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PROFESSIONAL FEES

IN ADMINISTRATION OF ESTATES

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1.1 INTRODUCTION

In this paper I hope to provide a brief overview of the regulatory provisions governing Solicitors' professional fees in the administration of Estates of deceased persons or funds held by Trustees. Until comparatively recently a general practice was prevalent in the profession whereby professional fees in matters pertaining to administration of estates were charged on a uniform basis expressed as a percentage of the gross assets passing. The practice stipulated that such percentages would decline on a regressive scale as the value of the matters involved increased. There is nothing wrong in principle with such methodology, however, its application on an agreed uniform basis would probably now fall foul of competition law.

Solicitors' professional fees referable to non-contentious probate matters are regulated by Statute. Order 99 Rule 48 of the Rules of the Superior Courts 1986 stipulates that such *"costs and fees to be allowed shall be those set forth in Appendix W, Part III"*. Various charges are provided, dependent upon the value of the Estate, in regard to preparation of Inland Revenue Affidavit, Oath of Executor, extracting the Grant and such like. The fees specified are ludicrously out of date and have not been addressed in any meaningful way since a revision of the Rules of the Superior Courts in 1962. The subsequent revision of the Rules which took place in 1986 does not appear to have addressed this issue. It is a matter which appears to have gone largely unnoticed by the profession as a

whole given that Solicitors were quite happy to continue to apply what were effectively scale fees in respect of their charges.

However, in addition to the specific fees provided in Appendix W, Part III, the Appendix also makes provision for the charging of an *instructions fee*. The fee covers instructions for the Grant and work under the Finance Acts. For the purpose of assessing the fee the Appendix provides a list of eight criteria which are intended to assist the practitioner or a Taxing Master in arriving at a fee which, in all the circumstances, is fair and reasonable.

The provision is as follows:

"Instructions for grant and work under the Finance Acts, such sum as may be fair and reasonable, having regard to all the circumstances including:-

(a) the complexity, importance, difficulty, rarity or urgency of the questions raised;

(b) the value of the property passing or deemed to pass on the death;

(c) the amount of duty involved;

(d) the importance of the matter to the beneficiaries;

(e) the skill, labour and responsibility involved therein and any specialised knowledge given or applied on the part of the Solicitors;

(f) the number and importance of any documents perused;

(g) the place where and the circumstances in which the business or any part thereof is transacted; and

(h) the time reasonably expended thereon."

These criteria are similar to those applicable to the assessment of fees relating to contentious matters but are tailored to suit probate work.

The instructions fee specified at Appendix W merely covers the work referable to the extraction of the Grant. The subsequent work of administration of the Estate, gathering in the assets, distribution, complying with tax requirements and preparation of the administration account are all matters for which additional charges are applicable. These charges are regulated by Schedule II of the Solicitors' Remuneration General Order, 1986. This General Order specifies various charges which are commonly referred to as *"Schedule II fees"*. In addition the schedule provides for the application of an instructions fee based on criteria which are not too dissimilar to those already described. The fees specified in the General Order have, at least, been addressed from time to time by the regulatory authority, albeit on an infrequent basis. This has resulted in various anomalies whereby for instance, the statutory fee for writing a letter, stipulated in Appendix W to the Rules of the Superior Courts, if done prior to the extraction of the Grant, is .85c whereas the fee for writing a letter subsequent to Grant, as prescribed in the General Order, would range between €6.35 and €9.52. In essence, the various scheduled fees as prescribed under either statutory regime are relatively meaningless and accordingly the instructions fee is the instrument which must be utilised to properly measure the appropriate fee. However, I

should say that for the purpose of taxing a Bill of Costs, the itemised or scheduled charges are extremely helpful in providing a chronological description of the work carried out in a particular matter.

1.2 CONTENTIOUS WORK

It is comparatively rarely that an executor, administrator or trustee seeks taxation of a Solicitor's Bill of Costs. I would estimate that on an annual basis less than 1% of the total bills taxed would be in this category. However, such taxations when they do occur can frequently be extremely contentious and quite long drawn out affairs.

The costs are taxed on the Solicitor and Own Client basis and the fact that taxation has been called for usually means that the client considers the bill to be far too high or is dissatisfied with the level of service provided by the Solicitor or both.

In any event, the Taxing Master is charged with applying the criteria heretofore referred to in assessing the instructions fees. In truth, the criteria are rather imprecise or perhaps woolly would be a better description given that the various headings under which a Taxing Master is expected to value the fee, provide a client, in particular, with absolutely no clue as to how the criteria are to be applied. One of the current Taxing Masters' predecessors had on more than one

occasion expressed the view that a Taxing Master is vested with a statutory licence to guess.

In Best V. Welcome Foundation Limited[1] Mr Justice Barron dealing with the instructions fee referable to a High Court action was of the view that ultimately there are only three criteria upon which the instructions fee is determined namely:-

1. any special expertise of the Solicitor;
2. the amount of work done;
3. the degree of responsibility borne.

I would certainly think that the value of the subject matter is an essential ingredient to the consideration of the professional fee but of course *value* would be reflected in the degree of responsibility borne.

The reality must be that in measuring an instructions fee in probate matters the Taxing Master looks at the gross value shown on the face of the Grant in the first instance. The extent of the Solicitor's work in the matter is then examined and ideally, such work should be accurately described in the Bill and corroborated by reference to the Solicitor's file.

