Kenig v Thomson Snell and Passmore LLP [2024] EWCA Civ 15

Paul Hughes and Matthew Smith,

Barristers,

Kings Chambers

Overview

- The problem
- Solicitors acting as executors and retaining their own firms to administer the estate.
- Challenging the firm's charges: or not.
- Section 71 of the Solicitors Act 1974

The problem

- The Guardian: 2009 £1.25 billion in fees by High Street banks/solicitors for dealing with administration of estates through grant of probate or letters of administration.
- Such sums are paid out of the estate. A reduced pot for beneficiaries. How does a beneficiary challenge these charges?
- Collusion: if a solicitor is appointed as executor and appoints her firm to administer the estate. How does a beneficiary challenge the charges?

The cost

- The Guardian: 24/2/24

- **‘Ruinously expensive’: record number of inheritance disputes in England and Wales**

Section 71(1) Solicitors Act 1974

(1) Where a person other than the party chargeable with the bill for the purposes of section 70 has paid, or is or was liable to pay, a bill either to the solicitor or to the party chargeable with the bill, that person, or his executors, administrators or assignees may apply to the High Court for an order for the assessment of the bill as if he were the party chargeable with it, and the court may make the same order (if any) as it might have made if the application had been made by the party chargeable with the bill.

(2) Where the court has no power to make an order by virtue of subsection (1) except in special circumstances it may, in considering whether there are special circumstances sufficient to justify the making of an order, take into account circumstances which affect the applicant but do not affect the party chargeable with the bill.

Section 71(3) Solicitors Act 1974

(3) Where a trustee, executor or administrator has become liable to pay a bill of a solicitor, then, on the application of any person interested in any property out of which the trustee, executor or administrator has paid, or is entitled to pay, the bill, the court may order—

(a) that the bill be assessed on such terms, if any, as it thinks fit; and

(b) that such payments, in respect of the amount found to be due to or by the solicitor and in respect of the costs of the assessment, be made to or by the applicant, to or by the solicitor, or to or by the executor, administrator or trustee, as it thinks fit.

Section 71(4) Solicitors Act 1974

(4) In considering any application under subsection (3) the court shall have regard—
(a) to the provisions of section 70 as to applications by the party chargeable for the assessment of a solicitor's bill so far as they are capable of being applied to an application made under that subsection;

(b) to the extent and nature of the interest of the applicant.

...

Tim Martin Interiors Limited v Akin Gump LLP [2011] EWCA Civ 1574

- Nugatory nature of an assessment under section 71.
- Derived from wording of section 71(1)
- “Blue pencil” test: can you strip out sections of the Bill, not based on excessive time or amounts.
- Alternative remedies: claim for an account may be the right approach or declaration as the amount properly due.

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- Mr. Kenig & sister beneficiaries of will of mother.
- Sols instructed by sole executor to administer.
- Costs est £10-15K plus VAT & exp – very substantially exceeded.
- Mr. Kenig applied for assessment 71(3).
- Sols argued Akin Gump applied – effectively that beneficiary could not challenge fees paid from estate.

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- Costs judge Brown ordered assessment. Akin Gump did not render pointless.
- Appeal dismissed.

10. It is plain on the face of section 71 that the third-party applications under sections 71(1) and 71(3) differ in (a) the person who may apply for assessment, (b) the nature of the application which the applicant may make, and (c) the nature of the order that the court may make on such an application…

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The liability to pay for subsection 1 is typically contract – e.g mortgage – which is what Akin Gump was.

Subsection 3 is for "beneficiaries".

The person chargeable in a 71(3) case has a diminished risk because they can pay out of trust/estate property.

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The nature of the assessment under 71(3) is looser.

That is understandable because … (para 14)

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…the party chargeable in an application under section 71(3), quite apart from being entitled to pay the solicitor's charges out of trusts or estate property, owes fiduciary obligations to the third party beneficiaries, as will usually be known (at least in general terms) by the solicitor. The interest of the third party beneficiary under section 71(3) is therefore wider than the interest of the third party applicant under section 71(1) , quite apart from there being a greater need to protect the third party beneficiary because of the ability of the trustee or executor to pay the fees out of trust or estate property.

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The existence of the trust makes a real difference to what the sol must say to the client, as explained in in re Brown (1867) LR 4 Eq 464:

At para 21, Stuart-Smith LJ recounted Lord Romilly MR in Brown:

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The first was where a client (not being a trustee) required work to be done that was not wanted or useful. When a bill came to be taxed, the client could not complain: "he would be told, "you ordered it to be done, you were told it was useless, and you must pay for it."" In contrast, where the client was a trustee and made the same request despite being told it was useless or inappropriate, it would then be the duty of the solicitor to tell the client that the work was not required for the purposes of the administration of the trust and that, accordingly he (the solicitor) could not put them in his bill of costs which would have to be paid out of the trust estate.

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22. Lord Romilly looked at the bill adopting this approach. He continued:

"and then comes this question, which is properly a question for the Taxing Master to determine, is it proper, or necessary, or fit, for the administration of the trust that certain things should be done?

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23. …what was being contemplated was that (even if the taxation was pursuant to section 38) the beneficiary was entitled to raise challenges that would not have been open to the client/trustee and was entitled to raise them after the fees had been paid…However, the main significance of the case lies in the recognition of the independent interest of the beneficiary that goes beyond that of the client/trustee.

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24. Hazard v Lane (1817) 3 Mer. 285 is yet more ancient, predates the 1843 Act and was not considered in Tim Martin . A solicitor's bill was referred to taxation upon the application of one of two trustees and executors who had been the solicitor's client. The motivation for the reference came from the beneficiary but he could not at that time bring an application in his own name. Without the knowledge of the beneficiary, the bill had long since been paid by the second executor who refused to consent to the application; …. The issue was whether the solicitor should be permitted to avail himself of the payment by the trustees and their subsequent acquiescence over time.

