



SOLICITOR AND OWN CLIENT ASSESSMENTS James Wibberley, Guildhall Chambers

1. If fixed costs are to be introduced for the majority of fast-track and multi-track claims, then it is likely to cause an increase in the occurrence of disputes between solicitor and client as the latter, pleased that the action has been successful but angered by the shortfall between the costs charged and the costs recovered, seeks to challenge the amount that they have been billed.
2. This paper aims to give a broad introduction into the world of solicitor and own client cost assessments, and to provide practical guidance both for those facing actual or likely challenges to their fees, and those representing disgruntled litigants. This paper, and the talk it accompanies, focuses on solicitor and own client costs within the context of contentious litigation; issues relating to non-contentious business fall to be considered separately.

The Nature of the Retainer

3. The starting point is that whilst solicitor and own client costs are primarily a matter of contract between the two; such contract is subject to significant judicial oversight or supervision by virtue of the provisions of the Solicitors Act 1974. Save in the case of specific types of retainer created by the Solicitors Act, the court has a broad power to assess (and therefore reduce) the costs charged by a solicitor to their client. Accordingly, before we turn to look at the court's power to assess solicitor and own client costs, it is first necessary to determine the status of the retainer between the parties.
4. Part III of the Solicitors Act creates two specific types of retainer under which the client's ability to challenge the fees charged are recovered. These are: 'non-contentious business agreements' (see sections 56 to 58 of the Solicitors Act) and 'contentious business agreements' (see section 59 to 66). This talk looks solely at the latter.
5. Contentious business agreements are defined by section 59 of the Solicitors Act as follows:

"(1) Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a "contentious business agreement") providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated ..."
6. This definition is in many ways circular as it is obvious that a contentious business agreement (or a CBA) relates to contentious business. In practice, the issues normally revolve around certainty; i.e. can the court be certain that a rate or rates were agreed and that the client was agreeing to a retainer under which he lost his right to have the costs charged assessed.
7. See the judgment of Denning MR in *Chamberlin v Boodle and King* [1982] 1 WLR 1443 at page 1445 for a list of the practical considerations to be considered when determining whether a CBA has been entered through correspondence. See also the judgment of Mann J in *Wilson v Specter Partnership* [2007] EWHC 133 at paragraph 16 for the elements of uncertainty that might render an agreement not a CBA (n.b. the case is authority for the proposition that the parties' description of the agreement is not determinative).
8. The significance of the parties entering into a CBA is twofold.
9. Firstly, as provided by section 60(1) of the Solicitors Act, save in cases where a solicitor is to be remunerated by reference to the hours spent by him, the sums payable under a CBA are not subject to the court's powers of assessment or the limits on pursuing recovery set down by section 69 of the Solicitors Act.



10. Secondly, a CBA does not give rise to a right of action against the client in the same way that a 'normal' contractual retainer does. Rather the solicitor must apply for permission to enforce the CBA under section 61(1) of the Solicitors Act. Where such application is successful, the costs are fixed and are payable, subject only to those cases where there is a challenge to the hours spent.

The Enforcement of CBAs

11. Per the above, any solicitor seeking to enforce the provisions of a CBA must apply to the court for permission to do so under section 61(1) of the Solicitors Act. Where such application is made, it will be determined by the provisions of section 61(2), which provide that:
"On any application under subsection (1), the court—
 - (a) if it is of the opinion that the agreement is in all respects fair and reasonable, may enforce it;*
 - (b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be assessed as if it had never been made;*
 - (c) in any case, may make such order as to the costs of the application as it thinks fit."*
12. The court is therefore in appropriate circumstances able to determine that a CBA is either unfair or unreasonable and to strike it down allowing the full costs charged by the solicitor to be assessed. Whilst CBAs protect the hourly rate and any uplift from assessment, the price for such protection is that the agreement is full is susceptible to challenge. The party seeking to rely upon them needs to show that the circumstances when the CBA was entered into were such that it was reasonable for the client to have lost its right to challenge.
13. It is also important to note that whilst the court can assess the number of hours spent by a solicitor working on a CBA, this power is substantially more restrictive than the power to assess the number of hours spent on a 'normal' assessment. This is due to the effect of sections 61(4B), which provides that:
"If on the assessment of any costs the agreement is relied on by the solicitor and the client objects to the amount of the costs (but is not alleging that the agreement is unfair or unreasonable), the costs officer may enquire into—
 - (a) the number of hours worked by the solicitor; and*
 - (b) whether the number of hours worked by him was excessive."* (Emphasis added).
14. This "*may enquire*" provision is permissive only. Where there is no proper basis for doubting the hours claimed, the court can simply decline to conduct this enquiry.
15. For a recent example of the considerations the court will take into account when considering: (i) whether an agreement is a CBA or merely a CFA; and (ii) whether such CBA is reasonable, see the judgment of Master Campbell in *Addleshaw Goddard LLP v Wood & Hellard* (8th April 2015, unreported). The case is also significant as it highlights how establishing an entitlement to costs under a CBA provides a solicitor with an easy (or easier) application under section 73 of the Solicitors Act.

