NEW SQUARE Chambers

Friday 2 February 2024

CASE NOTE: *KENIG V THOMSON SNELL & PASSMORE LLP* [2024]

James McKean

BENEFICIARIES EMPOWERED TO CHALLENGE THE BILLS OF AN ESTATE OR TRUST'S SOLICITORS: *KENIG V THOMSON SNELL & PASSMORE LLP* [2024] EWCA CIV 15

This Court of Appeal decision may dismay solicitors who act for an estate or trust, but is encouraging reading for beneficiaries who are unhappy with the bills – and whose personal representatives or trustees will not act.

FACTS

Thomson Snell & Passmore LLP ('**the Solicitors**') were instructed by an executor to conduct the administration of an estate.

The Solicitors' bills totalled £54,410.99 plus VAT and expenses – over four times their original estimate.

Mr Kenig, a beneficiary of the estate ('**the Beneficiary**'), applied for an assessment of those bills under section 71(3) of the Solicitors Act 1974 ('**the 1974 Act**').

At first instance, Costs Judge Brown ordered the assessment. In doing so, the Judge distinguished the Court of Appeal's decision in ***Tim Martin Interiors Ltd v Akin Gump LLP*** [2011] EWCA Civ 1574, which provided for a limited or 'blue pencil' level of review by third parties of solicitors' costs.

The Solicitors appealed. They submitted that ***Tim Martin*** was applicable and, because of its restrictive approach, an assessment was futile and should not have been ordered.

The Court of Appeal (Coulson, Stuart-Smith, and Nugee LJJ) dismissed the appeal.

***Tim Martin Interiors Ltd v Akin Gump LLP* [2011] EWCA Civ 1574**

This case concerned the right of a third party to seek assessment under section 71(1) of the 1974 Act and, it is now clear, not section 71(3).[1]

A company borrowed money from a bank. The mortgage included a covenant on the part of the company to pay the bank's costs, charges, and expenses, save for those unreasonably incurred or unreasonable in amount.

[1] Lloyd LJ rather elided sections 71(1) and 71(3). ***Kenig*** establishes that such an approach is mistaken.

The company defaulted on the mortgage and was pursued by the bank. The bank paid its solicitors' bills in full and then purported to charge the company for them under the mortgage. The company sought assessment from the solicitors as a third party under section 71(1).

Lloyd LJ, giving the leading judgment, held that such an assessment would be subject to two key limitations.

The first was a limit to quantifying the bill, the so-called 'blue pencil test':

'*As regards quantification it only allows the costs judge to follow what might be called a blue pencil approach. He can eliminate (a) items which ought not to be laid at the door of the third party at all because they are outwith the scope of his liability, here as mortgagor, and (b) items which are only allowable as between client and solicitor on a special arrangement basis, within the terms of CPR [46.9(3)(c)]. He cannot either eliminate any other item or reduce the quantum of any item which is properly included in itself, but for which he considers that the charge made is excessive, unless he could have done so as between client and solicitor on an assessment under section 70.*' [paragraph 95]

The second was to limit recovery in circumstances where the bank had already paid the company and the company had already paid the solicitors:

'[…] *because it cannot be right to require the solicitor to pay to the third party money which he received from his client and which his client was bound to pay to him, merely because the third party was not liable to pay the same amount to the client*'. [97]

Kenig: the judgment at first instance ([2023] EWHC 181 (SCCO))

In light of the austere approach endorsed in ***Tim Martin***, the Solicitors argued in Kenig that an assessment was pointless and should not be ordered.

Costs Judge Brown distinguished ***Tim Martin*** and ordered an assessment. The Judge noted:

'[…] *As the Claimant has asserted in correspondence the extent of the discrepancy between the initial estimate and the costs claimed is very substantial indeed - a multiple of some 4 to 5. Indeed, it is notable how quickly after instruction the estimate was exceeded. Whilst I have some concerns that the Claimant may himself have contributed to the costs being above the initial estimate, I am not satisfied that such information which is currently available does justify the discrepancy, or indeed come close to doing so. Indeed, I am left with the impression that on this basis alone there is potential for a very significant reduction in the bill* […]' [45]

Kenig: the appeal

The Solicitors appealed. They submitted that ***Tim Martin*** should have been applied and, had it been, an assessment would have been purposeless. The Court of Appeal disagreed, Stuart-Smith LJ giving the leading judgment.

