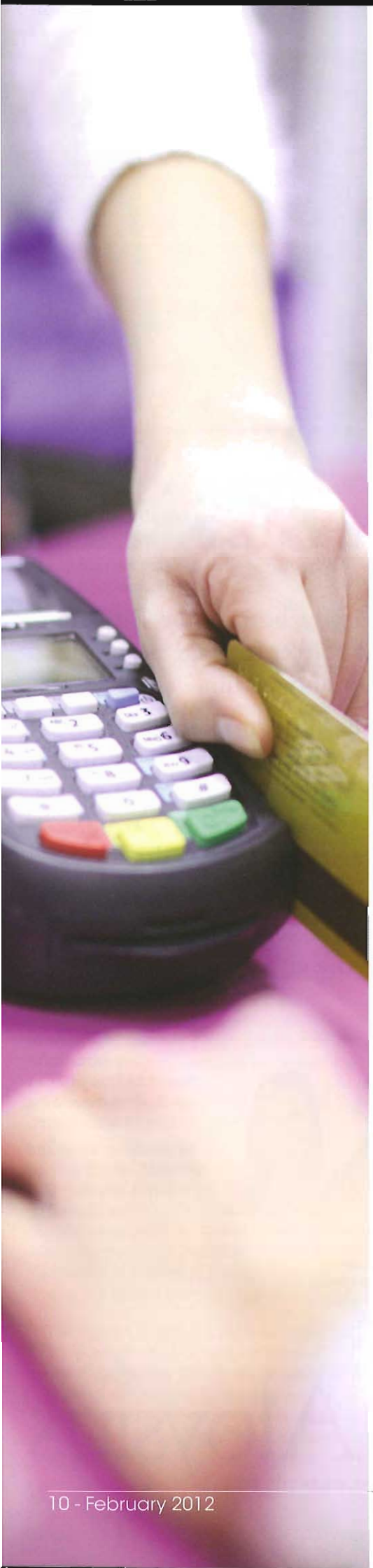

Lawyers' Costs: when are

By Bill Ericson, Chairman, Costs Committee

Introduction

The Law Society's Costs Committee is in the process of finalising a draft precedent retainer agreement for use by solicitors, together with notes on its application. However, there are some concepts which, whilst vital to the validity of the agreement, are too extensive to be dealt with adequately in mere notes. Accordingly, this article will expand upon a core concept necessary to the validity of a retainer agreement, namely that it be fair and reasonable.

The requirements for validity of retainer agreements can be divided into two classes. Firstly, there are the formalities required. In South Australia, for a retainer agreement to validly provide for charges above scale under the *Legal Practitioners Act* it must be "*in writing*" (see section 42(6) of the *Legal Practitioners Act* and see *McNamara v Kasmeridis (No 1)* (2005) 92 SASR 382 as to the interpretation of the same) and it must "*be for payment of a specified amount* (see section 47(6)(a)) *or a sum calculated in accordance with a specified scale*" (see section 47(6)(b)) or a compliant contingency fee (see 47(6)(c)). Family Court litigation retainer agreements prior to July 2008 had to be accompanied by a prescribed notice. Contingency fee agreements in Australian jurisdictions other than South Australia must, under the uniform legal profession legislation applying in those jurisdictions, be signed by the client (see for example section 323(c)(iii) of the *Legal Profession Act* 2004 (NSW)). These are all formal requirements, which need to be met as a matter of form regardless of whether or not this has any substantive effect on the appropriateness of the agreement.

The Common Law Heritage

If all such formal requirements are met, however, there is a second hurdle. At common law, traditionally a solicitor could only contract for above scale fees if the agreement to do so was both fair and reasonable (see *Clare v Joseph* (1907) 2 KB 364). This requirement has been carried through into all modern legislation (see section 42(7) of the *Legal Practitioners Act*, clause 6.15 of Schedule 6 of the *Family Law Act* and various provisions in the uniform legal profession legislation in other States, eg, section 328 of the *Legal Profession Act* (2004) NSW).

