Where there's a will

Colin Campbell explains a significant ruling for beneficiaries seeking to challenge solicitors' bills

Good news and bad news. The bad is that your favourite aunt, Aunt Agatha has died. The good is that she has left you her entire estate. It comprises an unmortgaged freehold cottage worth £700,000, with a registered title; her wine cellar valued at £100,000, plus a further £100,000 on deposit at the bank - the wise old lady having turned her other assets into cash, so that her executor can administer her estate inexpensively.

Aunt Agatha's executor is a lawyer working for the family firm of solicitors who has instructed them to administer the estate, obtain probate, pay inheritance tax, sell the cottage and distribute the balance to you. Now the job is done and the money is yours, except when you receive the pay-out, you notice that £50,000 plus VAT has been deducted from your inheritance for the solicitors' administration fees, which have been approved by the executor. Bit steep that, you think! While Aunt Agatha has been most generous, she would be disappointed with the family solicitors in having charged about 6% of the value of her estate, after she had done so much in her lifetime to settle her affairs, and leave them in a simple and orderly state. What can be done about it?

On enquiry, the solicitors say that a fee of 6% is 'standard' and less than a bank would charge. However, the bills you have seen, which the executor has sent you with apparent reluctance, state in a footnote that there is a right to have the charges checked by the court under the Solicitors Act 1974 to ensure that they are reasonable. It is called 'Assessment'.

What next? A little research reveals that section 71 applies to an assessment '… on application of third parties'.

The section has two limbs relating to bills delivered by solicitors:

- s.71(1) – enables a person who has paid (or is liable to pay) a bill to the solicitor or to the party chargeable, to apply to the High Court for an order for it to be assessed 'as if he were the party chargeable with it'. Research reveals that such a person might be a mortgagor paying a mortgagee's costs under a contractual term in a mortgage, or a tenant paying a landlord's costs under the terms of a lease.
- s.71(3) – enables '…any person interested in any property' out of which 'a trustee, executor or administrator has paid or is entitled to pay the bill', to apply to the High Court or an order that it be assessed. Research reveals that such a person might be a beneficiary under a will, whose share in the estate will be affected by the level of the solicitors' fees.

As the sole beneficiary absolutely entitled to Aunt Agatha's estate, you are clearly a 'person interested' and eligible to make an application under s.71(3), but taking a case to court is expensive. What are the chances, you wonder, of persuading a judge that £50,000 plus VAT is not a reasonable fee for winding up an estate as simple as Aunt Agatha's – indeed, that it should be far less?

Until *Kenig v Thomson Snell & Passmore* [2024] Costs LR 1 was handed down on 18 January, the chances would have been well-nigh minimal. In *Kenig*, the eponymous claimant was a beneficiary under a will made by his mother. The defendant was the firm of solicitors instructed by her executor to administer her estate. Against estimates of £10,000 to £15,000, the firm had charged and been paid £54,410 plus VAT to do so, eight bills having been delivered between 17 October 2019 and 2 August 2021 totalling that amount.

On Mr Kenig's application for an assessment under s.71(3), Master Brown had found that fees so much over the estimate amounted to a 'special circumstance' justifying the grant of the order sought. He also decided that although some of the bills had been paid in full more than 12 months before the application, he had a discretion to order an assessment despite the deadline for applying under s.70(4) having passed.

IN THE COURT OF APPEAL

The solicitors appealed via a 'leap-frog' direct to the Court of Appeal. It was their case that any assessment of the bills would be fruitless and should not be allowed, because it was not open to a beneficiary to challenge fees that had been approved by the firm's client (here the executor) and paid out of the proceeds of the deceased's estate. In support, the solicitors relied on the principles applied in *Tim Martin Interiors Ltd v Akin Gump LLP* [2012] 2 Costs LR 325.

