

How has Oakwood v Menzies (2024) changed existing thinking on solicitor-client costs disputes?

Does it signal an important shift in market practice?

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Menzies – the background

- An extensive body of recent caselaw on the Solicitors Act 1974;
 - **Richard Slade & Co. v Boodia** [2018] EWCA Civ 2667;
 - A statute bill can be complete and self contained even if disbursements are billed separately;
 - **Belsner v CAM Legal Services Ltd** [2022] EWCA Civ 1387;
 - Solicitors are not acting as fiduciaries when agreeing their retainers;
 - Portal claims are not contentious business (s.74(3) does not apply);
 - Client not given best possible information – but the overall charge was still fair and reasonable;
 - Oh – and its '*statutory*' – not '*statute*'!
 - **Karatysz v SGI Legal LLP** [2022] EWCA Civ 1388;
 - A statutory bill is the total demand for payment – including sums already paid by the other side;

Menzies – the background

- **Kenig v Thomson Snell & Passmore LLP** [2024] EWCA Civ 15
 - The sequel to **Tim Martin Interiors Ltd v Akin Gump LLP** [2011] EWCA Civ 1574;
 - The rights of beneficiaries to challenge the solicitor re costs incurred by trustees or executors are not limited to the rights the trustee or executor would have had;
 - The primary concern are the interests of the beneficiaries;
 - How does it work in practice?
- **Signature Litigation LLP v Ivanishvili** [2024] EWCA Civ 901;
 - Not (usually?) possible to render interim statutory bills when on a (discounted) CFA;
 - Time for seeking assessment for all fees therefore doesn't run until final bill delivered;

- Just a sample of the cases re the Solicitors Act 1974 in recent years;
- Many not concerned with the outcome of an assessment, but the prior question of whether the client is entitled to an assessment at all;
- Central in a lot of these cases are the very basic questions of;
 - What is a ‘statutory bill’?
 - When can a statutory bill be sent?
 - What right does a client have to challenge such a bill?
- And all so unclear that they all made it to the Court of Appeal.

“... s.70 of the 1974 Act, which contains significant restrictions on a client's right to challenge a solicitor's bill, has not been amended to reflect either the wholesale move away from the solicitor's retainer being an entire contract (with an entitlement to be paid only at the end of their work), or the popularity and widespread usage of CFAs following the more recent changes to costs funding models. The 1974 Act has been the subject of considerable criticism because it has not been amended to reflect modern practice. In my view, this appeal is another example of that ongoing problem.” (Coulson LJ, Ivanishvili @ 22)

See also his talk to the ACL – the Solicitors Act 1974 is ‘a mess’.

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The facts:

- The client's personal injury claim was successful, but there was a shortfall in the recovery of costs.
- The client had agreed in the CFA and its accompanying documents that the solicitors were authorised to deduct their fees from the client's compensation.
- The amount of the shortfall was therefore held back from the damages paid to the client, and used to discharge two of the solicitors' bills by deduction - at same time as sending the bills.
- Letter and bills "*amongst the most impenetrable documentation that I have seen*" (CJ Rowley).

The issue:

- The client wanted the fees assessed. Did the discharge of the bills by deduction amount to 'payment' for the purposes of s.70 of the Solicitors Act (so as to leave the Claimant out of time to seek an assessment)?
 - The Client had delayed, such that he was 12 months + post bill - so if paid, no assessment. If not paid, assessment if could show special circumstances (which CJ Rowley had held that he had).

Court of Appeal [2023] EWCA Civ 844:

- Yes - (1) "payment" in s.70 includes the deduction of fees payable under a statutory bill with the knowledge and consent of the paying client, and (2) the relevant consent could be given before or after the delivery of the bill.
- What the client needed consent to, in order for payment to take place, was "the transfer of money", not necessarily the precise amount to be transferred.

Menzies v Oakwood Solicitors Ltd

The appeal:

- Concerned the meaning of the single word - 'payment' - in its context in the Act;
- Claimant's case - 'Payment' meant the use of monies to settle a specific demand - a specific bill - with the agreement of the client. The client must be told of the sum demanded (receive the bill) and agree to the use of monies to pay that sum;
- Solicitor's case - as per the Court of Appeal - a prior general agreement that monies can be used to pay future bills, combined with later notification that this has been done, sufficed.

The unanimous decision:

- The client prevailed. For there to be 'payment', there must be a 'settlement of account';
- This means notification to the client of the sum demanded and the client's agreement to that sum;
- This must take place AFTER delivery of the statutory bill;
- There cannot be 'payment' of a statutory bill before the bill is delivered (even if the bill is paid using money already in the firm's possession).

