Lawyers' Costs: when are they fair and

By Bill Ericson, Chairman Law Society Costs Committee

In the concluding Part 2, author Bill Ericson takes a look at the issue of what is considered "reasonable" in relation to lawyers' costs.

Just as particular terms of the agreement may require additional disclosure to the client, peculiarities of the client may require additional disclosure. If a client is illiterate or does not understand English, they will obviously not be procedurally fairly advised by handing them a document explaining the matter in English. In the case of non-English speaking clients, it may be necessary to have the document translated into the appropriate foreign language, or alternatively to have it explained verbally through an interpreter and detailed notes kept of the explanation. In the case of an illiterate client, it would seem to be necessary to have the document read through and explained and again have the matter noted in detail.

Mentally deficient clients present a particular problem. If a client requires a next friend to litigate, because they do not have sufficient capacity to give instructions, then it is almost certain that the Court would find that they did not have sufficient capacity to enter into an agreement for above scale fees. A solicitor who wishes to act for such a client will need to have arranged for the appointment of a next friend, usually either an appropriate family member or public trustee, and to enter into the costs agreement with their next friend. In such a case, the litigation guardian is, if the retainer is valid, liable to pay the costs of the solicitor as calculated under the retainer (see *Flower* (1871) 19 WR 578, *Hawkes v Cottrel* (1858) 27 Law Journal Ex 369). The litigation guardian would then have an indemnity from the represented person for properly incurred costs but not for improperly incurred costs (see *Chapman v Freeman* (1962) VR 259).

Another complicating factor can occur in the case where a representative action is being brought. In such a case, technically there is a retainer agreement only with the nominated lead plaintiff, and if the action is lost the solicitor can only look to the assets of the nominated plaintiff for payment (although in practice many such actions are brought on the basis that no costs will be charged unless the action is successful). If the action is successful, under Rule 267(1) there is a power for the Court to order the payment of the costs of a represented party out of a fund, and it may well be that an order could be sought under this that the solicitor's costs be met out of the damages or a settlement obtained in litigation, on the basis that the represented party should be indemnified for costs incurred in obtaining benefits from the represented parties. The extent of such indemnity is, however, uncertain. There is old authority that such costs are only awarded on a party/party basis unless the Court otherwise directs (see *Edie v Elston* (1901) 2 KB 460), but it may be that in the context of a modern representative action the Court might well allow solicitor/client costs.

Another area in which specific disclosure may be necessary is where a solicitor seeks to charge for storage of files. Rule 16 of the *Australian Solicitors Conduct Rules* provides that there can be no charge for storage of files unless it is specified in the retainer agreement. Given that this rule only came into force recently, there is as yet no authority as to whether a valid provision in the retainer agreement for such charging must mention the fact that the ethics rule is being excluded, in order to be procedurally fair.

Substantive Reasonableness

Turning from "*fairness*" to "*reasonableness*", even if there is absolute procedural fairness it is possible to set aside an agreement if it is unreasonable. Accordingly, even if a client has been made fully aware they would be paying above scale fees, in some cases, the fees may be so high that the Court will say that they are unreasonable. There are several things that are clear. The mere fact that fees are above scale is not sufficient in itself to show them to be unreasonable (see *Schiliro v Gadens Ridgeway* (1995) 19 Fam LR at 204). However, if fees are at or below scale, it seems almost certain that the Court will hold them to be reasonable (see *Athanasiou v Ward Keller (6) Pty Ltd* (1998) 22 NTR 22 at 31). To say otherwise would be to say that the Court's own scale rates were unreasonable and is most unlikely that a taxing master would make such a finding.

The author is unaware of any occasion in which a solicitor has been ethically charged with overcharging in a situation where they have charged proper scale fees, and indeed the practice of the Legal Practitioners Disciplinary Tribunal appears to be to

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seek to prove in cases where overcharging has been alleged that the fees were, in fact, above scale. For example, the author has been called upon to give evidence in a disciplinary case where solicitors with several hundred clients on several occasions wrote extremely lengthy identical letters to all of them and charged each letter at a full individual rate, that the letters would have been classified as circular letters under the scale so as to attract a lesser fee than that charged by the sublessee.

Given that the onus of proving reasonableness lies on the solicitor, how does the solicitor affirmatively prove that his or her charges are reasonable? Whilst the categories of justification are not closed, the author can think of three main ways in which this can be done.

First, it appears to be generally accepted that if one is charging a commercial market rate for the work which is being done, then that rate will not be regarded as being unreasonable (see *GE DalPont, Law of Costs, 2nd Edition* at page 59). For example, whilst one may be able to obtain solicitor's services at scale rates for personal injury litigation, normally it is necessary to pay more to obtain the services of a large specialist commercial law firm to engage large scale commercial litigation. A solicitor seeking to justify fees in such a matter might well file an affidavit from a costs consultant, or several affidavits from practising solicitors, testifying to the fact that hourly rates charged were within market range for the type of work being charged for.