Enforcement of 'Ordinary' Retainers

16. Assuming that the retainer in question is not a CBA then the provisions relating to its enforcement and assessment are contained within sections 69 to 72 of the Solicitors Act.
17. The provisions of section 69 of the Solicitors Act will probably be familiar to most of those reading these notes. In simple terms it provides that (subject to two limited exceptions where the High Court may make a different order) an action to recover sums owed by a client may not be brought until the expiry of one month following the delivery of a properly signed bill.
18. Although it is not a statutory requirement, the courts have repeatedly found that for a bill to comply with section 69 it must also contain sufficient narrative to allow the client to know what he is being charged for. See *Garry v Gwillim* [2002] EWCA Civ 1500 at paragraphs 59-60 and



70 where it was said that a client could challenge a bill's compliance with section 69 if there was a lack of sufficient narrative and he did not have sufficient materials to take advice on whether or not he should apply to have the bill assessed. See also *In Re a taxation of costs* [1955] 2 QB 252 where Denning LJ said that: "... I think that it must contain a summarised statement of the work done, sufficient to tell the client what it is for which he is being asked to pay."

19. It is important to state though that the presentation of a bill complying with section 69 is only a prerequisite for taking action; it is not a pre-requisite for the right to costs arising and is not therefore required before a solicitor can deduct his fees from client funds. See *Edginton v Sekon* [2012] EWCA Civ 1812 for confirmation of this point.

Applications for Assessment

20. The starting point is section 70 of the Solicitors Act, which sets out the basic provisions governing the assessment of bills delivered under section 69. As per section 70(1), if an assessment is requested within one month of the bill being delivered, the solicitor cannot commence and action on the bill and the client is entitled to have the bill assessed as of right without any sum being paid into court.
21. Where the client fails to request an assessment within the initial one month period then section 70(2) provides that the court may still order an assessment on application by the party chargeable, but that such assessment can be made subject to any terms that the court thinks fit. Usually this will be terms as to a payment on account or the giving of security by the client (n.b. section 70(2) expressly excludes the power to make special orders as to the costs of the assessment).
22. It is important to stress though that the power under section 70(2) is permissive rather than mandatory. Accordingly, whilst a client is entitled to an assessment as of right if they apply within one month of delivery; if they miss this month then they will need to persuade the court to order an assessment. How easy this is to do will depend entirely upon the circumstances in which the assessment is sought, including in particular the prospect of having the bill reduced.
23. The power conferred by section 70(2) is though subject to further limitations as set out within section 70(3). These provide that:

"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 assessment as the court may think fit." (emphasis added).
24. There is no single test within the case law as to what amounts to 'special circumstances' and, like so many of the issues under the Solicitors Act, it will depend upon a judge taking an overall view of the merits of the case. Per Lewison J in *Falmouth House Freehold Co Limited v Morgan Walker LLP* [2010] EWHC 3092 (Ch) at paragraph 13:

"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 within Section 70(3)."
25. In the writer's experience the most obvious type of 'special circumstances' is where the client is not advised either of the ability or of the process/procedure to be followed on seeking an assessment. Other special circumstances will include cases where the costs claimed are



plainly excessive and therefore worthy of challenge, where illness or other personal difficulties have prevented a client from seeking an assessment sooner, or where there are obvious errors in the bill. An agreement between the parties can also amount to special circumstances. It is important to stress though that the existence of special circumstances is not of itself sufficient for an assessment to be ordered; it is merely the threshold test. Even if that threshold is met the court can still decide not to order an assessment, for example where there has been prejudice caused to the solicitor by the delay.

26. It is also important to stress that special circumstances are not exceptional circumstances (see Sedley J in *Riley v DLA, sub nom A v BCD (a firm)* (unreported)). Whilst a case needs to be out of the ordinary, its facts do not need to be wholly unusual or unique.
27. The other feature to note about cases falling within the scope of section 70(3) is that the court does have power to impose conditions as to the cost of the assessment as part of the order allowing an assessment to take place. The court may therefore order, for example, that the client pays the costs of the assessment by way of reducing any prejudice caused to the solicitor by the delay in seeking an assessment.
28. Per section 70(4) though, an assessment under section 70(2) cannot be made more than 12 months after the bill in question has been paid. This is obviously a far shorter period than any under the Limitation Act 1980 and is intended to provide certainty as to the costs ultimately payable. If more than 12 months have passed since payment then the only way in which the issue can be reopened is either to argue that the bill in question did not comply with section 69 such that time has not started to run, or to bring a claim for professional negligence.

