
Flynn & O'Donnell

Legal Costs and the Legal Services
Regulation Bill 2011

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LEGAL COSTS AND THE LEGAL SERVICES REGULATION BILL 2011

On 12th October, 2011, the Minister for Justice, Equality and Defence, Mr. Alan Shatter, published the Legal Services Regulation Bill 2011 (the "Bill").

The Bill marks a major change to the way that legal services are provided in Ireland and, in addition to regulatory changes to the legal profession as a whole, the Bill also paves the way for a new era of openness and transparency in the area of legal costs.

This article looks at the proposed changes to the area of legal costs and highlights the implications for both legal practitioners and their clients.

OFFICE OF THE LEGAL COSTS ADJUDICATOR

The Office of the Legal Costs Adjudicator

Section 81 of the Bill provides that the Office of the Taxing Master shall be replaced with the new Office of the Legal Costs Adjudicator, under the guidance of the Chief Legal Costs Adjudicator and with the assistance of other Legal Costs Adjudicators; the functions of the current Taxing Master shall thus be conferred on the Chief Legal Costs Adjudicator and the other Legal Costs Adjudicators.

Publication of Determinations

The Bill recognises the current lack of clarity in the area of legal costs as well as the difficulty faced by practitioners when trying to access prior rulings of the Taxing Master – given that they are not published online - and seeks to address this by providing that the Chief Legal Costs Adjudicator shall ensure that the outcome of every determination shall be published. Accordingly, the Bill proposes that a register of determinations of the Legal Costs Adjudicators be established and maintained in relation to applications for the adjudication of legal costs.

There are a number of specific exceptions to this publication requirement, namely (i) in cases which were heard otherwise than in public; (ii) in cases relating to solicitor-client costs; (iii) where the proceedings were settled prior to going before the Courts; or, (iv) where publication would not be in the public interest. In the case of these exceptions the Bill provides for the publication of a more limited amount of data which ensures that sensitive information is not disclosed.

Guidelines, Strategic Plan, Business Plan and Annual Reports

The Chief Legal Costs Adjudicator will be required to prepare legal costs guidelines setting out how the functions of the Legal Costs Adjudicators are to be performed. In addition, the Bill also requires that, within 6 months of the relevant section coming into force, the Chief Legal Costs Adjudicator must prepare a strategic plan for the following 3 years setting out 'key objectives, outputs and related strategies', which are ultimately approved by the Minister for Justice, Equality and Defence.

There is also a requirement on the Chief Legal Costs Adjudicator to prepare annual Business Plans in respect of the new office and, in addition, the Chief Legal Costs Adjudicator is required to report on the activities of the office annually with a report to be laid before each house of the Oireachtas.

LEGAL PRACTITIONERS AND LEGAL COSTS

Practitioners' Duties

The Bill places a significant duty on legal practitioners to keep clients informed at all times in relation to the level of legal costs incurred and likely to be incurred in relation to a given matter. A key example of this is the Section 90 Notice discussed below.

Definition of Legal Practitioners

The Bill defines "legal practitioners" as including both practising solicitors and practicing barristers. While the requirement to produce detailed bills of cost is nothing new for solicitors, barristers are now expected to meet the same standards for the first time. This is a positive development for clients and will address a significant disparity in the profession.

Prohibition of certain methods of charging costs

Section 89 of the Bill contains the following express prohibitions which aim to do away with a number of archaic practices in the area of legal costs:

- Legal costs may not be charged as a percentage of any damages/award payable to a client;
- The legal costs of Junior Counsel may no longer be set as a proportion of the costs charged by Senior Counsel; and
- A solicitor cannot deduct legal costs from the amount of any damages or moneys that become payable to the client.

The effect of these three prohibitions is to eliminate outdated practices in the profession in favour of a move towards solicitors and barristers being paid for work that is actually done.

The Written Notice to Clients

Section 90 (1) requires legal practitioners to provide a written notice to clients on receipt of instructions. This notice must be 'written in clear language that is likely to be easily understood by the client' and must disclose the practitioner's costs, or alternatively, if the costs cannot be assessed on receipt of the instructions then the notice must set out the basis on which the costs are to be calculated.

If for any reason it is not possible or is impractical to disclose the costs on receipt of instructions, then a legal practitioner is obliged to issue this notice as soon as it is practicable. The Bill also places an additional obligation

on practitioners to notify clients of where there is likely to be a significant increase in the level of costs.

