Webinar Notes:
PI Deductions: Professor Dominic Regan discusses how to navigate cost deductions following the recent supreme court ruling

Monday 28th October 2024

The right to apply to the court for assessment of a solicitor's bill of costs is governed by section 70 of the Solicitors Act 1974 (the "1974 Act"). In summary, the statutory scheme is as follows: For one month after its **delivery** there is an unconditional right to have the bill assessed and, if this right is exercised, no action can be commenced on the bill until that assessment has been completed. After that one month period, there is a right, until 12 months have passed from delivery of the bill, to apply to the court for an assessment, which it may order on such terms as it thinks fit. After 12 months have passed, no order for assessment shall be made unless there are "special circumstances".

A different regime applies, however, if there has been "payment" of the bill. In those circumstances, if an assessment is sought after the initial one month period but before the expiry of 12 months from payment of the bill, no order for assessment shall be made unless there are **"special circumstances"**. After 12 months have expired from payment, no assessment can be made (section 70(4) of the 1974 Act).

So far, so good. The issue in **OAKWOOD V MENZIES (2024) UKSC 34**, a rare costs excursion to the Supreme Court, was simply what does "payment" mean?

The claimant/ex client asserted that it requires that the client should have been informed of and have provided agreement to the specific amount in respect of which payment is to be made pursuant to the bill.

The respondent/solicitor claimed that all that was required is an agreement with the client that fees may be deducted from monies held to the client's account and delivery to the client of a bill setting out the amount of those fees. No further agreement is required.

This arose out of an injury claim that was settled for £275,000 gross in 2019. After CRU and credit for an interim payment of £25,000 the net receipt was c£210,000.

The solicitor retained over £58,000 from those damages, shifting £25,000 to office account. The following month sent out what it called an interim statute bill for £83,000, costs from D yet to be resolved. It identified fees retained from damages at £47,000 plus vat and disbursements. Three months later the client was rebated £22,629, supposedly the difference between damages retained and the alleged shortfall in recovery. This was accompanied by a "Final Statute Bill" stating total fees were £73,711 (to include basic charges, disbursements, insurance premium, vat and success fee). Twenty months later C sought a Section 70 assessment of that bill. A year later Costs Judge Rowley held the claim statute barred seemingly having taken the date of payment as when the Final bill was delivered. He did describe the bill as "amongst the most impenetrable documentation that I have seen".

The costs of the solicitor were put at £73,700 yet only £38,000 was recovered from the defendant leaving a shortfall of £35,700, a detail that seemingly baffled both Costs Judge Rowley and on appeal Bourne J.

The terms of the CFA stipulated "Whilst there is no maximum limit in relation to our Basic Charges, to give you certainty as to the maximum amount that you can be charged, we agree with you that, if you win, we will limit the total amount we will charge you for Basic Charges, Success fee and disbursements to a maximum of 25% of all the compensation you receive after deducting any fees and expenses recorded from your opponent".

Another clause provided "You agree to pay into a designated account any cheque received by you or by us from your opponent and made payable to you. Out of the money, you agree to let us take the balance of the basic charges; success fee; insurance premium; our remaining disbursements; and VAT. You take the rest".

On appeal Bourne J reversed the decision because there had been no effective payment, no "sufficient settlement of account".

A heavyweight Court of Appeal reinstated the first instance decision. The client had agreed to the deduction in principle and had been sent a final bill. It held a Section 70 payment equated to a transfer of money with the knowledge and consent of the client.

Now the Supreme Court has reinstated the High Court decision. The crux of the unanimous judgment is that the positive consent of the client to the sum charged is necessary. At paragraph 35 it said "An important consideration is the subject matter of the payment. In the present case, it is not payment of an agreed price or a fixed fee. Nor is there an agreed formula for determining the amount payable. The only agreed formula was as to a cap on payment, not its amount. The payment was to be of a sum explained in a delivered bill the reasonableness of which the Client had a statutory right to challenge."

A bill is obviously paid when a remittance is made after receipt of a bill requesting payment. It is not unreasonable to suppose that payment is indicative of agreement.

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Continuing at para.37 “There may be many circumstances, as in this case, where monies are held by the solicitor on behalf of the client and payment is made by means of an authorised deduction from the monies so held. Such a payment would only correspond with the most obvious example of payment if there was similarly agreement as to the amount to be paid in respect of the bill. That would provide a consistent meaning to what is required for payment.”

So, payment supposedly affected by a transfer of funds is incompatible with the natural meaning of payment (para 38). Looking at the statutory protection in the round, the date of delivery of a bill is the main event. The making of an application for assessment generates a right not to pay until assessment is concluded. That emphasises the critical importance of the delivery of a bill which the client can then consider. It would be contrary to the purpose of the Act were payment to itself by a law firm sufficient to start time running. The Oakwood scenario meant payment would occur without any opportunity for the client to see the bill.

Crucially, at paragraph 79 the Supreme Court declares “there is no reason why there cannot be prospective agreement as to some or all of the costs to be charged. That can be done by agreeing a fixed fee or by fixing costs through a mathematical formula”. Indeed, there was a formula of sorts here but it only served to cap rather than quantity costs.

The White Book guidance on “payment” went back to at least 1939; “the retention of moneys by the solicitor is no payment unless there has been a settlement of account”. The statutory language has been in place for 180 years.

What if the client ignored the bill? “It must in my judgment be possible for a solicitor to give a client a reasonable time in which to notify any dispute, after which agreement can be assumed if there is no reply” per Bourne J at para.37.

He identified the ultimate problem in the case as the failure of solicitors to clearly identify between the options of declining to agree the deduction opening the way for them to apply for assessment and agreeing the deduction which would not preclude the client from seeking assessment.

The letter muddied the waters by introducing the company complaints procedure which appeared to elide that process with Section 70, not making it clear that the 2 were separate.
As Hailsham Chambers have pointed out, all this meant that time had never started to run on the facts of Menzies.
Roger Mallilieu KC of 4 New Square led for the successful client.

The right to assessment doesn’t mean that the challenge will succeed of course. That fat shortfall in recovery will certainly be the focus of attention.

Happy to help

If you have any further questions or wish to book a private session with our expert trainers, don’t hesitate to get in touch.

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