# Costs disputes with clients

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## By Andrew Hogan

Solicitor and own client assessments of a solicitor's fees under section 70 of the Solicitors Act 1974 used to be rare beasts. It used to be possible for solicitors to undertake their entire career, without suffering the indignity of a challenge to their fees by their own clients.

No more. Across a wide range of work solicitors are increasingly at risk of finding themselves in the Senior Courts Costs Office (SCCO) or a District Registry having to justify their fees because their (usually former) client will have made an application to court for an assessment of their charges.

An issue at the current time is the deduction of "success fees" from clients' damages in personal injury and clinical negligence claims: historically, solicitors used to content themselves with the costs recovered from insurance companies and the NHS.

But with the implementation of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012 charges are commonly made to clients, thus setting the scene for a conflict between solicitor and client over fees.

The rise in fee disputes is not limited to personal injury claims: there is noticeable uptick in solicitor-own client costs disputes across all areas of civil and family work.

In this short paper, I will consider some of the key issues for a solicitor to consider when she finds herself embroiled in a dispute with a client over fees.

### The starting point

A solicitor can go a long way to removing or limiting the scope for a dispute with a client, by ensuring that an appropriate retainer is put in place at the start of a matter and that there is complete transparency over the charges that a client

will be asked to pay, so that client understands what she will be charged and gives her informed consent to what she will be asked to pay.

The starting point is to consider the professional obligations which apply when advising a client about costs in relation to contemplated litigation. The current professional obligations are to be found in the SRA Standards and Regulations which came into effect on 25 November 2019, replacing the SRA Handbook. The key provisions which relate to costs matters have been substantially slimmed down from the predecessor provisions to the following obligations:

*8.6 You give clients information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.*

*8.7 You ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred.*

It will be noted that the use of the words "best possible" imposes an onerous obligation upon a solicitor, and one which applies both at the time of initial instruction and one which must also be complied with throughout the case.

As foreshadowed above, the key points that must be addressed with the client are transparency and certainty, in the way that fees are calculated and charged, the likely disbursements and their amounts and the overall costs.

Any advice that is given should be recorded in writing and will be reflected in the creation of the retainer: the contract for services that governs the relationship between solicitor and client.

## The retainer

It is the retainer which governs how charges may be calculated and billed to the client. All retainers should be written retainers, and in most cases the retainer will be a privately paid retainer set out in a client care letter or a conditional fee agreement supplemented by a client care letter.

The content and drafting of these documents should be carefully thought about. Client care letters often perform a hybrid role of containing both advice and

contractual obligations. It can be sensible, to separate out the detailed terms and conditions into a separate document for ease of reference.

A conditional fee agreement must be set out in writing as a statutory requirement, and the obligations imposed by the Courts and Legal Services Act 1990 and the Conditional Fee Agreements Order 2013 must be scrupulously complied with.

As is well known these documents impose limits on how much by way of success fee can be charged to a client.

This retainer documentation and/or client care letter should be written with an eye to the Law Society Practice Note June 2018 Law Society Guidance on retainers. This document notes without any irony

"There are relatively few outcomes that require you to provide information in writing. These relate to complaints.".

But reading into the document that is not quite right. Clients must be made aware in writing of their right to make a complaint and details of how to do so. They must also be advised of their right to complain to the Legal Ombudsman. They must further be aware of their right to challenge or complain about a bill, including their rights to an assessment of costs under part III of the Solicitors Act 1974.

Getting the retainer documents "right" will dramatically reduce the scope for confusion or dispute over what charges are properly due from a client.

## Costs estimates

A client care letter may also deal, with the initial costs estimate. It will be noted that a key obligation is to give an initial estimate of costs and to update that estimate as the matter proceeds. Clients may legitimate grounds for complaint, if a failure to give proper costs estimates lands them with unexpected charges. This can cause conflict between the solicitor and client and cost a solicitor dearly.

A failure to give an adequate estimate of costs, particularly where a client has relied upon the estimate can justify a swinging deduction from a bill of costs at an assessment. In **Harrison v Eversheds LLP [2017] EWHC 2594** Slade J stated:

*An estimate is to be distinguished from a quotation of fees: an offer which is accepted. An estimate is what it says. It gives an idea, which from a professional firm can be taken as reasonably and carefully made taking into account all relevant considerations, of what the future costs of work on a case is likely to be. A solicitor cannot be held to be restricted to recovering the exact sum set out in an estimate. However, a client is entitled to place some reliance on the estimate. The nature degree and reasonableness of that reliance will no doubt be one factor in the view taken on an assessment under section 70 of the Solicitors Act 1974 of how much more than the estimate it is reasonable for the client to pay.*

**Billing the client**

Billing a client often causes problems. Historically, solicitors have not billed their clients in personal injury claims and often do not appreciate the importance of sending a client a final bill of costs when they make a deduction from damages. There is no standard form for a Bill of Costs, on a solicitor-own client basis, unlike the very detailed rules which prescribe how a Bill should be drawn for an inter partes assessment, contained in part 47 CPR and the Practice Direction 47.