Interim Bills

29. Given the strict time limits outlined above, one key issue that arises within the context of solicitor and own client assessments is whether an interim invoice is a statutory bill following which time starts to run, or whether it is merely a request for a payment on account. This issue is obviously one that gives rise to competing considerations. During the course of any case a solicitor will obviously want to leave open the possibility of revising its charges, in particular if there is a risk that time might have gone under-recorded. Following the conclusion of a matter though, the solicitor will want each interim invoice to be a statutory bill such that the time for seeking an assessment has started to run when each invoice was provided.
30. Whether interim invoices rendered by a solicitor are properly to be considered statutory invoices is primarily a question of construction. The starting point therefore will be the letter of retainer under which such invoices are issued. Does the retainer give the solicitor the power to deliver 'final' bills on an interim basis under which the client is under a definitive obligation to make payment? Alternatively, is the solicitor merely able to seek payments on account of its actual or estimated charges?
31. Following on from this, the next most significant consideration is the circumstances in which the invoices are provided and, in particular, whether they can be said to correspond with any break in the work undertaken either chronologically or in terms of the stage of the litigation. This reflects the traditional common law position that a retainer was an entire and indivisible contract such that the right to payment did not arise until the end when the entirety of the work has been completed. Whilst the courts have moved away from this strict approach, there is still a desire to identify particular stages of the work that are being billed for before it will be found that an interim invoice is a compliant statutory bill.

Particular Rules Relating to Assessments

32. Before we turn to the provisions of the CPR, there are two particular provisions within the Solicitors Act that warrant comment.



33. The first is the so-called one fifth rule contained within section 70(9) with which those reading these notes will no doubt be familiar. Under this rule, the costs of any assessment will be paid by the client unless the solicitor's costs are reduced by more than one fifth in which case the solicitor will pay the client's costs of the assessment process. This rule is subject to two exceptions: (i) where the assessment is on application by the solicitor and the paying party does not attend or (ii) where the court orders otherwise either as part of the order for the assessment or where the circumstances in section 70(10) apply.
34. So far as section 70(10) is concerned, it simply provides that:

"The costs officer may certify to the court any special circumstances relating to a bill or to the assessment of a bill, and the court may make such order as respects the costs of the assessment as it may think fit" (Emphasis added).
35. This provision obviously echoes the 'special circumstances' test within section 70(3) for cases where an assessment is sought after 12 months of presentation of the bill and similar considerations will therefore be relevant, not least the advice given to the client in relation to the right to seek assessment. In addition though there is no reason why Part 36 or Calderbank offers in respect of the quantum of the costs could not be considered 'special circumstances' within this context such that solicitor and client may be able to protect themselves by offering suitable concessions.
36. The second statutory provision worthy of note is section 74(3) of the Solicitors Act, which applies solely in relation to contentious business done in the County Court. This provides that:

"The amount which may be allowed on the assessment of any costs or bill of costs in respect of any item relating to proceedings in a county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and of any counterclaim."
37. This provision often catches solicitors unawares as they assume that as solicitor and own client costs are a matter of contract, they can automatically be charged and recovered at whatever rate the solicitor sees fit. This is simply not the case. The reference to the rules of court is a reference to the Civil Procedure Rules and thus the circumstances in which this clause does and does not apply are dealt with in more detail below.

Civil Procedure Rules – Procedure for Requesting Assessment

38. The requirements for requesting an assessment are set out within CPR 67. Per CPR 67.3(1), applications for the assessment of costs relating to contentious business done within the County Court and falling within the financial limit of the County Court may be made in the County Court. In all other cases the application must be made in the High Court, albeit the application does not have to be heard by a High Court judge, and can be heard by a District Judge in the District Registry where the judge sits.
39. Per CPR 67.3(2), applications for any order under Part III of the Solicitors Act (n.b. this includes applications to enforce CBAs as well as applications for assessments) must be made via Part 8 claim or under application under Part 23. Where a client is being sued for payment, applications for assessment are normally filed with the Defence and the application heard at the first case management conference.
40. Where an order for an assessment is made, CPR 46.10 sets out the basic procedure. Save where the court provides otherwise, the solicitor must provide a breakdown of the costs claimed (i.e. a bill akin to that used within an *inter partes* detailed assessment) within 28 days of the order for an assessment. The client then has 14 days to file points of dispute, followed by a further 14 days for the solicitor to put in any Reply. Either party may then file a request for an



assessment hearing: (i) after the Points of Dispute have been served; but (ii) within 3 months of the order for costs to be assessed.