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25. In giving judgment Lord Eldon LC held:

"that a Solicitor cannot be allowed to interpose the payment of his bill of costs, by a person in the situation of a trustee, between himself and the parties ([beneficiaries]) for whom he was at the time aware that the person who paid him was no more than a trustee—as, here, an executor acting for the parties beneficially interested under the will…

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27. These are slim pickings, but they do suggest and support the inference that the position of beneficiaries as a particular subset of third parties has long been recognised because they have interests that go beyond those of a "normal" third party to a solicitor's bill.

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Are they slim pickings or will they lead to the court scrutinizing the costs much more closely, having regard to whether the work done was proper, necessary or fit for the administration, having regard to the interests of the beneficiaries?

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CPR 46.9(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.

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29. In order to rely upon presumptions (a) and (b) it is necessary for solicitors to show informed consent or approval to the incurring of the costs. The initial burden lies upon a solicitor who wishes to rely upon the presumptions to show that the precondition of informed consent is satisfied. Once the solicitor does that, the evidential burden shifts to the client to show that there was in fact no consent or no informed consent. The overall burden of showing that informed consent was given remains on the solicitor: Herbert v HH Law Ltd [2019] EWCA Civ 527, [2019] 1 WLR 4253 at [37]-[38] .

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Macdougall v Boote Edgar Esterkin

[2001] 1 Costs L.R. 118, Holland J, para 8:

..the quality of the approval has to be such as to raise a presumption. In the course of argument I talked of 'informed' approval and even with reflection I adhere to that concept. To rely on the Applicants' approval the solicitor must satisfy me that it was secured following a full and fair exposition of the factors relevant to it so that the Applicants, lay persons as they are, can reasonably be bound by it…

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Costs Judge Brown, at first instance in Kenig. Had concluded that there were special circumstances to warrant an assessment on the assumption that payment of all the bills but the last had been made over 12m before Mr. Kenig's application, so that the client would not have been able to challenge them, even in special circumstances.

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The finding of special circumstances was not appealed and was based on:

46. ..the scale of the discrepancy between the original estimate and the costs claimed, which he described as "very substantial indeed"; the speed with which the initial estimate was exceeded; the absence of information that either justified the discrepancy or came close to doing so; and specific matters in the bills that gave rise to possible concern…

Kenig – conclusions of C.A.

51. *…there are material differences between applications under section 71(3) and those under section 71(1) because of the different nature of the interests of the third party that the different sub-sections are intended to reflect…*

Kenig – conclusions of C.A.

51. …*The consequence of Lloyd LJ's mistaken assumption* [in Akin Gump – that there is no difference between 71(1) & 71(3)] *is that his judgment cannot be relied upon as saying anything authoritative about the position that obtains where an application and assessment are brought under section 71(3)…*

Kenig – conclusions of C.A.

51. *…In my judgment the Costs Judge was correct to find that Tim Martin was distinguishable and should be distinguished - essentially for the reasons he gave - and that the relevant principles to be applied are to be derived from In re Brown , which is binding on us.*

Kenig – C.A hesitant to say more than necessary but…

54. *…it was submitted by the Solicitors that the fact that the executor had paid some of the bills more than 12 months before Mr Kenig made his application provides a complete answer to any assessment in relation to those bills because of the terms of section 70(4) of the 1974 Act. We heard limited argument on this point and my conclusion should therefore be regarded as provisional…*

Kenig – C.A hesitant to say more than necessary but…

54. *…the situation in relation to a beneficiary is different since the court is only required "to have regard" to the provisions of section 70 as to applications by the party chargeable. It seems to me to be well arguable that different considerations may apply to an application by the person chargeable (who will know whether and when the bills were paid) as contrasted with an application by the beneficiary (who may have no such knowledge, or may learn of the payment later).*

Kenig – C.A hesitant to say more than necessary but…

The time bar jurisdiction point was not pursued in the grounds of appeal, the Court considered it was not open to the solicitors to take the point before the C.A. and so the point was not decided (para 55).

Kenig – C.A hesitant to say more than necessary but…

56. *…The question was raised before us what the effect on a section 71(3) assessment would be if it were to be held that the executor had approved the bills. For the Solicitors it was submitted that the effect of such approval would preclude any challenge by the beneficiary. For Mr Kenig, while accepting that approval by the executor may be a material factor, it was submitted that there should be no hard and fast rule because what mattered most was the legitimate protection of the beneficiary's separate interest.*

Kenig – C.A hesitant to say more than necessary but…

57. *I would accept Mr Kenig's submission…First…the ultimate interest to be protected on an assessment under section 71(3) is that of the estate and/or the beneficiaries. Second…71(3)(b) makes …provision permitting an order that payments be made "to or by the applicant, to or by the solicitor, or to or by the executor, administrator or trustee", which underscores the broader nature of the enquiry under section 71(3) …. Third, …separate consideration should be given to the position of the beneficiary and the estate in circumstances where the executor/trustee carries no risk because of their ability to pay the solicitor out of the trust property. Fourth, the decisions in In re Brown and Hazard v Lane both contemplated and allowed the beneficiary to challenge the bill even though an executor had approved it.*

Kenig – C.A hesitant to say more than necessary but…

58. That said, I would accept that the fact of fully informed consent by the executor (if proved) is likely to be a major consideration, which in many cases may prove to be determinative.

Thank you

Many will no doubt consider the way they take instructions, the information and estimates they provide, the work that they do, and the bills they present for it.

Many bills will be out there, many paid. There will plainly be an increase in cases. The potential is really serious.