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Costs and the Administration of Estates

Cost Litigation Newsletter

By Andrew Hogan & Matthew Smith
Kings Chambers
Manchester, Leeds and Birmingham
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To what extent may beneficiaries to a will challenge the charges of, or legal costs incurred by, a professional executor appointed under the terms of that will? In what forum and on what basis can the costs and charges of a solicitor executor who appoints her own firm to administer an estate be argued to be unreasonable and liable to reduction? As we shall see, this topic has raised points of uncertainty in recent years, and is now a "hot topic", with two significant cases going to the Court of Appeal.

The problem

As long ago as 2009, The Guardian recorded that an estimated £1.25 billion was charged in fees per annum by High Street banks or solicitors for "sorting out wills and small estates", in particular dealing with probate. This area is big business for the legal profession.

The sums paid in respect of these professional charges will be paid out of the estate. The consequence of the charges coming out of the estate is that there will be a reduced pot of assets for the beneficiaries. If the charges are unreasonable and excessive how does a beneficiary challenge them? The problem may be particularly acute where a will appoints a solicitor to act as a professional executor, rather than one or more of the beneficiaries or some other lay person, because the solicitor will often appoint her firm to carry out the work administering the estate. This is not an arm's length relationship.

Indeed, it will be noted that there is the obvious potential for abuse: the executor might exercise a very light touch upon the costs incurred by her firm and may even dictate the terms upon which the firm is appointed, as well as approving and paying the bills sent to her by her own firm. This is the phenomenon called collusion: the beneficiaries may not learn the details of what is going on until the estate is distributed and the estate accounts drawn up, detailing the extent of the charges.

Solicitors as professional executors

Such arrangements are not wrong or improper. Indeed, the Law Society Practice Note made on 3rd September 2020 deals specifically with the practice of solicitors who draw up a will for a client, which provides for them to act as professional executors. There may be very good reason why a solicitor should be appointed as professional executor: obvious examples are where a testator anticipates a challenge to his wishes, or there are intra-family disputes which she wishes to avoid by appointing a neutral third party as professional executor. The Practice Note emphasises the need clearly to explain a client's options, and above all to ensure there is transparency in terms of the charging structure that would apply. The Note also distinguishes between charges made for carrying out the administration of the estate and for acting as executor. The latter requires a charging clause to be placed in the will.

Charging for the administration of estates

Much of the work done in respect of the administration of estates work will be non-contentious. Although it would be possible to enter into a non-contentious business agreement pursuant to section 57 of the Solicitors Act 1974, most work will be done under a conventional privately paid retainer, but with the addition of a "value charge" supplementing time spent and paid for by hourly rates. The case of **Jemma Trust v Liptrott and others [2004] 1 WLR 646** where the Court of Appeal considered how solicitors could charge for such work is now nearly 20 years old but remains a useful starting point. An essential piece of legislation that should be referred to is the Solicitors (Non-Contentious Business) Remuneration Order 2009 which prescribes how a solicitor's charges and expenses may be assessed in the context of non-contentious business. Solicitors wishing to put themselves in a good position to address later challenges would do well to heed the advice given at Para 33 of Longmore LJ's judgment in Liptrott, namely, to obtain prior agreement as to the basis of their charges not only from the executors but also, "where appropriate", from any residuary beneficiary. One might well replace the words "where appropriate" with "unless clearly inappropriate".

Challenging a solicitor's charges and expenses

Whilst many, perhaps most, disputes will arise after the work has been done, and the magnitude of the

charges is known by the beneficiaries, in this context as in many others, an ounce of prevention can be worth a pound of cure. It is possible for the beneficiaries to seek to remove the solicitor appointed as professional executor, to forestall the incurrence of legal costs. There are a various ways to do this by way of application to the court, but the two principal ones are an application under section 116 Senior Courts Act 1981, which can be utilized prior to the grant of probate, or the more widely cast terms of section 50 Administration of Justice Act 1985 which can be used before or after grant even where a professional executor has started to perform its duties. There is a significant body of case law which deals with the court's approach to this issue, which is essential reading for anyone advising upon or drafting an application.