"the detail of the bill delivered, and the opportunity for the client to consider that detail, is of central importance." [41]

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What does this mean in practice;

- It does NOT mean that the firm cannot deduct sums from damages;
- It does NOT mean that the firm cannot transfer those sums from client account to office account;
 - To do this, the Solicitors Accounts Rules require 'written notification' to the client of the sum payable;
 - 'Written Notification' has often been elided with 'Statutory Bill'. Post Menzies it seems clear that there can be a written notification which is not a statutory bill;
- It does mean that until the client (a) received a statutory bill in proper form and (b) agrees the amount of that bill, that the transfer of money does NOT count as 'payment' for s.70;
- That therefore means that the time limits for the client seeking assessment under s.70 are not triggered until this happens;
- The net effect, therefore, is that the client will have longer to seek assessment / with fewer restrictions;
 - Up to one month post delivery - absolute right (no change);
 - Up to 12 months post delivery of bill, subject only to conditions. No need to show special circumstances (as would with 'paid' bill);
 - Post 12 months - no absolute bar to assessment if not paid (no 12 month 'guillotine'). Instead, client will need to show special circumstances;

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Other key points;

- The judgment contains the clearest and most authoritative statement that the purpose of these parts of the Act is consumer protection;

"As to the purpose of the regime, it is apparent that the requirements that bills of costs be delivered, that the bills comply with statutory conditions, and the right to have those bills assessed are concerned with the protection of the interests of the client - the consumer of solicitors' services. The court's power to assess costs exists to ensure that excessive costs are not claimed from the client. Client protection is diminished if payment occurs before there is any opportunity to consider the bill of costs and whether and, if so, to what extent, it should be paid."

- Whilst it was always arguable that part, at least, of the purpose of this part of the Act was to protect solicitors, it is now clear, at the highest level, that the - or at least the main - purpose of the regime is consumer protection;
- This may be material to future issues of construction and interpretation of the Act

Does Menzies change thinking on solicitor-client disputes?

- **Two aspects**
 - The immediate and practical;
 - Solicitors' billing practices may need to change;
 - Solicitors' understanding of their exposure to costs challenges may need to develop.
 - The longer term;
 - Clear and unanimous decision from the Supreme Court that consumer protection is the central issue in interpreting these provisions;
 - These provisions are 'a mess' – Coulson LJ (and others – see Vos MR);
 - The expectation should be that where the mess leaves uncertainty, post Menzies the Courts are more likely to resolve that in the clients' favour, not the solicitors;
 - Contrast the 'robust' approach by the Court of Appeal in Menzies to that in the Supreme Court.

Does Menzies signal a shift in market practice?

- **It should;**
 - Firms need to review or revise their billing and post billing practices;
 - Probably a particular issue for personal injury firms – the classic CFA deduction from damages cases;
 - Other firms, using discounted CFAs for example, need to take into account both this and cases such as Ivanishvili;
 - It does not, however, undermine the ability to secure funds – liens, retention of damages etc;
 - It just means it needs doing properly.
 - Detail for another time, but if you are going to rely on payment, or ISBs etc, please make sure what you say in your retainer letter / TOBs / Bills is consistent;
 - Don't tell clients they have rights you then say they don't have (or vice versa);
 - If it's an interim statutory bill, say so;
 - Are there ways to ensure 'payment' even if the client does not engage?

What's next?

- **Wider background;**
 - A range of difficult issues to do with DBAs and CFAs, outside scope of this talk;
 - All adds to uncertainty for solicitors;
- Upcoming cases;
 - **Holcroft v Thorneycroft Solicitors Ltd** – appeal from Eyre J;
 - Listed in CA July 2025;
 - Central issue – client told of Defendant offer (£x), costs inclusive;
 - Solicitor says this includes its costs of £y (though D's offer did not specify this);
 - Solicitors says, therefore, if accept you will receive £z (£x-£y);
 - Client accepts offer;
 - Does this amount to a complete agreement as to the solicitor's costs, so as to remove the client's rights to assessment?
 - Can a client 'contract out' of their rights under the Solicitors Act 1974?
 - If so, does it require clear wording?
 - Can it be done before the client has even received a statutory bill?

What's next?

- **Other issues;**
 - Holcroft may involves arguments about whether such an 'agreement' (if there was one) is a Non-Contentious Business Agreement;
 - NCBA's and CBAs are sometimes seen as a 'safe haven' for solicitors seeking to inhibit clients' rights to later seek assessment;
 - Increased use in light of uncertainties and difficulties surrounding s.70?
 - A number of interesting cases upcoming as to the effects of NCBA's and CBAs – especially where the underlying basis of payment is on a hourly rate basis;
 - May be the next 'hot topic';
- **Reform?**
 - The calls are many – judiciary, Senior Costs Judge, ACL, even the odd costs counsel;
 - It requires '*urgent legislative intervention*' and a '*generational look*' (Vos MR);
 - CJC review limited. Government appetite for a thorough review?

Thank you

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