Paying the consequences

Colin Campbell scrutinises a crucial Supreme Court ruling on 'payment' of a solicitor's bill

What is meant by 'payment'? It's a simple question, and it should be capable of a straightforward answer. After all, if a round is bought in the pub, 'payment' occurs when the drinks are poured, the cash is handed over, or the credit card is tapped. Likewise, when buying and selling a car, 'payment' takes place when the buyer produces the money and the seller hands over the keys, vehicle and log book. Sometimes, of course, the process is more nuanced, such as where a wine buyer agrees to buy a case of wine, with full payment to be deferred until the bottles are shipped and delivered. While title to the goods will remain with the vendor until those conditions are met, no confusion is likely to arise about when 'payment' is actually made.

Why, then, should the meaning of 'payment' be different where solicitors and their bills are concerned, and does it matter? That is the question that exercised the minds of Master Rowley, the costs judge at first instance in *Menzies v Oakwood Solicitors*, Bourne J on appeal (see [2022] Costs LR 1793), the Court of Appeal (Vos MR, Lewison, Simler LJJ (see [2023] Costs LR 1083) and finally the Supreme Court (Lord Hamblen, Lord Briggs, Lord Sales, Lord Leggatt, Lord Richards (see [2024] Costs LR 1525).

And the answer? Master Rowley went one way, Bourne J another way, the Court of Appeal went the Rowley way, and the Supreme Court went the Bourne J way, restoring his order five nil, against a three nil overrule by the Court of Appeal! Whoever said that costs were dull and predictable?

Back to the question, elegantly summarised by Lord Hamblen who gave the only judgment in the Supreme Court: 'The issue which arises on this appeal is what constitutes "payment" for these purposes…'

'Purposes' referred to deciding whether a client had paid his solicitor's bill under the terms of the Solicitors Act 1974 ('the act').

THE FACTS

The facts of the case are uncontroversial. Mr Menzies had retained Oakwood to act for him in the recovery of damages for personal injuries he had suffered following a road traffic collision. The claim had been resolved on the basis of agreed damages of £275,000, plus costs to be assessed if not agreed. Those costs were subsequently negotiated and settled in the sum of £38,000. However, the conditional fee agreement (CFA) under which Mr Menzies had retained Oakwood had not been 'lite', and the firm had looked to him for shortfall costs, being the difference between agreed recovered costs and the costs as between solicitor and own client: the latter included, for example, an insurance premium, as well as a success fee capped at 25% payable under the CFA.

Overall, the shortfall was £35,711.20. Oakwood held back that amount from the damages, sent Mr Menzies a final bill dated 11 July 2019 which they discharged by deduction from the retained sum, and accounted to him for the remaining balance of the damages. Thus in the firm's books at least, Mr Menzies owed nothing, as payment of Oakwood's bill had taken place when their fees had been transferred from their client account to the office account. Indeed, for the solicitors, that was the end of the matter. It was not, however, for Mr Menzies, although it took him a while to express his concern at the deduction that had taken place.

In the ordinary course of events, a client who is unhappy with their bill can ask the court to assess the charges, so that solicitors do not claim excessive remuneration for the work they do. The act is the client's route to do this. Under s.70, there is an unconditional right to have the bill assessed within one month of delivery. After that one-month period and until no more than 12 months have elapsed from the payment of the bill, the court can order an assessment on such terms as it thinks fit. After 12 months, an order cannot be made unless there are 'special circumstances'. However, the court has no power to order an assessment after 12 months have elapsed from the date of payment of the bill - see s.70(4).

For a reason that is not evident from any of the four judgments, Mr Menzies did not exercise his rights under the Act to have Oakwood's final bill assessed until he issued an application to do so on 11 April 2021. It followed that if payment of the bill had taken place on 11 July 2019, he was far too late, and the application was doomed under s.70(4). That was the conclusion reached by Master Rowley, although had his hands not been thus tied, he would have found 'special circumstances' to order an assessment, since only 17% of Oakwood's profit costs had been recovered from the defendant in the personal injury claim.