In most cases, the provision which will be of relevance to South Australian solicitors is section 42(7) of the *Legal Practitioners Act* which provides for the rescinding or varying of a retainer agreement by the Supreme Court "*if it considers that any term of the agreement is not fair and reasonable*". In the leading recent case on the matter, *McNamara Business & Property Law v Kasmeridis* (2007) 97 SASR 129, the Full Court confirmed that the test under that Act was the same as the test at common law and under previous English legislation.

It thus confirmed that "*fair*" meant procedurally fair and cited the words of Lord Esher MR in *Re Stuart* (1893) 2 QB 201 at 204-205 that "*with regard to the fairness of such agreement, it appears to me that this refers to the mode of obtaining the agreement, and if a solicitor makes an agreement with a client who fully understands and appreciates that agreement that satisfied the requirement as to fairness*". However, "*reasonable*" means substantively reasonable so in the words of Lord Esher "*.... the solicitor must not only satisfy the Court the agreement was absolutely fair with regard to the way in which it was obtained, but must also satisfy the court the terms of the agreement are reasonable. If in the opinion of the Court they are not reasonable, having regard to the kind of work the solicitor has to do under the agreement, the Court is bound to say the solicitor, as an officer of the Court, has no right to an unreasonable payment for the work which he has done*".

McNamara v Kasmeridis also confirmed that the traditional common law approach that the onus lay on the solicitor to justify the agreement prevailed under section 42(7). Accordingly, where a solicitor has stipulated in a retainer agreement that he or she will charge above scale fees, even if that agreement meets the technical requirements of the legislation, if it is challenged by the client, the solicitor must affirmatively prove it is both procedurally fair and substantively reasonable.

Procedural Fairness

Turning firstly to the requirement of procedural fairness; this has an impact in several ways. Firstly, the client's consent must be an informed consent in the sense that the client has had an opportunity to consider the agreement before signing it.

they fair and reasonable? Part 1

It is likely, for example, if an agreement is presented on an immediate take it or leave it basis at a conference with a client and the client is not given the opportunity to take the agreement away and consider it at length or obtain legal advice upon it, that the agreement would be held to be unfair. Accordingly, the normal practice of solicitors is to provide the client with an agreement which may contain its own explanatory material or which may then be explained verbally by the solicitor. The client then has the opportunity to take it away to consider it and if they approve of it, sign and return it

Further, any such agreement should normally be entered into at the commencement of a matter. Any costs agreement entered into after a solicitor has been acting for some time, so that the client would find it difficult to change solicitors, will be very closely scrutinised by the Court (see *Stoddart & Co v Jovetic* (1993) 8 WAR 420).

The requirement of fairness can be legally satisfied by an appropriate verbal explanation of the agreement by the solicitor to the client. However, it is unwise to rely upon such verbal explanations as if there is a dispute and those explanations are necessary for the agreement to be fair, the solicitor bears the onus of affirmatively establishing them. Unless the solicitor has express notes of such advice, he or she may find it difficult, given he or she bears the onus of proof, to establish that the advice was given.

Further, there are some old cases (see for example *Griffiths v Evans* (1953) 1 WLR 1424 at 1428 and *Gummow v Bloom* (1930) VLR 81 at 83) that suggest that in a dispute over a retainer agreement the Court should normally prefer the oral evidence of the client over the oral evidence of the solicitor, on the basis a solicitor should have protected himself by recording matters in writing. Whilst it may well be those old cases might not be followed today (see *Dew v Richardson* (1999) QSC 192), a solicitor may nevertheless be vulnerable to an argument that the client's recollection is more reliable since it was a much more important event for a client, who rarely enters into legal fee agreements, than for a solicitor who does this all the time. It is thus strongly recommended that the necessary advice be incorporated into the agreement itself so there can be no dispute that it was given.

