Chaos reigns

Dominic Regan on the urgent need to reform the Solicitors Act 1974

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While lots of reform proposals are flying around, there is one important area where there is a screaming need for radical revision. The Solicitors Act 1974 covers many matters. Noteworthy is section 21, which provides that someone pretending to be a solicitor is guilty of a crime. However, the nightmare is section 70, which regulates the right for a client to demand a court assessment of the bill presented to them by their own solicitor.

In the current environment, this has taken on greater importance than ever before. Many wistfully reflect upon the balmy days in litigation, where one recovered so much from the other side that the outcome was 'Win, no fee'. In particular, the now defunct success fee meant double recovery in many matters, if an uplift of 100% was achieved.

The departure of additional liabilities and the arrival of fixed costs mean that there is much less in the till upon the conclusion of a claim. This has inevitably caused solicitors to look to their own client to help bear the costs burden.

As we saw in *Herbert v HH Law* (2019), clients who may have signed an agreement in which they agreed to relinquish part of their damages have no compunction in challenging the bargain they made – and with success too in that case. There are people out there actively seeking disaffected clients and offering a cut of costs for a successful referral.

Late next year, or perhaps in early 2021, there will be a drastic extension of fixed costs to most matters worth up to £100,000. The Ministry of Justice impact assessment accepts that the amount of costs recoverable will fall. Indeed, the very motivation of the architect, Sir Rupert Jackson, was to curb costs. It is evident that we are moving in a direction where costs recovered become, as Master Rowley put it in his *May* judgment, a 'contribution' towards outlay, and certainly not anything approaching a full indemnity for expenditure. It is an inevitability that more solicitors will ask clients to pay more from their own pocket.

SOLICITORS ACT

SECTION 70

This brings us to Section 70. The intention is to provide a mechanism for the client to involve the court in vetting what their own solicitor wants to take from them. The senior costs judge, in a speech at the Hailsham Chambers Annual Costs Review on 26 June, explained that at the start of many an application, he first had to decide what type of bill the client had been presented with. This naive spectator truly assumed that a bill was like the ones for utilities or Amex, but no. It might be a final bill, but then again it could be a *Chamberlain* bill, which is one delivered in instalments. Then again, it might be an interim Statute bill, or might it be a mere request for a payment on account. Those wishing to appreciate these intricacies should go and read Chapter 35 and 36 of the sublime *Friston On Costs* OUP 2019, where the poor author dredges up relevant authorities from as far back as 1815.

Suffice to say that the legal status of the bill in issue has significant consequences. Specifically, it can determine whether the solicitor can bring a claim to secure payment, and also whether the time to seek a court assessment is under way.

What we lack is a clear, pragmatic definition of what a bill is, hence reliance upon archaic common law authorities. In *Richard Slade v Boodia* (2018), Simon Browne QC convinced the Court of Appeal that both a master and then a High Court Judge had wrongly categorised the true nature of a bill. The upshot was that clients were out of time for raising a challenge.

It is a miserable state of affairs when arcane points such as whether a bill must include both costs and disbursements together should determine the right to seek court assessment.

In simplistic terms, once a valid bill has been presented, the court shall order that the bill be assessed provided that an application for assessment is made within just one month. Once a month has elapsed, but before 12 months have passed, the court has a discretion to order an assessment.

We live in an era where consumer protection is rightly paramount. The requirement to display clear information about charges is indicative of that approach. Why, then, do we still have in place a nigh impenetrable regime for vetting a bill that could be pitched at an outrageous level?

Another strange feature is that the procedure for launching an assessment claim is not in one place. One must look to CPR 67.3 and PDs 46 and 67. In *Herbert v HH Law*, Nicholas Bacon QC, in opening at the Court of Appeal, pointed out that the challenge by the former client was advanced under CPR 8, which lead to the district judge at first instance awarding costs of £4,500 when the amount of the excessive deduction as found by the court was a few hundred pounds. So much for proportionality.

Herbert got worse for clients. As Deputy Master Colin Campbell has observed, there is now an almighty lacuna in the law, because the Court of Appeal decided that the cost of after-the-event insurance is beyond scrutiny in an assessment. The reasoning was that the premium is not an outgoing that a solicitor is obliged to make on behalf of a client, unlike a court fee; and nor is it a custom of the profession to regard it as legitimately included in a bill as a disbursement. The riposte to the latter point is that ATE insurance is a recent arrival in the world of costs.

While the premium was but £349 in *Herbert*, it should be appreciated that it nevertheless represented over 10% of the client's gross damages of £3,400. It is highly improbable that Ms Herbert played any active role in deciding whether to take out such insurance, let alone was she in a position to gauge the value of it. In big money litigation, the premium might be a five or six-figure sum. It is bizarre that one can argue on assessment about a letter charged at £100, but not an outgoing that might costs thousands. Where the cost of ATE remains recoverable, as in privacy cases, the paying party has every right to contend that the premium is preposterous – yet the client who takes out the policy (not that they in fact do) cannot.

THE WAY FORWARD

Regional Costs Judge Beresford has predicted that *Herbert* will generate a flood of new challenges, putting yet more pressure on the beleaguered court structure.

What is the way forward? Repeal of the offending act is where we begin. New legislation should supply a concise checklist of what information is necessary, so as to render a bill open to court scrutiny. Let there be an obligation to supply, alongside the bill, a simple statement in prescribed wording explaining how and when a challenge is to be launched. Failure to supply the statement would leave the client free to raise a challenge at anytime. The deadline should be explicit, for example, 'If you wish to have this bill assessed by the court, you have until 4pm on 12 December to commence formal proceedings'.

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A client should be given the right to challenge the cost of after-the-event insurance. I sympathise with practitioners, who must feel that on some occasions, a slippery client is invoking a delaying tactic. Despite that concern, I do wonder if a slightly longer period than one month is justified? The compromise could be that after, say, a two-month period, the ability to challenge might be confined to exceptional circumstances.

The longstanding costs principle is that under Section 70(9) (b), the solicitor shall bear them if the amount of the bill is reduced by one fifth or more. Otherwise, the client will pay. Consideration should be given to whether that ancient yardstick ought to survive.

At the Costs Law Reports 2018 Conference, barrister Roger Mallilieu condemned the 1974 Act as unfit for purpose. The Senior Costs Judge recently expressed his frustration. He had voiced concerns to the powers that be but, depressingly, there seemed to be no appetite to confront the problem. In a landscape seemingly swamped by reform, it is unsatisfactory that a real problem is being ignored.

Dominic Regan of City Law School is an expert on legal costs and a special adviser to Affiniti Finance