Costs recovery proceedings by lawyers

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Many lawyers issue recovery proceedings in the Magistrates Court against their clients in order to recover their fees. In many cases the client will defend the proceedings, often on the basis that they have been "overcharged", and usually also on the basis that their lawyer did not provide an adequate service (for whatever reason).

The service of the proceedings will often be the trigger for the client to complain to me about overcharging. Sometimes, the client will have already complained to me before the proceedings are issued – indeed, the complaint may be the trigger for the lawyer to issue the proceedings. The complaint will usually mirror the client's defence to the proceedings.

When all of that happens, there is clearly an overlap between my role in relation to the complaint and the Magistrates Court's role in relation to the recovery proceedings.

A Magistrate no longer has any power to refer these type of proceedings to the Supreme Court – so, quite simply, once proceedings are commenced in the Magistrates Court, that Court has to deal with the proceedings one way or another. Similarly, once an overcharging complaint is made to me, I have to deal with it one way or another.

What then can lawyers and firms expect when they issue recovery proceedings in the Magistrates Court and the client also complains (or has already complained) to me about overcharging? In discussions I have had with the Chief Magistrate, we have come to a "common understanding" as to how we will usually deal with the potential overlap between us.

THE COMMISSIONER'S POWERS

My powers in relation to overcharging complaints are set out in section 77N of the Legal Practitioners Act (Act). In very general terms:

- when I receive an overcharging complaint, I first consider whether it can be resolved through conciliation conducted by my office;
- if conciliation is either inappropriate or unsuccessful, it may be appropriate that I then have a costs assessment undertaken by a suitably qualified practitioner;
- if the amount I determine to be appropriate for the work done is less than the amount that the practitioner has charged, then I can make a (non-binding) recommendation that the bill be reduced (or, if already paid, that there be a refund);
- if my recommendation isn't accepted (by either or both the practitioner and the complainant), then:
  - o if the amount in dispute is more than $10,000, I am unlikely to be able to do much else (although I could take adjudication proceedings in the Supreme Court under clause 42 of Schedule 3 of the Act); or
  - o if the amount in dispute is $10,000 or less, I can make a binding determination as to whether or not there has been overcharging and, if so, the amount that has been overcharged;
- a binding determination can only be set aside by the relevant bill being adjudicated in the Supreme Court.

Because of the expense involved in obtaining a costs assessment, I will usually only do so when the amount in dispute is $10,000 or less (such that I can make a binding determination). And, even where the amount in dispute is $10,000 or less but the overall costs exceed $10,000, I will often not obtain a costs assessment because the whole of the fees on the matter need to be assessed, which can be a significant exercise. I need to weigh up the cost to my office of having that assessment undertaken as against the use to which I will be able to put it.

Under section 77C(1)(e) of the Act, I can close an overcharging complaint without further consideration of its merits if the bill complained of is the subject of civil proceedings between the complainant and the practitioner.

I have no power to make decisions in relation to the issues which the Magistrates Court can determine (which are described below). So, I have to consider any overcharging complaint that comes before me on the basis of the retainer agreement (if there is one) as it is presented. While I can proceed to assess an overcharging complaint on the basis that I consider that the Supreme Court would set it aside under clause 30 of Schedule 3 of the Act, I can't actually set it aside. Nor can I make any binding decision in relation to contractual issues, whether there has been negligence etc.

MAGISTRATES COURT'S POSITION

While the Magistrates Court has jurisdiction to determine issues of liability in relation to a lawyer's and firm's fees, it has no jurisdiction to adjudicate the question of costs. Judge Lunn said this in *Cavallaro v FNE Lawyers* [2012] SASC 189:

> "*By virtue of the relevant legislation, recovery of lawyers' costs from clients can require separate proceedings in two different courts. It is for the Magistrates Court to determine the retainer and the contractual liability of the client to the lawyer and it is for this Court to determine the proper quantum of the costs which are payable.*"

That is, the Magistrates Court determines:

- whether or not there is a retainer between the parties; and
- any other contractual issues, such as:
  - o whether the practitioner is seeking to recover from the correct party; and
  - o whether (and if so when) the retainer was terminated.

But the Magistrates Court cannot determine whether a practitioner's retainer agreement should be set aside, or the proper amount that the client should pay. Both of these things are for the Supreme Court to decide (as per Judge Lunn above, and in particular clause 30 and Part 7 of Schedule 3 of the Act). As it will be relevant to any decision about the proper amount that the client should pay, it is also for the Supreme Court to decide:

- whether the practitioner has been negligent, and if so the impact of that negligence on the fees (on the basis of *Cavallaro*); and
- whether the practitioner has a claim for fees based on quantum meruit (see clause 21(c) of Schedule 3 of the Act).

COMMON UNDERSTANDING

I will use the following terms in describing my common understanding with the Chief Magistrate as to how we will usually deal with the potential overlap between the Magistrates Court and my office:

Small Recovery Proceedings means recovery proceedings in the Magistrates Court where:

- the amount in dispute is $10,000 or less;
- the relevant bill is not part of a much larger matter (ie the expense associated with a costs assessment would not be prohibitive);

Large Recovery Proceedings means recovery proceedings in the Magistrates Court where the amount in dispute:

- is more than $10,000; or
- is $10,000 or less but the relevant bill is part of a much larger matter (ie the expense associated with a costs assessment would probably be prohibitive).

In relation to Small Recovery Proceedings:

1. if these proceedings are on foot, I will suspend my investigation until a Magistrate has dealt with the matter;
2. the Magistrate will then make a decision in relation to any of the matters about which he or she has jurisdiction (as above);
3. the Magistrate will then adjourn the proceedings for a period not exceeding 6 months (with liberty to apply), and suggest to the parties that, in order to determine quantum, they can do one of the following 3 things:
   a. they could reach agreement as to quantum between themselves;
   b. one of them could commence adjudication proceedings in the Supreme Court; or
   c. they could ask my office to again be involved;
4. if either party asks my office to again be involved:
   a. I will most likely start by attempting to achieve a conciliated outcome;
   b. if conciliation is either inappropriate or unsuccessful, then I will consider whether or not I can make a binding determination;
   c. we will so advise the Magistrates Court if:
      i. either a conciliated outcome is achieved or I make a binding determination; or
      ii. a conciliated outcome is not achieved and I decide it isn't appropriate for me to make a binding determination.

In relation to Large Recovery Proceedings:

1. if these proceedings are on foot, then I will most likely simply close the complaint (at least that part of it that relates to overcharging) under section 77C(1)(e);
2. I will advise the Court of the overcharging complaint and that I have closed it, simply so that the relevant Magistrate is aware that I have done so;
3. the Magistrate will then make a decision in relation to any of the matters about which he or she has jurisdiction (as set out above);
4. having made that decision, the Magistrate will then adjourn the proceedings for a period not exceeding 6 months (with liberty to apply), and suggest to the parties that, in relation to quantum, they can do one of the following 2 things:
   a. they could reach agreement as to quantum between themselves; or
   b. one of them could commence adjudication proceedings in the Supreme Court.

Therefore, in any costs recovery proceedings, ultimately the quantum of the costs will be determined:

- by the parties reaching agreement as to quantum between themselves – either on their own or (in the case of Small Recovery Proceedings) with the assistance of conciliation through my office;
- by the Supreme Court, as a result of adjudication proceedings before it; or
- (in the case of Small Recovery Proceedings) by me making a binding determination.

Once the question of quantum has been finalised, the lawyer can simply discontinue the proceedings in the Magistrates Court. B

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