Secondly, it may be possible to justify charging above market rates where the solicitor has some special skill which is relevant. The extremely high rates charged by leading Silk appear to be accepted on the basis that special skills as an advocate can justify high charges. If the firm is specialising in a particular area and can show it is the leading firm in that area, it may well be able to justify higher rates than other firms. Alternatively, a solicitor may have an extraneous skill which will be of use in assistance with the litigation. For example, if a litigation was to be conducted in an Australian Court under Paraguayan

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law, a solicitor could argue that he would be entitled to charge an above normal rate if he was the only admitted Australian solicitor with a detailed knowledge of Paraguayan law. One can similarly imagine patent litigation in which the solicitor had a relevant scientific qualification as being another example of a higher fee being justified.

Thirdly, it may be possible to justify high fees if some extraordinary commitment is given. Whilst a solicitor has a duty to act in the client's interests, it is probably implicit that this does not involve devoting every second of their waiting time to the client and the solicitor is entitled to work reasonable office hours and have time off on the weekend. If, for example, there was an urgent matter in which a solicitor undertook to work around the clock to achieve a prompt result or undertook to do other things beyond the normal call of duty, such as perhaps travelling into a war zone, then even if the rates are above market and the solicitor did not have special skill, the extraordinary nature of the task undertaken might justify higher rates.

Reasonableness most often comes in with regard to rates, but it can also come in with regard to other clauses of the retainer agreement. For example, sometimes in a retainer agreement solicitors seek to limit their liability for negligence. Save insofar as this may be possible under a legislative provision (see for example, the scheme recently set up by the Law Society under *The Professional Standards Act* 2004), this would probably normally be regarded as unreasonable, at least in the ordinary case. The general principal is that solicitors should be liable for their work This is the reason why solicitor directors of incorporated practices remain personally liable for corporate liabilities (see Section 28 of the *Legal Practitioners Act*), so that solicitors cannot protect themselves from negligence litigation by hiding behind a corporate veil. There may be particular situations in which a limitation of liability could be held to be proper (perhaps in a case where a solicitor was taking on a difficult matter in which he had little experience to help out an impecunious client, but could potentially be subject to a very large liability) but such cases would probably be far and few between.

A similar example of a provision which is likely to be held to be unreasonable (or possibly also unfair) would be provisions enabling a solicitor to increase fees at their discretion. It may well be that this would be technically invalid in any event as not being an agreement to charge a specified amount or a specified scale within the meaning of Section 42(6) of the *Legal Practitioners Act*. However, even if it passed that hurdle, it is likely that the Court would hold that it was unreasonable for a solicitor to have the ability to fix whatever rate he or she thought was appropriate (see in this regard the remarks of Master Lunn in *Catto v Hampton* [2007] SASC 360 that "*Solicitors cannot reserve to themselves the right to increase their time charges as they see fit*"). This would not preclude an agreement to increase fees on the basis of some objective scale such as the Consumer Price Index.

It is likely that in general, a provision of a retainer agreement which clashes with the *Australian Solicitors Conduct Rules* would be held to be unreasonable. The Ethics Rules make it clear they are not per se enforceable by third parties (see Rule 2.3). This precludes the argument which was accepted by a Magistrate in *Peter Scragg & Associates v Badcock* (2003) SAMC 2 that the previous legal ethics rules were an implied term of a solicitor's retainer with a client. Nevertheless, it is very hard to see how it could be regarded as being reasonable for a solicitor to act unethically. Thus, a provision contrary to the Ethics Rules is likely to be struck down as unreasonable. It might also be argued to be procedurally unfair, in that the client was not being advised that the solicitor they were engaging was willing to put an unethical provision into their retainer. Thus retainer provisions providing that the client was not to be entitled to estimates of costs, as provided by the Ethics Rules, would likely be struck down.

Finally, it should be noted that with regard to procedural unfairness, it is highly desirable to ensure that the provisions of the Ethics Rules as to providing an estimate of likely costs are complied with. Whilst, as discussed above, the Ethics Rules are not enforceable as such against third parties, where there is an ethical requirement that certain information be provided to a client, it would be very hard for a solicitor to argue that their dealing with the clients were fair, even though they amounted to unprofessional conduct. In the case of a costs estimate, this means if one is not given to the client and the client then later persuades a Court that if an estimate had been provided they would not have agreed to the retainer agreement because they would not have been prepared to pay that much in costs, the retainer agreement is likely to be set aside.

Conclusion

As can be seen from the above, the concepts of fairness and reasonableness, although simply expressed, can be quite complex in their application and can vary greatly from circumstance to circumstance. The best drafted retainer agreement, even if accompanied by explanatory notes, cannot deal with all circumstances which arise and cannot guarantee that in a particular case, a retainer agreement may not be held to be unfair and unreasonable by reason of circumstances unique to the client or the situation. It was for this reason that this article was written: to try to give an understanding of the basic concepts of fairness and reasonableness in this context, so that lawyers may know when, in a particular circumstance of a case, their usual practice with regard to retainers may have to be adapted to meet these requirements. **B**