to the administration, not that the fees were reasonable:

'16 In particular, the executor is not required at the outset to prove by his or her voucher(s) that the charge made is reasonably incurred or reasonable in amount. These are matters which may arise in the assessment of solicitors' costs, but they are not matters which arise – at least initially – in considering whether the executor may put the sum into the accounts.

'It is not necessary for the executor to defend the charges made by solicitors against the beneficiaries. That is what the system of assessment of solicitors' costs is for.

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‘As is well known, it is not only the direct client (here the executor) who may seek assessment of costs. In addition, third parties who in substance pay such costs may do so too. It would plainly be wasteful if, in every case, for their own protection, executors were to be obliged to engage the costs’ assessment system down to the last penny before being able to enter the sum concerned in their accounts to their beneficiaries.’

But it may well be that *Mussell v Patience* is wrongly decided or limited to its own particular facts, for a number of reasons. First it should be noted that the Court of Appeal in *Akin Gump* expressly contemplated that the taking of an account which considered the reasonableness of the charges in question was an apt solution where the administration of estates was concerned:

‘101 A claim for an account may be the right approach for several situations which can throw up this sort of problem, for example in the case of a trust or the administration of an estate.

‘In other cases that may not be the right approach, and it may be necessary to claim a declaration as to the amount properly due, especially if the amount claimed has had to be paid by the third party, no doubt under protest.’

Second, it should be noted that solicitors are fiduciaries, a point seemingly not in issue in *Mussell v Patience* and not discussed as that case was concerned with fees rendered to executors rather than executor / solicitors lining their own nests: solicitors will be clearly subject to fiduciary duties owed to the estate, as the deceased will have been their client and the fiduciary duties arise from the contract of retainer.

Moreover, both trustees and executors owe fiduciary duties to an estate. A solicitor executor may be wearing all three hats and may accordingly owe three sets of duties.

Going back to authorities such as *Nocton v Lord Ashburton* [1914] AC932, the House of Lords established a jurisdiction to scrutinise the actions of a solicitor who has a financial relationship with his client, and that the jurisdiction to give relief in equity arises because of the potential or actual conflict between the interests of the solicitor and the client.

In the case of *Mothew v Bristol and West Building Society* [1996] EWCA Civ 533, Millet LJ (as he then was) observed: ‘A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter, in circumstances which give rise to a relationship of trust and confidence.

‘The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.



‘This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

‘This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977 ed.p. 2), he is not subject to fiduciary obligations because he is a fiduciary; it is because he is

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subject to them that he is a fiduciary.’

The way in which a beneficiary may make a personal claim against a defaulting solicitor-executor for breach of fiduciary duty by levying unreasonable and excessive charges on the estate is, I would suggest, by an action for an equitable account. This is the route which the Court of Appeal clearly had in mind in the dicta in *Akin Gump* above: it is a claim for an equitable remedy, analogous to the court’s ancient power to fix the equity of redemption in a mortgage. On such an action the court has very broad powers to fashion an appropriate remedy, the most obvious one being to strike out or reduce charges claimed by a solicitor executor against the estate.

It follows that in my view, solicitors’ charges may be properly the subject of challenge in the same way that a mortgagee’s costs and charges can be challenged, but by an action for an equitable account, rather than under section 71 of the Solicitors Act 1974.

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