Civil Procedures Rules – Basis of Assessment

41. Following the Jackson Reforms, the rules relating to solicitor and own client assessments are contained with CPR 46.9, which provides that:
- “(1) This rule applies to every assessment of a solicitor’s bill to a client except a bill which is to be paid out of the Community Legal Service Fund under the Legal Aid Act 19884 or the Access to Justice Act 19995 or by the Lord Chancellor under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.*
- (2) Section 74(3) of the Solicitors Act 1974 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.*
- (4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.”*
42. The first point to note is the effect of assessment on the indemnity basis. This means that there is no assessment of proportionality; the costs are either reasonable or they are not. It also means that the client bears the burden in disproving reasonableness.
43. The second point to note is the combined effect of section 74(3) of the Solicitors Act and CPR 46.9(2). In order to charge more than has been recovered in County Court cases, the retainer must contain an express statement of that right. In the writer’s view it is not necessarily sufficient that the ordinary billing structure/system under the retainer allows for sums to be charged in excess of the recoverable costs. The retainer must go on to say that such sums are payable irrespective of what is recovered from the other side.
44. The third point to note is that where the costs are unusual in type or amount there is effectively a requirement to double warn. It is not enough simply to say that costs generally might not be recovered in whole or in part. If, for example, costs are unusually high due to the client’s preference for a QC then the solicitor will need to specifically warn that the level of the costs might not be recoverable. In many cases this will be an obligation that cannot simply be met by clever drafting of the retainer. It will need proactive review of the costs and dynamic warnings during the course of the litigation.

Practical Advice

45. The first piece of practical advice is that the time limits contained within section 70 of the Solicitors Act are not the be all and end all where a client is being pursued for payment of the solicitor’s charges. A client facing such a claim is able to raise any defence that they might otherwise seek to do so in a case where they are facing a contractual claim for payment. The client can therefore question whether the time claimed has in fact been spent and, indeed, whether the time claimed was reasonably spent bearing in mind the solicitor’s obligation to use due care and skill in the performance of the retainer. See the decision of the Court of Appeal in *Turner & Co v O Palomo SA* [2000] 1 WLR 37, where, following a review of the relevant



authorities, it was found that the provisions of the Solicitors Act does not supplant an individual's common law rights.

46. The second is to highlight the effect of costs budgeting (and, should they become a reality, fixed costs) on the duty to warn. Whilst there is no strict obligation to involve the client during the budgeting process, it makes sense to use the budgeting process as an opportunity to warn the client about the likely inability to recover costs in excess of the budgeted amounts. Indeed, there is certainly an argument that cost in excess of those budgeted could be regarded as 'unusual' within the meaning of CPR 46.10 such that recovery is impossible on assessment absent this express warning. If the client is not made aware of the effect of a costs management order even if they are generally given advice about the possibility that not all of their costs will be recovered then this will give rise to a strong argument for a reduction.
47. The third is to highlight the importance of regular updates and estimates. Whilst it is settled law that a breach of the Solicitors' Code of Conduct in relation to funding advice will not render a retainer unenforceable, costs greatly in excess of estimates are likely to be considered *prima facie* unreasonable as being unusual in amount and/or falling outside the scope of the client's express or implied approval. For example, the fact that a client is on a CFA does not mean that estimates are not required, a feature many firms miss therefore giving rise to arguments that the level of costs has not been approved. In addition, it is the writer's experience that costs judges are particularly critical of costs charged in excess of estimates such that they will look to allow clients the opportunity to challenge such costs.
48. The fourth is the need to make sure that clients are properly advised about not simply the ability to seek an assessment of any costs that they have been charged, but also the time limit for so doing. Again, it is the writer's practical experience that this is one of the most important factors when a judge is asked to order an assessment outside of the initial 12 month period. In addition, a failure to give such advice could give rise to a claim for professional negligence and therefore open the costs up to challenge through the back door.
49. The fifth is the necessity to preserve evidence of client approval for both fees and disbursements. The writer's experience is that whilst firms tend to be very good at retaining signed copies of retainer letters, they are often less adept at being able to prove that notifications of (for example) increases in hourly rates were sent out. Further, very few firms actually ask for estimates to be approved thus opening themselves up to arguments that estimates were not provided or received, and preventing them from being able to show express approval by the client for the fees charged.
50. Finally, those acting for clients should not forget to consider retainer issues such as those outlined above. Is the retainer a CBA or not? More generally though, is the letter of retainer relied upon consistent with the client's understanding of the basis upon which they would be charged? If not, can the enforceability of the retainer (particularly if it is a CFA) be challenged as part of the assessment process?

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