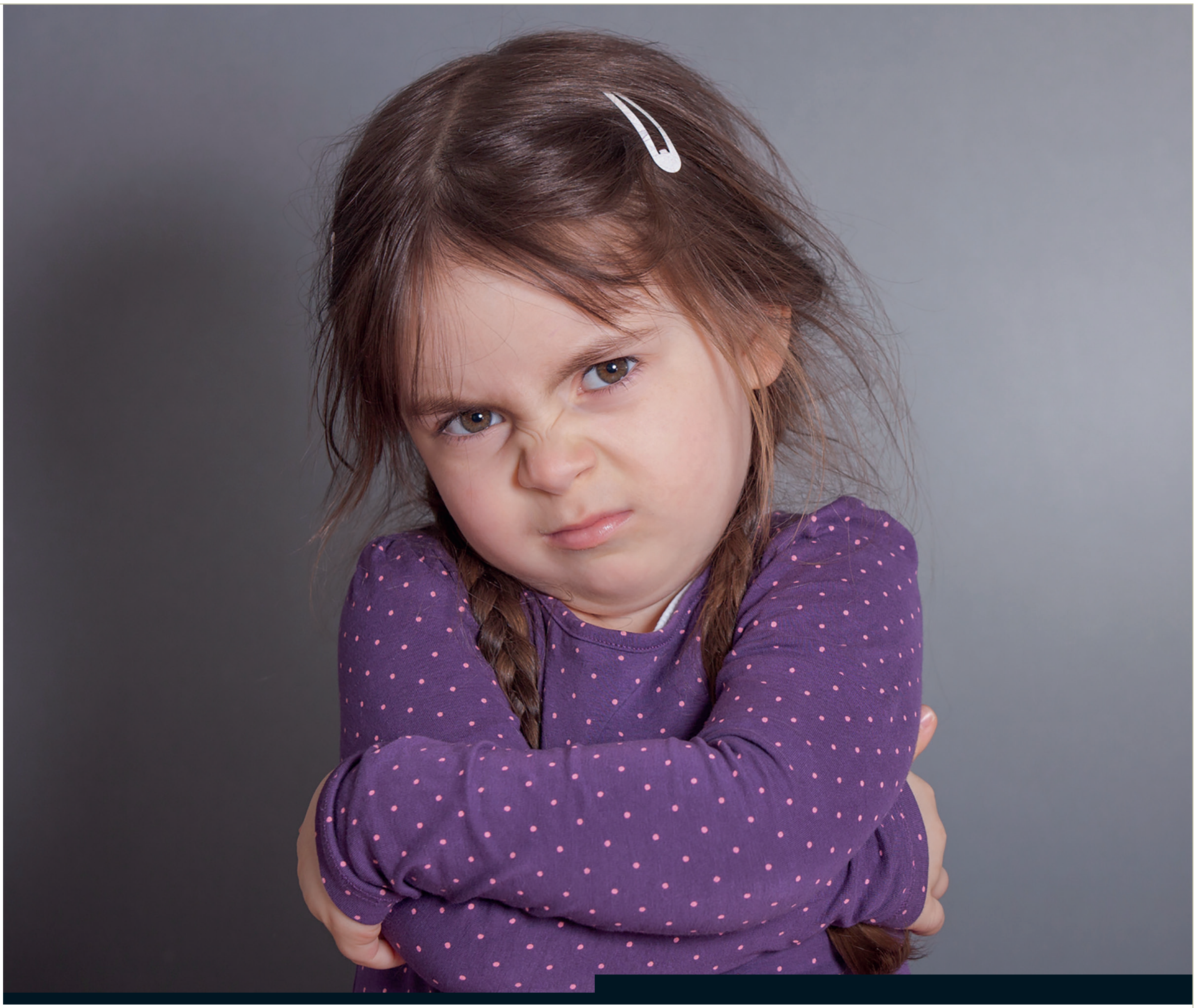
The crux of the decision in *Tim Martin* was that s.71 entitled a third party to an assessment as between solicitor and client, as if that third party were the client. It followed that if the client had approved the charges, it was not open to the third party to make any challenge to them except by what Sir Timothy Lloyd called a 'blue pencil' approach. By that he meant items outwith the scope of the third party's liability (in that case, some bankruptcy costs) or costs only allowable 'on a special arrangement basis' within the terms of CPR 46.9(3)(c), being items unusual in nature or amount (see *Tim Martin* paragraph [95]). It followed that although the mortgagee bank in *Tim Martin* had used a City firm to enforce mortgages in the Wandsworth County Court, and when doing so, had insisted that the solicitors travel to its offices to take instructions, and all for a mere £114,216, having approved the charges, there was nothing the mortgagor who was liable to pay the bill could do about it under s.71(1).