But where the charges and expenses have been incurred and, to all intents and purposes, the work has been done, the beneficiaries may seek an assessment of the costs of the solicitors appointed by the executor(s) under section 71 of the Solicitors Act 1974. This section confers additional or alternative rights upon the beneficiaries to those contained in section 70 of the Solicitors Act 1974. The section reads as follows:

(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.

(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.

(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.

One right or two rights to assessment contained in section 71?

One of the interesting points of construction of this section is whether it contains one right or two to a third-party assessment. Although section 71 is a singular section it has its origins, in two separate sections of the Solicitors Act 1843, sections 38 and 39. The section would also appear to be of little assistance to a disgruntled beneficiary (at least for the moment) in circumstances where the professional executor has agreed the bill of his own firm. That can make collusion or liberal expenditure on legal costs by an executor difficult if not impossible properly to challenge.

This is due to the (possible) effect of the decision of the Court of Appeal in **Tim Martin Interiors Limited v Akin Gump LLP [2011] EWCA Civ 1574** where the Court of Appeal ruled that there is only limited scope for a challenge under section 71, due to its wording. In effect the right is residual and provides nothing more than a "blue pencil" by which the court can remove sections of costs which simply should not be there, because for example, they have nothing to do with the work the firm is charged to

do. But there is no scope for a conventional assessment, where the complaint is simply that the items in the bill are unreasonably high.

Instead, the Court of Appeal suggested that the real target will be the party chargeable with the bill, the professional executor and the correct application is to seek an alternative remedy against her: a claim for an account may be the right approach or a declaration as to the amount properly due.

These comments are obiter and they may not actually be helpful as the limits of an application for an account have been exposed in cases such as **Mussell v Patience [2018] 4 WLR 57** where, provided it was shown that the moneys claimed in costs had been spent in administering the estate, there was no scope to argue they should be discounted simply on the basis that they were unreasonably high. The suggestion from this case is that an account will largely be a nugatory remedy: instead, if a remedy is to be granted it must be because there has been something akin to fraud, waste, or breach of trust. Unreasonableness would not be enough.

However, there may be some clarity applied to this area by two very important cases which are separately going to the Court of Appeal. The first of these is **Shepherd & Co v Peter Ian Brealey [2022] EWHC 3229 (KB)**. This is a significant case. Or rather at this stage, has three significant judgments. In the first judgment Costs Judge Rowley, on 7th June 2021accepted that, under section 71(3), the **Akin Gump** approach applied to an assessment sought by beneficiaries. This judgment has not been appealed. The bill of costs, however, had substantial charges in it, not just for the administration of the estate, but for the work done by the executor qua executor. There was no charging clause in the will.

In his second judgment, dated 29th November 2021, Costs Judge Rowley ruled that the solicitor's charges as professional executor were not recoverable because there was no charging clause. Although a lack of a charging clause can be circumvented by, for example, all the beneficiaries agreeing that the charges should be paid, that was not the case here. Further, neither section 29 or 31 of the Trustees Act 2000 could be used to circumvent the lack of a charging clause and the court refused to invoke the **Boardman v Phipps [1967] 2 AC 46** jurisdiction to allow the charges. This judgment was upheld on appeal.

The second important case is that of **Daniel Kenig v Thomson Snell & Passmore [2023] EWHC 181** a decision of Costs Judge Brown. This is perhaps the more significant decision. Again, it is an application for an assessment of a solicitor's costs under section 71 of the Solicitors Act 1974 by beneficiaries. There is lots to read in this judgment. It deals with issues of privilege (the beneficiary is not a client: how is privilege dealt with in this sort of assessment)? It deals with the application of time limits for bringing a detailed assessment, and the concept of special circumstances.

The most interesting point is that it distinguishes **Akin Gump LLP** and holds that an assessment under section 71(3) is very different to an assessment under section 71(1). In effect it decides that there are two separate rights to an assessment in section section 71, due to the history of the section and the materially different wording. In effect a merits-based assessment of a solicitor's charges and expenses for administering an estate is possible, under section 71(3).

The significance of this decision is such that the case has been leapfrogged to the Court of Appeal. If the Costs Judge's decision is upheld, then the floodgates will open for disappointed beneficiaries to challenge the charges and expenses of solicitors appointed to administer the estate by their own principal, acting as a professional executor.

Andrew Hogan and Matthew Smith
both practice from Kings Chambers in Manchester.

Find out more about the Kings Chambers Costs Team