What then must be advised in order to make the agreement fair? It is not possible to do a comprehensive listing of what is required, as fairness varies from case to case and in particular varies with the degree of legal expertise of the client. The key concept of fairness appears to be that to the extent that the client is, by entering into the agreement, prejudicing himself or herself from the position which would apply if there was no such agreement, this should be brought home to the client. This is in accord with the fact that the Full Court

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has held (see *McNamara v Kasmeridis* (2007) 97 SASR 129) that the fiduciary duty which a solicitor owes to a client does not commence merely when the retainer is signed, but commences once negotiations as to acting are initiated. Accordingly, a solicitor, unlike a party in a normal commercial negotiation, has an affirmative duty of disclosure to the client and should disclose to the client matters which are relevant to the retainer and which the solicitor knows but the client does not know.

The most obvious example of this is the fact that if the retainer agreement provides for fees which are likely to be above scale, this must be advised to the client. A failure to advise this will normally cause the agreement to be set aside, unless the solicitor can affirmatively prove the client was aware of this in any event. Further, it should be noted that the advice must be frank. If it is likely that the fees will be above scale, the duty of disclosure is not met and the agreement is not fair if there is merely a statement that the fees "*may*" be above scale, so that the client is given the impression that there is a reasonable chance that he might recover a full indemnity when this is not the case. Thus, in the context of a retainer for litigation, if a reference to the fact fees "*may*" exceed scale leaves the client to believe there is a reasonable prospect of the client recovering all of the above scale fees under the retainer on a party/party taxation if he or she is successful, the agreement will be set aside as unfair (see for example *McNamara v Kasmeridis (No 2)*). Whilst this has long been an accepted part of costs law, in *McNamara v Kasmeridis (N0 2)* it was held that the duty to disclose went further and, if indeed there were other solicitors available who might do the work for scale, this is a matter which should be advised to the client.

These are the most common areas in which disclosure is required; however, there are other particular terms of retainers which might require further disclosure. In some cases, solicitors provide for the charging of interest on late accounts. While this is not in itself unfair or unreasonable (assuming the rates are reasonable), some solicitors stipulate the rates which they pay on their overdraft account or that rate plus a percentage. In such a case, the duty of disclosure of a solicitor as a fiduciary would seem to require that the current overdraft rate charged to the solicitor to be specified. If such a rate is not specified and if the client persuades the Court that if the rate had been specified the client would not have agreed to the interest provision, then the interest provision may be set aside.

Another provision which may require specific disclosure is incurring disbursements. In general, the rule is that if an unusual disbursement which has been incurred is not likely to be recoverable on a party/party taxation has incurred in a litigious matter, then the solicitor will not be able to recover the fees from the client unless he or she has explained this to the client and obtained the client's specific consent to the disbursement. This is the so called "Rule in *Re Blyth*", named after the case of *Re Blyth and Fanshaw Ex Parte Wells (1882) 10 QBD207*, which has been recently held to be of continued application in South Australia (see the unreported decision of Master Lunn in *Legal Practitioners Conduct Board v McNamara Business & Property Law*). Accordingly, if there is a provision in the retainer agreement that says the client is liable to indemnify the solicitor for all disbursements incurred by the solicitor without any qualification as to reasonableness or client consent, such a provision is likely to be held to be procedurally unfair, in that the client has not been advised that they are foregoing their rights to refuse to pay unusual disbursements not previously approved.

This can be of very considerable importance. Imagine a case in which, (to take an example from the writer's own experience), a solicitor agrees with junior counsel to pay for his or her service in a motor vehicle accident personal injury case at a rate of $550 per hour. If the specific approval of the client for that had not been obtained after giving advice that it is extremely unlikely that such a rate would be recovered on a party/party taxation, then the solicitor could well find themselves in a position where they have to pay the barrister (because they are contractually obliged to do so and would not as a solicitor be able to claim ignorance of the law), but will not be able to recover the full payment to the barrister from the client. **B**

The concluding Part 2 of this article will appear in the March Bulletin and will look at what is considered "reasonable" in relation to lawyers' costs.

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