In giving judgment when dealing with the claimant's application under s.71(1), Sir Timothy had assumed that no distinction was to be drawn between s.71(1) and s.71(3) (see [40]). That meant that the costs judge was not entitled to alter items approved by the party chargeable, whether that be the bank as was the position in that case, or an executor on a s.71(3) application. That meant that such matters as the hourly expense rates for the solicitors instructed and their locality, or the hours they claimed for doing the work, could not be touched. Consequently, said Sir Timothy, ' a third party assessment *under s.71* …[was] of limited use to a third party…' [95] [author's emphasis].

The third party's remedy was to seek an account in the Chancery Division. That led Sir Timothy to predict that '... third party assessments will become rare, whereas claims for an account... may become much more frequent..' but that 'it seems to me that the appropriate procedure for a dispute of this kind is a subject worthy of the attention of the Civil Procedure Rule Committee [CPRC]'. [71]

Unfortunately, both of Sir Timothy's recommendations ended up in dead ends. Nothing was taken up by the CPRC, while in *Mussell v Patience* [2018] 2 Costs LO 239, the account door was firmly closed to disappointed beneficiaries. HHJ Matthews held that on taking the account, executors were entitled to all 'just allowances' within CPR PD 40A paragraph 4. In rebuttal, it would be necessary for the beneficiaries to produce evidence to dispute the accounts. Otherwise, said the judge: ' …an executor has only to show (1) that the sum concerned was indeed spent and (2) that it was spent in the fair execution of the administration of the estate.' [14]

In these respects, a voucher showing payment or a receipt would normally be sufficient. No assured result for challenging Aunt Agatha's bill, were the account route to be taken in that case! But help is now at hand.



In *Kenig*, it was argued and accepted by the court that Sir Timothy Lloyd's assumption that no distinction was to be drawn between s.71(1) and s.71(3) was wrong, and that Master Brown had been correct so to find. Under s.70(3), beneficiaries were owed a fiduciary duty by the executor (or trustee) as the party liable to pay the bill, whereas third parties such as mortgagors or tenants under s.71(1) were not, and in particular, not by the party chargeable. It followed that the interests of the beneficiaries under s.71(3) were wider than those of the third party under s.71(1), and were entitled to greater protection because of the ability of the executor (or trustee) to pay the solicitors out of the deceased's estate.

To reach this conclusion, however, the court needed to draw heavily on a Victorian authority, *Re Brown* (1867) LR 4 Eq 464, and even a case decided in the reign of George III, *Hazard v Lane* (1817) 3 Mer. 285.

OTHER IMPACT

How might this impact on an assessment of the solicitors' bill for Aunt Agatha's estate, or, indeed for Mr Kenig?

First, it appears that it will no longer matter if the executor has approved the charges, as it will be open to the costs judge to wield a red pen, rather than a blue pencil, when deciding whether the charges

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are reasonable. Thus, when an executor instructs solicitors to administer the estate, there will be accountability to the beneficiaries, and the costs judge will be entitled to disallow not just items outwith the scope of the third party's liability, but also to make adjustments for excessive hourly rates, the wrong grade of fee-earner undertaking the work, using a City firm when a local practice might do, and so on. In an Aunt Agatha context, that means that both the solicitors and the executor will be answerable to you, as the beneficiary, and the bill will no longer be a tick-through where the executor has approved it, as would have been the case applying the principles in *Tim Martin*.

