TIME-LIMITS AND SHOWING UNDUE PREJUDICE in solicitor:client assessments

By Peta Solomon

Applications for assessing solicitor:client costs in NSW have increased substantially in recent years. The position with respect to time limitations for these applications has been complex and problematic, providing practitioners with little certainty as to the 'cut off' point beyond which their costs would not be subject to challenge. Various time-limits apply, depending upon the date the practitioner was first instructed in the matter. Once this date is ascertained, time will run from the date the bill was given to the client according to the provisions of the *Legal Profession Acts* of 1987 and 2004, and the regulations that applied as at the date of first instructions.

Where first instructions occurred prior to 1 October 2005, then – irrespective of when the bill(s) are issued in the matter – the limitation period that applies will comply with the provisions of the *Legal Profession Act* 1987 and *Legal Profession Regulation* 2002. The time within which a client may bring an application also differs depending upon whether the bill in question has been paid or partly paid. If the bill has been paid, or partly paid, the client has 12 months to apply for costs to be assessed: cl 52 *Legal Profession Regulation* 2002. However, it appears that, due to a legislative oversight, the client who has made no payment on the account is in a better position, because there is no time-limit provided by the Regulation in that circumstance.

If first instructed from 1 October 2005 to 30 June 2006, the amendments introduced by the *Legal Profession Act* 2004 (LPA 2004) will apply. A large number of matters that are currently likely to be the subject of applications would fall within this period. The LPA 2004 renders the position more uncertain for the practitioner. Section 350 provides that an application 'must be made within 60 days from the date a bill was given or a request [for payment] was made or after the costs were paid in full (whichever is earlier or earliest)' s350(4). Although this provision is mandatory, another provision – also mandatory – states that a costs assessor must deal with an application made out of time, unless s/he considers that the law practice has established that to do so would, in all the circumstances, cause unfair prejudice to it: s350(5). It has proved extremely difficult to demonstrate prejudice to the satisfaction of assessors, and there is little guidance as to how the assessors are to approach this question. In many

instances, this has effectively meant that there is no time-limit for clients, who first instructed during this period, to make applications.

Recent cases have been decided in Western Australia that provide some guidance and authority as to the types of matters that may be relied upon by practitioners in demonstrating unfair prejudice in attempting to resist applications often made substantially out of time by their clients. Section 232 of the *Legal Practice Act* 2003 (WA) provides that a party can require a bill to be taxed by giving the practitioner a notice in writing within 30 days of receiving an account. That Act also provides that a taxing officer may enlarge the time prescribed: s229. Several cases have recently been decided in which parties have appealed the taxing officer's decision under s229. These cases have elucidated some matters that may be relied upon in NSW with respect to the 'unfair prejudice' provisions (referred to above) in the LPA 2004.

In these cases, the court considered whether a law practice could rely on delay to demonstrate prejudice. In *Monopak Pty Ltd & Anor v Maxim Litigation Consultants,*[1] bills had been rendered on a monthly basis from 30 June 2005, but the practitioner was not requested to tax the costs until 9 June 2006. Master Newnes took into account that notices of rights had been included on the accounts rendered to the client. The court held that the proper exercise of the discretion must consider the dual purpose of the Act in protecting clients against excessive charges while imposing time limits to prevent a client from unfairly taking advantage of the provisions to delay the obligation to pay proper costs and avoid frivolous objections. Accordingly, relevant considerations will include, but will not be limited to, the reasons for the delay; whether the client would suffer injustice as a result; the nature and degree of the prejudice to the practitioner; the motives of the practitioner; and whether there is evidence suggesting that the bill(s) may be excessive. In *Monopak*, the court had regard to evidence of repeated late payments of accounts, the fact that the client was commercially sophisticated, and that it was inconceivable that the notices of rights were not read.

However, the court disagreed with the full court in *Lawecki v Marcel Kalfus & Co*[2] by finding that, where payment had been made, it constituted an admission as to liability and reasonableness of the account, so as to require special circumstances to be demonstrated. The court, however, expressed the view that 'it would be a mistake to approach such an application on the basis that it should be allowed as a matter of course' and that to do so would be to permit the statutory time limits to be effectively ignored. Importantly, the court found that prejudice of a 'general nature' is inherent in any substantial delay because, among other reasons, the work that the practitioner would have to do on taxation would be considerable and more costly and time-consuming as recollections of events fade. Also relevant was the applicant's failure to provide evidence sufficient to conclude that the amount of the costs might be excessive.

These matters were also considered by Newnes J in a judgment on 3 August 2007 in *Lewis Blyth and Hooper v Dennis.*[3]

The amendments to the LPA 2004 significantly improve the position for practitioners, where clients first instruct a practice after 30 June 2007. In such circumstances, the time-limit will be 12 months from the date the bill was given. If clients seek to proceed out of time, they must now apply to the Supreme Court for leave and demonstrate that, 'having regard to the delay and the reasons for the delay, ...it is just and fair for the application' to be dealt with out of time.

Practitioners should bear in mind that, under these amendments, the time-limit for practitioners to apply for the assessment of the fees of another law practice (including counsel and agent's fees) is limited to 60 days (s351). Further, where bills are expressed as interim bills, a client may assess those costs either at the time of the interim bill or at the time of the final bill (s334). Care should be taken. ■

Notes: **1** [2007] WASC 112 (25 May 2007). **2** (1985) 10 Fam LR 464. **3** [2007] WASC 177.

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