

The Consumer Rights Act 2015 A New Front in Solicitor-Client Assessments?

Surprisingly, the latest development in solicitor-client costs disputes has not come from the domestic courts, but from the European Court of Justice (ECJ). It has the potential to open up a new line of attack in Solicitors Act detailed assessments *if* the courts decide to apply it.

The case – *DV v MA* (Case C-395/21)¹ – concerned the fees charged by a Lithuanian lawyer, who had agreed to charge her client an hourly rate, but did not give any estimate of the likely total costs and the retainer did not make any provision for regular interim bills. The lawyer sued her client for unpaid fees and the first instance court found the terms in the retainers regarding price to be unfair and allowed the lawyer around half of what she had claimed. The basis for that finding was Lithuania’s enactment of EU Directive 93/13 on unfair terms in consumer contracts (“the Directive”). On an appeal to the Supreme Court of Lithuania, the court referred certain questions concerning the operation of the Directive to the ECJ.

The relevant parts of the Directive are enacted in the UK by the Consumer Rights Act 2015 (“the Act”). Section 62 of the Act is (in part) as follows:

62 Requirement for contract terms and notices to be fair

- (1) An unfair term of a consumer contract is not binding on the consumer.
- (2) An unfair consumer notice is not binding on the consumer.
- (3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
- (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.
- (5) Whether a term is fair is to be determined—
 - (a) taking into account the nature of the subject matter of the contract, and
 - (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.

¹ It has recently been reported in the Professional Negligence and Liability Reports at [2023] PNLR 16

Also relevant is section 64, which provides (in part) as follows:

64 Exclusion from assessment of fairness

- (1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
 - (a) it specifies the main subject matter of the contract, or
 - (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.
- (2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.
- (3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.

The ECJ reached the following conclusions of principle. In the usual way, it left the national court to make the final decision applying the principles laid down to the facts.

Firstly, the ECJ held that a term governing the price of legal services falls within the exclusion embodied in s. 64(1) of the Act. However, it then went on to hold that the requirement of transparency “cannot be reduced merely to those terms being formally and grammatically intelligible”. In the context of a lawyer’s retainer, that meant that the client must be in a position to estimate the approximate total cost of the services to be provided. That could be done by estimating the total cost of the work at the outset or through a commitment to send bills or periodic reports at reasonable intervals.

Where that was not done, unless the national legislature had decided to make a term which breaches the transparency requirement automatically unfair (which the Act does not do), the fairness of the charging terms was to be considered in the usual way. Since that was a decision for the national court to make, the ECJ did not express a view.

The final issue for the court was what the consequence of a finding of unfairness would be. The Lithuanian court was concerned that, if the charging term was not binding on the client, then she would get a windfall in receiving the legal services for free. The ECJ’s conclusion was unflinching: unless the client does not want the term removed, the contract must continue in existence without any amendment other than removal of the unfair term, even if that means that the supplier receives no payment. The court is not permitted to substitute a requirement to pay what would be fair. This appears to conflict with the (obiter) finding in *Higgins & Co Lawyers v Evans* [2020] 1 WLR 141 (made by agreement between the parties in that case) that a quantum meruit would be payable in any event.

In cases where the client is a consumer, this decision has the potential to open up powerful avenues of argument where the engagement letter contains neither an estimate of the likely fees nor a promise to deliver regular interim bills or indications of the costs. However, that is subject to two important caveats. Firstly, the client must still persuade the court that the payment term is unfair. It may be arguable for the solicitor that any unfairness is mitigated by the existence of a statutory mechanism in s. 70 Solicitors Act 1974 for assessment of the fees. Secondly, post-Brexit, decisions of the ECJ no longer have binding status. Sections 6(1) and (2) of the European Union (Withdrawal) Act 2018 provide that UK courts are not bound by any decisions made by the ECJ after 31 December 2020, though they may have regard to them. However, ECJ decisions before that date remain binding on most courts below the Court of Appeal. Courts may therefore be more likely to apply post-Brexit ECJ decisions where they represent an incremental development from pre-Brexit decisions, provided of course that they do not conflict with binding domestic law. Thus, a Costs Judge would be obliged to follow the binding parts of *Higgins & Co*, but a High Court Judge would not.

In any event, the decision in *DV* is a salutary reminder to solicitors of the importance of having clear terms as to charging and billing and of giving a costs estimate wherever possible.

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Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.