In addition to the above requirements, Section 90 (2) sets out the following particulars which must be included in the notice to clients:

- The amount of legal costs incurred as of the date of the notice, the amount of those costs that are of a fixed nature (or alternatively, the basis on which they are to be charged) and the amount of those legal costs that are likely to be incurred from that date onward;
- The percentage of VAT to be charged on those legal costs;
- An explanation of the basis on which the legal costs are calculated;
- In cases involving litigation, practitioners are required to set out the work to be done in each stage of the process, as well as the costs that are likely to be involved;
- In litigious matters, a practitioner is required to indicate the legal and financial ramifications of a withdrawal from said litigation;
- In litigious matters, practitioners are also required to advise clients on those circumstances where they would be required to cover the costs of another party or parties, as well as those circumstances where the clients' costs may not be fully recoverable; and
- Practitioners are also required to provide an undertaking to clients to advise them of any factor that may significantly increase legal costs.

The Bill obliges practitioners to give clients a cooling-off period during which legal services should not be provided, save in the case where to fail to do so would contravene a statute, it would be likely to prejudice the client or where a court orders that legal services are to be provided.

In addition to the above, a legal practitioner is not precluded from entering into a written agreement with a client in relation to legal costs and, provided this agreement meets the requirements of Section 90, an additional notice shall not be required.

The level of disclosure required by legal practitioners under Section 90 is clearly quite onerous and some commentators have even claimed that the cost of meeting these regulatory requirements could lead to higher legal costs for the client.

The Bill of Costs

Section 92 of the Bill places requirement on practitioners to provide the client with a bill of costs, in such format as may be specified in the relevant rules of Court, following the conclusion of a relevant matter.

According to Section 92 (3) of the Bill, a bill of costs must include:

- A summary of the services provided;
- An itemised statement of all fees and disbursements incurred;
- The practitioner's VAT registration number and the amount of VAT chargeable on the legal services;
- In cases where time costing is employed, then detail of the time spent should be included;
- The amount of damages recovered/payable; and
- The amount of any legal costs recovered.

There is also a requirement on the practitioner to explain the procedure which the client should follow if they wish to dispute the bill of costs and there is a corresponding duty on the practitioner to make all efforts to resolve disputes prior to an application for adjudication.

ADJUDICATION

Where one party is ordered by a Court to pay the costs of another party, then that other party is obliged to produce a bill of costs in line with the terms of the relevant Court order and the terms of the Bill.

Once the bill of costs has been drawn, either party may apply to the Chief Legal Costs Adjudicator to have the bill, or any item contained in the bill, adjudicated. Individual clients also have the right to apply to the Chief Legal Costs Adjudicator to have a bill of costs received from a legal practitioner adjudicated upon.

Section 94 (5) of the Bill gives legal practitioners the right to refer a bill for adjudication in cases where a bill has remained unpaid for a period of 30 days or more. In addition, Section 94 (7) prohibits a client from making an application to the Chief Legal Costs Adjudicator following 'the expiry of 6 months after the issue of the bill of costs, or 3 months from the date of payment of the bill, whichever first occur'.

In cases where an agreement is reached to accept a lesser amount for the bill and that amount is paid, then there is no right to seek adjudication under the Bill.

The Principles relating to Legal Costs

Schedule 1 of the Bill applies to the adjudication of bills of costs. It sets out the following principles that are to be applied by a Legal Costs Adjudicator in adjudicating a bill of costs following an application under Section 94:

- a) the costs have been reasonably incurred;
- b) the costs are reasonable in amount; and
- c) in the case of a party and party bill, whether it is reasonable to expect the party from whom payment is sought to indemnify the party whose costs are the subject of the bill of costs.

In addition to the general principles set out above, Schedule 1 also sets out the following factors that must be considered by a Legal Costs Adjudicator in determining whether the costs are reasonable in amount:

- The complexity of the work;
- The difficulty and novelty of the issues involved;
- The skill or specialised knowledge relevant to the matter;
- The time and labour that were reasonably expended;
- The importance of the matter;

- The urgency of the matter;
- The place and circumstances in which the matter was transacted;
- The number, importance and complexity of the documents drafted, prepared or examined;
- The amount of any money/value of the property/ interest in property involved in the matter;
- Whether there is an agreement to limit the liability of the legal practitioner;
- Whether the legal practitioner undertook research or investigative work;
- The level of overheads and other costs associated with the provision of legal services generally; and
- The level of overheads and other costs associated with the provision of legal services by barristers generally.