ON APPEAL

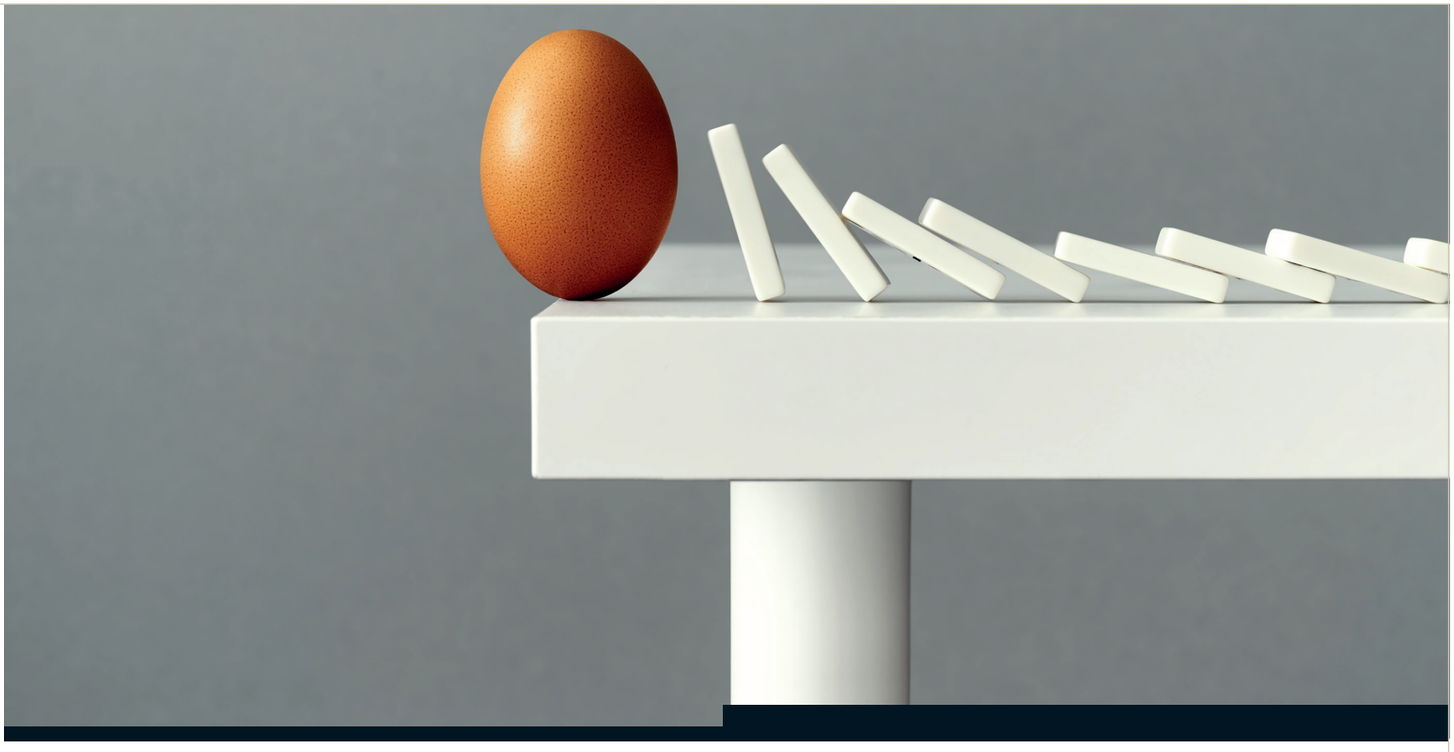
On appeal, Bourne J disagreed. He held that there had been no payment sufficient to start time running against Mr Menzies under s.70(4) of the act because there had been no 'settlement of account', by which was meant the client's agreement to the sum to be taken by way of payment of the bill. It followed that Mr Menzies' application for detailed assessment of the bill was not time-barred by s.70(4) because it had been made more than one year after the relevant costs had been paid, as the court below had held. On the contrary, there had been no payment, because he had not settled the account by giving his consent to the charges.

COURT OF APPEAL

Next stop the Court of Appeal. Giving the judgment of the court with which Lewison and Simler LJJ agreed, Vos MR reversed the decision of Bourne J, on the grounds that Mr Menzies had agreed under the CFA that Oakwood could deduct monies held on account from the firm's final bill. Retention of the monies in the light of his earlier agreement in principle sufficed to amount to payment for the purposes of s.70(4). At [29] he said:

'It is well-settled, and not disputed, that payment may, in certain circumstances, be made to solicitors where they retain monies out of a fund received on their client's behalf. It will not be payment if the solicitors simply help themselves to the money without either the client's knowledge or approval. Something more is required.'

At 42, he continued: 'The requirement of consent does not, in our view, require that consent be given after the delivery of the bill, if the client has already validly authorised the solicitor to recoup his fees by deduction from funds in his hands. What the client needs to consent to, in order for payment to take place, is "the transfer of money", not necessarily the precise amount to be transferred. We reject the submission that the client must agree to a deduction quantified in pounds and pence. It is the process of assessment that fixes the



precise amount that the client is required to pay.

