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# Costs and the administration of estates

Matthew Smith and Andrew Hogan,  
Barristers,  
Kings Chambers

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# Overview

- The problem
- Solicitors acting as executors and retaining their own firms to administer the estate.
- Removal of an executor/administrator.
- Challenging the firm's charges: or not.
- Section 71 of the Solicitors Act 1974
- Actions for an account or declaratory relief: breach of trust and fraud.
- Recent caselaw

# 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?

# Appointment of solicitor or trust corporation

- Law Society Practice Note 3<sup>rd</sup> September 2020.
- Will drafting.
- Appointment of professional executor.
- Client care requirements: transparency of charging.
- Distinction: carrying out the administration of the estate v acting as executor.
- Charging clause

# Nature of the work administering the estate

- Contentious v non contentious work.
- Much administration of estates work will be non contentious.
- Section 57 Solicitors Act 1974: non contentious business agreement.
- **Jemma Trust v Liptrott and others [2004] 1 WLR 646**
- Solicitors (Non Contentious Business) Remuneration Order 2009

# Removal of an executor/administrator

- Section 116 Senior Courts Act 1981
- Section 50 Administration of Justice Act 1985
- Conceptual overlap.
- Section 116 jurisdiction is narrower: applies prior to grant.
- Section 50 can be used after grant and “intermeddling”.
- Significant body of caselaw.

# 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 [F2assessment] 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.

# Conceptual problems

- One right or two contained in section 71?
- Historical origins: sections 38 and 39 of Solicitors Act 1843
- What if the executor agrees the bill?
- Collusion.
- Work as executor v work administering the estate: the charging clause.
- Is the target the solicitors firm or the executor/administrator who agreed the bill?

# 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.

# Mussell v Patience [2018] 4 WLR 57

- Suggests account is a nugatory remedy.
- Prove money was spent in relation to administering the estate.
- Not that it was reasonably spent.
- Need to go further: breach of trust/fraud?

# Shepherd & Co v Peter Ian Brealey [2022] EWHC 3229 (KB)

- A very significant case. Or rather three very significant judgments.
- Costs Judge Rowley: 7<sup>th</sup> June 2021.  
Accepted that under section 71(3) the Akin Gump approach applied to the assessment. Not appealed.
- Costs Judge Rowley: 29<sup>th</sup> November 2021  
Ruled that solicitors time as executor not recoverable: no charging clause.

# Appeal before Cavanagh J with Costs Judge Brown

- No charging clause.
- No express agreement from all the beneficiaries.
- No utility in section 31 of the Trustee Act 2000.
- No utility in section 29 of Trustee Act 2000.
- The Boardman v Phipps [1967] 2 AC 46 jurisdiction.

# Daniel Kenig v Thomson Snell & Passmore [2023] EWHC 181

- Costs Judge Brown.
- An extremely significant decision.
- Lots in this judgment.
- Issue of privilege.
- Consideration of time limits.
- Application of special circumstances.
- Key point: distinguishes Akin Gump LLP and holds section 71(3) assessment different to section 71(1).
- Much wider concept: dealing with for example failure to adhere to estimates.