The Adjudication of Legal Costs

In assessing a bill, the Legal Costs Adjudicator is obliged to have regard to the entire case to which the adjudication relates.

It is incumbent on the Adjudicator to ascertain, in the case of any matter at issue, that any work that was claimed to have been done was actually done; that it was appropriate to charge for the work that was done; and also whether the charge applied for that work was reasonable.

In order to ascertain the reasonableness or otherwise of the work that was carried out by a legal practitioner, the Legal Cost Adjudicator must consider the nature, extent and value of the work carried out, the person who did the work and the amount of time taken to carry out that work.

In order to determine an application, the Legal Costs Adjudicator can inspect documentation relating to the matter in question and, in the case of oral hearings, the Legal Costs Adjudicator has the power to summon and examine witnesses.

Where the Legal Costs Adjudicator considers both an item of costs and the amount charged for that item of costs to be fair and reasonable, then the Bill provides that he or she shall confirm that charge. In cases where the item charged is reasonable but the amount charged is disproportionate to the work done, then the Legal Costs Adjudicator shall determine an alternate amount to be charged for that work.

In respect of disbursements, the Bill provides that the Legal Costs Adjudicator shall only confirm vouched

expenses, or, in the case of unvouched expenses, only those where the parties are in agreement.

One significant matter which should be noted by legal practitioners, in respect of practitioner-client bills, is that the Legal Costs Adjudicator shall not confirm a charge in relation to a matter that is not included in the Section 90 notice referred to above. This again highlights the onus on practitioners to keep clients informed in respect of all elements of a case.

In cases where one party seeks to frustrate proceedings by neglecting or refusing to provide documentation, then the Legal Costs Adjudicator has the discretion to award a nominal sum only to that party.

The Bill also places an obligation on the Legal Costs Adjudicator to prepare a report on the adjudication outlining the background to the case, setting out the work done and specifying the various stages of the legal services provided, summarising the written/oral submissions and giving the reasons for the determination. A copy of this report shall be provided to all parties to the adjudication once prepared; it is also published, as discussed above.

APPEALS

While the determination of the Legal Costs Adjudicator is final, the Bill does provide for an appeals mechanism.

Pursuant to Section 100 of the Bill, a party to an adjudication has 21 days following the receipt of the report from the Legal Costs Adjudicator to appeal the determination. This appeal is made to the High Court, save where the adjudication relates to party and party costs in which case the appeal is heard by the court that heard the original proceedings.

The appellate court may (i) confirm the determination, (ii) allow the appeal and remit the matter to the Legal Costs Adjudicator, or (iii) make its own determination.

MISCELLANEOUS MATTERS

Section 101 of the Bill provides that proceedings and documentation created and presented before an adjudication are absolutely privileged, save to any extent required for an appeal or in relation to any mediation where costs are concerned.

Section 102 grants the Legal Costs Adjudicator the power to specify the use of forms for the purpose of the Bill.

Finally, Section 103 – 105 deal with transitional matters relating to the former office of the Taxing Master and the transfer of its duties to the Legal Costs Adjudicator.

CONCLUSION

The Legal Services Bill, if enacted, will represent a significant development in the area of legal costs.

Its provisions will benefit clients by introducing a degree of clarity to this currently obscure area of law. Clients will have a much better idea of likely legal costs, and will therefore be able to 'shop around' among practitioners, particularly given the provision of a cooling-off period similar to current practice in insurance and other services. This is to be welcomed from a consumer choice perspective.

At the same time, the Bill will place a new, heavier, obligation on both solicitors and barristers to liaise with their clients in relation to legal costs and to keep them informed on the progress of their case. Billing will continue to be an aspect of practice demanding precision, expertise and strict compliance with regulations.

The reporting obligations on the Chief Legal Costs Adjudicator are a welcome addition also; however, there is a concern that the extent of this reporting may ultimately be cost prohibitive, and might not be carried out as envisaged.

It remains to be seen, of course, whether the majority of these changes will be present once the Bill finally becomes law.

Please feel free to contact a member of the Flynn & O'Donnell team with any queries that you may have in relation to the Bill or the area of legal costs in general.

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