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Second, if that is good news for beneficiaries, what about executors? Suppose that the application to challenge Aunt Agatha's bill is successful and it is assessed at £10,000 plus VAT. While that means that your testamentary gift will increase by £40,000 plus VAT, who stands the shortfall? After all, it was the executor who instructed the family firm and he is the party chargeable, so does he pay the balance personally, or do the solicitors take the hit because their charges were unreasonable?

One possibility lies in s.71(5) which provides that the applicant under s.71(3) who has paid money to the solicitor (in effect by deduction of funds from the estate on approval by the executor): '... has the same right *to be paid that money by the … executor …* chargeable with the bill as the solicitor had' (author's emphasis).

If that is right, how willing in future will executors be to accept their appointment, if that leaves them personally on the hook for the solicitors' costs of administration? Far fewer than currently may be the answer to that.

Third, before the beneficiaries pop the champagne corks, what happens if it is too late for the bills to be assessed due to s.70(4)? In *Kenig* the Court of Appeal expressed a view that was merely 'provisional', that while the section would preclude the executor from making a s.70(3) application, it might not for a beneficiary. The reason was that the executor would be aware of the date of payment, but the beneficiary might have no such knowledge. However, the court did not need to decide that point as it had by then dismissed the appeal against Master Brown's decision on *Tim Martin*; but in doing so, has left plenty of scope for argument about time limits under s.70(4) in a future case.

So far as s.71(1) is concerned, *Kenig* leaves the conclusion in *Tim Martin* untouched. That continues to mean that a third party such as a mortgagor or a tenant who is liable to pay the solicitors' bill of the party chargeable (being the mortgagee or landlord), has nothing to gain if the fees have been approved, because there is nothing left to challenge. It follows that such third parties have no remedy. This is illogical if is to be assumed that the *raison d'etre* of s.71 in the first place is to safeguard all categories of third parties from overcharging. Why should it be different for borrowers and tenants than it is for beneficiaries?

Kenig explains this by saying that the third party's interests under s.71(1) need no particular protection, as the assessment can be conducted as a normal solicitor-client assessment [13]; but that will only be the case if the party chargeable has not approved the bill and gives the third party free rein to raise any challenges it likes at detailed assessment. Why would the party chargeable ever want to do that? It is hard to think of a reason.

A more constructive interpretation of the rule would be that if the court makes an order for assessment under s.71(1), the third party can raise objections to the charges irrespective of whether the party chargeable has approved them. That way, the third party has a remedy against paying more than he should, while leaving the solicitors in-pocket because any luxuries such as going to the City when a high street solicitor would suffice, will be for the account of the party chargeable. Unless that is done, as Sir Timothy observed: 'The effect of my conclusions as regards both quantification and payment is that a third party assessment under s.71 is of limited use to a third party' [95].

It is right to point out that if that is the case, a third party might have a remedy under CPR 44.5 (amount of costs payable under a contract), but that is beyond the scope of this article. What is clear, however, is that the upshot of *Kenig* is to bring into sharp focus the wisdom of the words of Vos MR that: 'I have no doubt that the 1974 Act is in urgent need of legislative attention'.

COMMENT

It has taken a differently constituted Court of Appeal in *Kenig* to decide that an earlier Court of Appeal in *Tim Martin* was wrong to elide applications under s.71(1) and s.71(3). While in doing so, the decision has given beneficiaries some real bite in a bill such as Aunt Agatha's or, indeed, those of Mr Kenig when they are assessed by Master Brown, the fact that the court had to draw so heavily on two ancient authorities to do so, must give real credence to Vos MR's views about the relevance of the Act in modern conditions.

Expressed another way, in 2024, should we still be relying on cases belonging to the days of the horse and cart when interpreting the 1974 Act? Surely not.

Whoever wins the next election needs to tackle the Solicitors Act, even if we should be saying 'Happy 50th Birthday' rather than highlighting the urgent need for legislative attention to be given to it.

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