The requirements of a statute Bill of Costs delivered to a client instead are to be derived from a combination of the caselaw and certain provisions of the Solicitors Act 1974. They can be summarized as follows:

(a) A document purporting to be a bill of costs must demand or claim costs

(b) It is for the solicitor to decide the form of the bill they send to the client.

(c) A bill of costs must detail all the costs claimed including those recovered from the defendant and those which are chargeable to the client.

(d) A bill of costs must contain a narrative so that the client knows what he is being charged for or the client must know from the other documents or what he has been already told, what he is being charged for.

(e) The requirements of section 69 of the Solicitors Act 1974 are met.

-The Bill of Costs has been signed.

-The Bill of Costs has been delivered as a Bill of Costs

(f) The bill of costs may be either a gross sum or a detailed bill under section 64 of the Solicitors Act

## Lost documents

Sometimes, a client may complain about their bill months after it was sent and paid, and sometimes may seek copies of documents that they have already been provided with for the purposes of disputing the bill.

Clients often lose documents that they are given, or do not retain them. They may also have an imperfect impression of what work has been done on their case. When they terminate the relationship with their former solicitor and instruct a fresh legal team to challenge the fees of the former solicitors, it is key to obtain the former solicitors file.

The first point that often arises is to determine whether there are any grounds for an assessment, which may not be easy to judge when a disappointed client may lack access to the file or have lost copy documents she was provided with.

Solicitors may not be obliged to supply a client with multiple copies of documents she has already had. Solicitors should bear in mind the Law Society Practice Note Who Owns the File on what documents they must furnish to their clients.

In **Hanley v JC & A Solicitors: Green v SGI Legal LLP [2018] EWHC 2592 (QB)** Soole J ruled the court had no jurisdiction to make orders under the inherent jurisdiction and/or s.68 in respect of documents which were the property of the solicitor. Nevertheless, it did not follow that solicitors should in all circumstances press their legal rights to the limit, nor that they could necessarily do so with impunity.

## Time limits

To have a bill assessed, a client must obtain a court order that the bill should be assessed, and if that order is obtained, the court will then make appropriate directions for the assessment.

A client's right to seek an order for a detailed assessment under section 70 of the Solicitors Act 1974, is circumscribed by time limits. These can be especially important, as if a client simply leaves it too late, to apply for an order for assessment, their application will fail

Section 70 itself provides as follows:

*(1)Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be taxed and that no action be commenced on the bill until the taxation is completed.*

*(2)Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the taxation), order—*

*(a)that the bill be taxed ; and*

*(b)that no action be commenced on the bill, and that any action already commenced be stayed, until the taxation is completed.*

*(3)Where an application under subsection (2) is made by the party chargeable with the bill—*

*(a)after the expiration of 12 months from the delivery of the bill, or*

*(b)after a judgment has been obtained for the recovery of the costs covered by the bill, or*

*(c)after the bill has been paid, but before the expiration of 12 months from the payment of the bill,no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the taxation as the court may think fit.*

*(4)The power to order taxation conferred by subsection (2) shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill.*

It can be seen from the statute, that a client only has an absolute right to an assessment if the application for an order, is made within one month of receiving the bill of costs. Thereafter if the bill is unpaid, the court will, for a period of up to 12 months after receipt of the bill make an order for assessment on such terms as it thinks fit and after 12 months, only when there are special circumstances.

Where the bill of costs has actually been paid, the approach taken by the statute is stricter: only one month after paying the bill special circumstances have to be

shown for an assessment to proceed and after 12 months the court has no jurisdiction to order an assessment.

However, just because something purporting to be a "bill" is sent to the client does not mean that time for an assessment starts to run. Instead it should be carefully considered whether the "bill" is adequate to start the clock running. A bill that does not accord with certain legal formalities will not be a bill for the purposes of section 69 of the Solicitors Act 1974 and either is not capable of assessment or cannot be sued upon.

**Extending time**

If the client has missed the initial period for challenging a bill of costs and special circumstances must be proved, the question arises as to what that elliptic term means. The leading authority on what constitutes special circumstances is that of **Bentine v Bentine [2016] EWCA Civ 1168** which endorsed the formulation of Lewison J (as he then was) in the case of **Falmouth House Freehold Co Ltd v Morgan Walker LLP [2011] 2 Costs LR 292** where he stated:

*Whether special circumstances exist is essentially a value judgment. It depends on comparing the particular case with the run of the mill case, in order to decide whether a detailed assessment in the particular case is justified, despite the restrictions contained in section 70(3).*

Notwithstanding the open textured nature of the test, one searches for cases to provide illustrations of where special circumstances have been found to apply.