Tim Martin was distinguished. It was limited to applications under section 71(1) of the 1974 Act and was no authority for the quite different proposition of a beneficiary seeking assessment under section 71(3).

There are five reasons why this might be so:

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1. The statutory language was different – section 71(1) grants a third party the right to assessment '*as if he were the party chargeable*'. Section 71(3) has no such limitation.
2. Section 71(3) gives the Court an express power to order that *'such payments, in respect of the amount found to be due to or by the solicitor […] 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.'* No such power exists under section 71(1), where the Court's powers are limited to making the same orders as might have been made on the application of the chargeable party.
3. The beneficiary applying under section 71(3) is owed fiduciary duties by the executor or trustee, the party chargeable. No such duties would typically be owed in a section 71(1) scenario where the third party's liability arises under contract (as in ***Tim Martin***).
4. The estate or trust's interest, and ultimately the interest of the beneficiaries, is central under section 71(3). It is not under section 71(1) (again ***Tim Martin*** is a good example).
5. A trustee or executor who retains solicitors at needlessly high rates could be criticised by beneficiaries in a way that the bank in ***Tim Martin*** could not – it instructed its own solicitors at the rates it chose.

Delay and approval

Two other points arise from ***Kenig*** which, though obiter, are of considerable importance.

The first concerns delay. Section 70 of the 1974 Act imposes time limits on a chargeable party's right to assess (eg the chargeable party can automatically seek assessment of a bill within one month of delivery). Importantly, the chargeable party cannot seek assessment at all after twelve months have elapsed from payment of a bill (section 70(4)).

In ***Kenig***, the executor had paid some of the bills more than twelve months before the Beneficiary's application. Stuart-Smith LJ observed, obiter, that this would surely bar the executor seeking assessment, but perhaps not the beneficiary:

'*It seems to me to be well arguable that different considerations may apply to an application by the person chargeable (who will know whether and when the bills were paid) as contrasted with an application by the beneficiary (who may have no such knowledge, or may learn of the payment later).*' [54]

The second point concerned what would have happened if the executor had given informed consent[2] to the bills. Would this preclude challenge by the beneficiary? Stuart-Smith LJ held (again obiter) that it might not. Though executor approval would be a major and often decisive consideration, the beneficiary's separate interest still had to be protected, especially where the executor or trustee would face no risk, being able to recover from the fund.

[2] See CPR r 46.9(3)(a) and (b) where a client's express or implied approval raises a presumption that costs have been reasonably incurred and are reasonable in amount.

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Conclusions for practitioners

1. Power to the beneficiaries! The blue-pencil test does not apply to assessments by beneficiaries of wills and trusts under section 71(3) of the 1974 Act. Beneficiaries are now in a stronger position to challenge fees, including hourly rates and time spent – arguably they find themselves better able to do so than a solicitor's 'ordinary' client.

2. Solicitors should think carefully about how, and how much, they bill while acting for a will or trust. These cases require discernment in the billing process (including giving careful estimates) as good as, or arguably better, than that used with 'ordinary' clients. Instruction on behalf of a trust or estate is not carte blanche to charge unreasonable fees.

3. Solicitors will also need to rethink timing. One year having passed since a bill was paid by a trustee or personal representative may not preclude assessment by a beneficiary, although such a case would surely be rare.

4. Passive trustees, take note. The personal representative or trustee who rubber-stamps unreasonable legal fees may find beneficiaries taking the matter into their own hands. If the beneficiary's assessment succeeds, there could be consequences for the trustee who omitted to bring it, and perhaps allegations of negligence, unfitness for office, or both.

5. Watch this space – even if this appeal goes no further, it seems certain that subsequent authorities will consider Stuart-Smith LJ's obiter observations as to delay and approval.

James McKean is a barrister at New Square Chambers. He practices in the law of trusts and estates, and takes a particular interest in disputes over the Solicitors Act 1974, having appeared for the claimant solicitors in ***Carpmaels & Ransford LLP and Collyer Bristow LLP v Regen Lab SA*** [2021] EWHC 845 (Comm); [2021] Costs L.R. 151

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