SOLICITOR AND CLIENT COSTS DISPUTES

A brief guide to solicitor client costs dispute and assessments under section 70 of the Solicitors Act 1974

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Solicitor and own client assessments 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 SCCO or a District Registry having to justify their fees. The reasons are not hard to discern: the rise of fixed costs, the changes introduced by LASPO 2012 and a general rise in consumerism. In this short discussion paper I will consider a number of the key issues which frequently arise on section 70 detailed assessments.

Documents and files

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 he was provided with. Solicitors may not be obliged to supply a client with multiple copies of documents he 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

A client only has an absolute right to an assessment if the application is made within one month of receiving the bill of costs. Thereafter if the bill is unpaid, the court will 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: one month after paying the bill special circumstances have to be shown and after 12 months the court has no jurisdiction to order an assessment.

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 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.

Further, consideration should be given as to whether a solicitor is entitled to send a client interim statute bills according to the contract of retainer: the case of **Vlamaki v Sookias and Sookias [2015] EWHC 3334 (QB)** is an interesting case, where the court found that the solicitors were not contractually entitled to render statute bills, so the bills which were sent were to be treated as requests for payment on account.

Conversely, in the case of **Abedi.v.Penningtons [2000] 2 Costs LR 205** where there were no express terms as to the rendering of interim bills, the solicitors were able to assert that the act of rendering bills and their payment enabled them to assert that there was an agreement by conduct that they could do so.

Special circumstances

Assuming that special circumstances must be proved, the question arises as to what that elliptic term actually 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 defendants 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.

The playing field

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:

(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.

It can be of crucial importance, to determine what a client knew and approved, and whether items sought from a client fall into that category of costs, called "unusual costs".

General points

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 by way of general points of principle, 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.

The second is to note that 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. 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.

Points of detail

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: that there has been overmanning, duplication, the booking of block time and simply too much time spent on particular elements of the case.

Costs of the assessment

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 very important to limit the costs which are to be assessed to particular parts of the Bill, such as the profits costs and not the disbursements, as permitted under section 70(6) of the Solicitors Act 1974.

OVERVIEW

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