'In our judgment it is clear that the CFA in this case, and its accompanying documents, specifically authorised the solicitors to recoup their fees out of the client's compensation, up to a maximum of 25% of that compensation. Payment of the bill took place when, after delivery of the bill, the solicitors made that deduction. It follows, in our view, that payment of the bill took place more than one year before the bill was challenged and that, consequently, the court's power of assessment was barred by s 70(4).'

THE SUPREME COURT

Last stop, the Supreme Court!

As so often with matters involving the Solicitors Act, a trawl of Victorian authorities was required to enable the Justices to find the right answer.

In *Re Bignold* (1845) 9 Beav 269, Lord Langdale MR had said this: 'I have never, hitherto, considered that the mere retainer by a solicitor, out of monies in hand, of the amount of the bill, amounted to payment unless there has been a settlement of account.'

In *Re Street* (1870) LR 10 Eq 165, Lord Romilly MR had continued: 'I have held over and over again that there can be no payment within the meaning of [the Solicitors Act] before the bill has been delivered and before the client has had the opportunity of seeing the items.'

Fast forward a century, that too was the opinion of Stamp J in *Forsinard Estates Ltd v Dykes* [1971] 1 WLR 232, approved by the Court of Appeal in *Gough v Chivers & Gordon* [1996] Lexis Citation 1048. Stamp J said that: 'It is clear that if a solicitor without the knowledge or approbation of his client pays his own bills out of monies of his client and hands over the proceeds, that is not payment within the meaning of s.69 Solicitors Act 1957 [a forerunner of the 1974 act].'

Drawing this line of cases together, Lord Hamblen concluded that they provided strong support for Mr Menzies' case of the need for an agreement as to the amount to be paid in respect of the bill, and that mere delivery of the bill did not suffice. The client needed to be informed of, and to provide agreement to, the amount which the solicitor intended to take, before there could be 'payment' for the purposes of the act.

In the modern world, that should not cause a problem: it was open to solicitors to have a prospective agreement as to the amount to be charged by fixing a fee. Moreover, where agreement was required, communication with clients to get it was far quicker and more straightforward than in Victorian times. It followed that Bourne J had been correct to hold that there had been no settlement of account and that, accordingly, his order for an assessment of Oakwood's bill would be restored.

PRACTICAL EFFECT

Question one was thus answered by the Supreme Court: the client must be given the opportunity to consider the detail of the bill, and to decide whether and to what extent it should be paid, before 'payment' will occur for the purposes of s.70(4).

Question two: to what extent, if at all, does this matter? The answer is, probably a great deal for solicitors who do not update their

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retainers as a consequence of the judgment in *Oakwood*.

As so often in solicitor / client disputes, it is the lawyers who are the authors of their own misfortunes. Rather than present Mr Menzies with a fait accompli, it would have been open to Oakwood to have given him an opportunity to agree the charges, and thereby conclude 'payment'. That said, there was nothing improper in the firm having relied on the terms of the retainer permitting the deduction of their fees from the damages recovered: indeed, a strong Court of Appeal had held that such action constituted 'payment' under the act.

Not any more! The Supreme Court was clear that the client must have an opportunity to consider the charges before payment of the bill can take place. It follows that there now appear to be two types of 'payment'. In the solicitor's' books, payment will occur when sufficient of the client's funds are transferred from the firm's clients' account to office account, so that the client owes nothing to the firm. However, for the purposes of s.70(4), 'payment' will not take place unless or until the client has had an opportunity to learn, mark and inwardly digest the bill, and has approved its contents. It follows that firms that fail to update their terms and conditions to address this point may find that, years later, they face an application for detailed assessment that is not too late, because there has been no 'payment' for the purposes of s.70(4). By then, the fee-earners who did the work may have moved departments, changed firms, become judges, retired or even died - thereby making justification of the charges that much harder. At worst, that might mean that the solicitors will be ordered to pay the costs of the assessment if they fail to hold onto at least 80% of their charges (see s.70(9)).

If a fixed fee cannot be agreed, or the solicitors want more because the case was a nightmare... they can always ask 'Are you happy with the bill?'

THE SOLUTION

The obvious solution, as suggested by Lord Hamblen, is to agree the fee with the client in advance. 'Payment' will then take place when that agreed amount is taken from damages, or alternatively, when the client pays the bill out of other funds. And, of course, if a fixed fee cannot be agreed, or the solicitors want more because the case was a nightmare and went over budget, they can always ask 'Are you happy with the bill?'. As Lord Hamblen observed, communication is much easier than it was in Victorian times (except perhaps the postal service: a once a day delivery if you are lucky), so that obtaining the client's agreement to the charges ought to be that much more straightforward.

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