In the case of **Eurasian Natural Resources Corporation Limited v Dechert LLP (SCCO Master Rowley 27th January 2017)** it was contended that there were seven separate factors which gave rise to special circumstances: (1) The defendant's failure to give an initial costs estimate and its subsequent failure to give adequate costs estimates. (2) The size of the bills. (3) The fact that there is to be a detailed assessment of a substantial part of the defendant's charges in any event. (4) The impossibility of the claimant challenging the defendant's bills during the currency of the retainer. (5) The defendant's approach to billing queries during its retainer. (6) Specific billing irregularities. (7) The Defendant's attempts to avoid scrutiny of its charges. The application in the Eurasian case succeeded, the Master finding that only (3) was not a specific circumstance: one could not piggyback on bills where the time limit had not expired.

**Presumptions**

Once directions which typically provide for service of a breakdown of the costs claimed, service of points of dispute and replies have been complied with, an assessment under section 70 will be listed for a hearing. How will the court assess a bill between solicitor and client?

The playing field on a section 70 assessment is not level. The assessment takes place on the indemnity basis, not the standard basis. The principle of proportionality is simply not in play. Both parties are likely to refer to the presumptions in rule 46.9 CPR which can remove large elements of costs from argument over their reasonableness:

*(2) Section 74(3) of the Solicitors Act 19746 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings.*

*(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –*

*(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;*

*(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;*

*(c) to have been unreasonably incurred if – (i) they are of an unusual nature or amount; and (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.*

Rule 46.9(2) can be used to defeat a claim to costs based on hourly rates where there is no written agreement that these should be paid in a fixed costs case. These presumptions can be particularly important when assessing the quantum of a success fee, the level of hourly rates charged, and whether the client should pay hourly rates at all in a low value personal injury claim where only fixed costs may be recovered from the opponent to litigation. In **Herbert v HH Law Limited [2019] EWCA Civ 527**, the Court of Appeal considered the application of the presumptions in these terms:

*37. Counsel were agreed before us that the Judge was correct to hold that "approval" in CPR 46.9(3)(a) and (b) means informed approval in the sense that the approval was given following a full and fair explanation to the client (although there was dispute between them as to the reasoning and significance of the Macdougall case cited by the Judge). We agree.*

*38. There was some debate before us as to whether it is the client who bears the burden of satisfying the court that express or implied approval was not given or it is the solicitor who bears the burden of satisfying the court that it was given. We consider that where, as here, the client brings proceedings under the Solicitors Act 1974 s.70(1), it is for the client to state the point of dispute and the grounds for it. If the solicitor wishes to rebut the challenge by relying on the presumption in CPR 46.9(3)(a) or (b), the burden lies on the solicitor to show that the pre-condition of the presumption, informed approval, is satisfied. Once the solicitor has adduced evidence to show that the client gave informed consent, the evidential burden will move to the client to show why, as a result of having been given insufficiently clear or accurate or comprehensive information by the solicitor or for some other reason, there was no consent or it was not informed consent. The overall burden of showing that informed consent was given remains on the solicitor.*

It follows that if the presumptions are engaged, then the scope to dispute any of the fees, is likely to be limited. If the presumptions are not engaged, then the client can argue against a backdrop of the indemnity basis that the costs should be assessed in the normal way, as a matter of the costs judge exercising his discretion as to the reasonableness of particular items or the reasonableness of their amount.

In terms of what type of challenge at a detailed assessment, many of the points which can be deployed against a receiving party on a detailed assessment can suitably tailored, be deployed on a section 70 assessment.

Two examples will suffice: the first is to note a challenge to the entirety of costs claimed can be made where there is a strong allegation that a client was given the wrong advice on funding options, as illustrated by the case of **McDaniel and Co v Clarke [2014] EWHC 3826 (QB)** and so no costs have been reasonably incurred.

Secondly, in addition to general points, points of detail can be advanced, again suitably tailored, much as they would against a receiving party in an inter partes

assessment: an excessive success has been charged, that the hourly rates are too high, that there has been overmanning with multiple solicitors deployed to undertake work for no proper reason, duplication of work being undertaken as distinct from appropriate delegation to a cheaper fee earner, the booking of block time and simply too much time spent on particular elements of the case.

## Assessment costs

Finally, it should be noted that the client must obtain a discount of 20% from the costs sought to be assessed, otherwise the starting point is that the client will be paying the costs of the assessment. Thus, it can be especially important to limit the costs which are to be assessed to parts of the Bill, such as the profits costs and not the disbursements, as permitted under section 70(6) of the Solicitors Act 1974.

## Contact me

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