When is a solicitor's bill paid? *Oakwood Solicitors Ltd v Menzies* [2024] UKSC 34

In a much-anticipated decision handed down today (23rd October 2024), the Supreme Court (Lord Hamblen giving the sole judgment) has held that "payment" for the purposes of s.70 of the Solicitors Act 1974 requires an agreement to pay the sum specified in the bill. It is not (as the CA had held) met by a mere agreement to the transfer of money followed by the appropriation by the solicitors of a sum towards their costs. In short (a) clients may well have longer to challenge invoices than they thought and (b) solicitors are well advised to ensure agreement by their clients to the specific amount claimed in their invoices.

The Issue

S. 70(4) of the Solicitors Act 1974 provides that: "The power to order assessment [of a solicitor-client bill] shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill. …"

What is "payment" for the purpose of s 70(4)? In particular, does the common practice of sending a bill to the client, whilst also remitting to the client the balance of damages after deducting the sums claimed in the bill, start time running under the subsection?

Factual Background

The client (Mr Menzies) was represented in his claim for personal injuries by Oakwood solicitors under a CFA. The CFA provided for a success fee of 25% of basic charges and that the total amount of fees would be capped at a maximum of 25% of the compensation received after deducting any fees and expenses recovered from the other side.

The CFA also provided that the balance of Oakwood's basic charges and success fee would be "paid out of [the client's] compensation" and that, out of the compensation monies received, the client agreed "to let us take the balance of the basic charges; success fee; insurance premium; our remaining disbursements; and VAT. You take the rest" (par 8 of judgment).

An offer was made by the defendant in the underlying litigation and accepted. £200,000 was paid over to Oakwood.

Oakwood then sent an Interim Statute Bill to the client showing sums which might be recoverable from the defendant and some non-recoverable costs.

Then (on 11th July 2019) Oakwood sent a Final Statute Bill stating what its total fees were and adding that "unless otherwise stated in the covering letter the total charge has been deducted from your damages as agreed" (par 16). On the same day it paid over £22,000 to the client which was said to be the difference between the sums it had retained and the sum now stated to represent the shortfall.

Procedural History

The client sought – more than 12 months after events set out above – to assert his right to challenge the bill under s 70 of the Solicitors Act 1970. The Solicitors asserted that payment had been made more than 12 months earlier and therefore there was no right to assessment by operation of s 70(4) of the Solicitors Act 1974.

Costs Judge Rowley held that payment for the purpose of s 70(4) had been made when the Final Statute Bill was delivered but on appeal Bourne J (with Costs Judge Brown as assessor) held that there was no payment because there had been no sufficient settlement of account.

On further appeal, the CA (Sir Geoffrey Vos MR, Lewison and Simler LJJ) held that retention of the monies in the light of the agreement in the CFA amounted to payment for s 70(4) and no settlement of account was required. They concluded that (at par 42 of their decision): "The delivery of a compliant bill will give the client the necessary knowledge. 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."

The case went to the Supreme Court.

The parties' cases in the Supreme Court

The client argued, in short, that payment for the purposes of s.70 requires an agreement as to the amount to be paid, which has to be a reactive process to a demand made in the bill. Oakwood argued that the requirement is satisfied where the retainer provides for payment by way of deduction from sums held in client account and there is communication of the fact

of the deduction – so payment may be made simultaneously with delivery of the bill (as happened in this case).

The Supreme Court allowed the appeal and favoured the client's case.

Discussing the statutory context, the court highlighted the following:

1. The section is concerned with the client's right to challenge solicitors' bills of costs by way of assessment. It would therefore be surprising if payment was to occur without the client having any opportunity to consider the detail of the bill and decide whether and to what extent to pay it.
2. The date of delivery of the bill is central to the statutory scheme, triggering a one-month period during which there is an unconditional right to assessment. This, said the court, demonstrates that the opportunity for the client to consider the detail of the bill delivered is of central importance to the regime under s.70.
3. The section clearly envisages payment after deliver of the bill of costs and, therefore, not by virtue of the delivery of the bill. This is reinforced by the fact that an application for an assessment gives rise to a right not to pay the bill until the assessment is completed.
4. The purpose of the regime is the protection of the interests of the client; that protection would be diminished if payment could occur before the client had any opportunity to consider the bill and decide whether to pay it. Given the prevalence of similar retainer terms, there would be fewer and fewer cases where clients could benefit from the relatively generous provisions pertaining to the time for assessment where a bill remains unpaid.
5. There is an obvious reason for the stricter regime that applies where the bill has been paid: payment is taken to represent acceptance and agreement to the sums claimed in it, and in those circumstances it is understandable that the client's right to an assessment, effectively reopening that agreement, is restricted. But on Oakwood's case, payment could occur without the client having any opportunity to consider the bill at all, let alone accept and agree to it.

The Supreme Court therefore considered the client's interpretation was the more obvious reading of the statute.

It was also in keeping with authority under both the 1974 Act and its antecedents, to which the Court held it was right to have regard in the light of the "real difficulty or ambiguity" of the issues of interpretation raised. Those authorities established the need for a "settlement of account". The Court of Appeal had found these authorities to be largely irrelevant, but the Supreme Court disagreed: although the phrase "settlement of account" was not used in the statute, the authorities nonetheless showed what was meant by "payment" in that context.

Accordingly, where it is alleged that there has been payment by deduction or retention, the solicitor must show that the client agreed to the sum taken or to be taken by way of payment of the bill, and not merely the fact of the deduction. Whilst such agreement can be inferred by conduct, mere delivery of a bill accompanied by a deduction does not suffice.

Clients' Rights

Plainly, the decision opens up the possibility of challenges to bills which solicitors, clients and their advisers alike may have been treating as time barred. If the facts resemble those of Menzies v Oakwood, in fact time has not started to run under s 70(4).

It is evident that clients and those advising them will want to consider the circumstances in which their obligations to meet their solicitors' bills have been met. The following considerations are relevant:

1. A payment in the usual way (presentation of invoice and subsequent transfer of funds in respect of that invoice) clearly amounts to "payment" (par 36).

2. However, the mere delivery of a bill together with retention of monies does not amount to payment (par 38).

3. Similarly, the settlement of account (meaning agreement to the particular amount being taken or being taken from monies in account) amounts to payment (par 37 and 71 of judgment). Settlement of account can be implied by conduct (par 62 of judgment).

4. However, the mere agreement as to the fact of retention or deduction (whether prior or contemporaneous) does not amount to payment absent agreement to an amount (par 71 – 72 of the judgment).

5. Prospective agreement as to a particular amount can amount to payment (par 79 of the judgment).

Practical Implications for Solicitors

The Court rejected a submission that this interpretation would cause unacceptable practical difficulties. It said that the law had been well settled for decades prior to the Court of Appeal's decision, without apparently leading to widespread difficulty. In particular, the judgment points out that it is open to solicitors to agree terms with their clients which should assist in establishing acceptance of and agreement to the bill. Of course, even if payment has not been made, if 12 months has elapsed from delivery of the bill, there is no entitlement to challenge as of right. The client has still to prove that "special circumstances" exist which entitle them to challenge under s 70(3) and solicitors can argue that no such circumstances exist. But there is no doubt that solicitors are well advised to seek to include appropriate wording in their retainer documentation, and/or their final bills and accompanying correspondence.

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