[1] [1996] 1 ILRM 34

In my experience the overall professional fees allowable may equate to between 1% and 3.5% of the overall gross value of the Estate depending upon the amount of work done by, or any particular expertise applied by, the Solicitor:

1.2.1 The Solicitor's File

The Solicitor's file should contain all the information necessary firstly, to enable the Solicitor assess the appropriate fee and secondly, to assist the Taxing Master in considering the issue later, if required. In this regard I cannot over emphasise the value of attendance notes. They are the backbone of any Bill of Costs, apart altogether from the protection which they may afford the Solicitor by recording in writing the client's instructions and the work carried out together with any particular difficulties or complex issues which may have arisen.

1.2.2 Keeping the Client Informed

I believe that an informed client is, generally speaking, a happy client and is far less likely to ultimately query the bill. Apart from executors or administrators, the beneficiaries of an estate also have rights in regard to the Solicitor's bill and reasonably regular progress reports to them also may guard against later problems.

1.3 NON-CONTENTIOUS BUSINESS AGREEMENTS

Given the rather neglected state of the regulations concerning the measurement of Solicitors' costs in probate, administration or trust matters it would seem prudent that Solicitors should, if possible, enter into agreements with their clients in regard to the manner in which their fees should be calculated.

In fact, since the passing of the Solicitors' (Amendment) Act, 1994, the practitioner is required under the provisions of Section 68(1): *"on the taking of instructions to provide legal services to a client, or as soon as is practicable thereafter"* to provide the client with particulars in writing of:-

a) The actual charges; or

b) Where the provision of the particulars of the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges; or

c) Where the provision of particulars of the actual charges or an estimate of such charges is not in the circumstances possible or practicable, the basis on which the charges are to be made.

Accordingly, it would seem to make good business sense to kill two birds with one stone whereby in the course of complying with Section 68, the Solicitor might set forth in writing the terms of a proposed agreement in regard to the fees to be applied to the case.

Historically there was a marked reluctance amongst Solicitors to mention the subject of fees to their clients at the early stages of any matter whether contentious or non-contentious. Given that there is now a statutory requirement of raising the matter with the client at the earliest opportunity and that a failure to do so may amount to professional misconduct[2] there is no reason why this issue should not be tackled head on. The reluctance to discuss fees in the early stages may have been explained by fear of the client taking the business elsewhere but given that the requirements under Section 68 of the Act apply to all Solicitors this problem should not arise. Of course a client is perfectly at liberty to *shop around* and while this may be unpleasant, it is a fact of life.

The execution of an agreement regulating how their Solicitors' fees are to be assessed would in all likelihood be welcomed by clients.

The entitlement of Solicitors to enter into such agreements is catered for at Section 8(1) of the Solicitors' Remuneration Act, 1881 which allows the Solicitor and client to enter into such agreements *"before or after or in the course of the transaction"* and further that the agreement as to remuneration may be as to *"such amount and in such manner as the Solicitor and the client think fit, either by a gross sum, or by commission, or percentage, or by salary, or otherwise"*.

[2] S.24 Solicitors' (Amendment) Act, 1994

It goes without saying that any such agreement must be fair and reasonable and given that the relationship between Solicitor and client is a fiduciary one the necessity of avoiding any subsequent accusation of undue influence arises. In respect of any other transaction between a Solicitor and a client it is, of course, advisable that the client should take independent legal advice but I suggest that it might be unreasonable to expect a Solicitor to request a client to refer an agreement relating to the Solicitor's remuneration to a separate Solicitor for advice. Sub-Section 4 of the 1881 Act provides that the agreement as to costs *"may be sued and recovered on or impeached, and set aside in the like manner and the like grounds as an agreement not relating to the remuneration of a Solicitor"*. Under the sub-section the client would appear to have an entitlement to seek an Order for taxation of the costs and the Taxing Master has power to consider the terms of the agreement and report to the Court thereon. The Court in turn may order rescission of the agreement or make an Order reducing the amount payable.

I would suggest that in most cases, indeed in probably 99% of cases, the client would honour, without demur, the terms of a written agreement entered into with a Solicitor.

1.4 PERCENTAGE OR HOURLY RATE?

In respect of the larger estates it seems to me that Solicitors' remuneration may be properly and fairly calculated by means of a percentage of the assets declining on a regressive scale as the value increases, along the following lines:-

3.5% on first €40,000.00

2.5% on the next €60,000.00

1.5 on the next €80,000.00

1% thereafter

On this basis, an estate with a gross value of say 1.5 Million Euro would yield a professional fee of 17,300 Euro. Applied to the estates where the assets are held in one block such methodology probably provides fair remuneration. But in the more complex estate or indeed in respect of the small estate the return pursuant to this formula may be insufficient.

In such cases and also in reference to administration of Trust funds a charge by reference to percentages may not be appropriate. Remuneration by reference to time spent is probably preferable.

Of course, any agreement as to remuneration should also be explicit that all disbursements are payable in addition.

The manner in which hourly rates may be properly applied to Solicitors' work can give rise to considerable contention between Solicitor and client unless properly and unambiguously explained to the client and thereafter set forth by way of agreement in writing.

1.5 HOW IS THE APPROPRIATE HOURLY RATE OR RATES TO BE DECIDED UPON?

There is absolutely no guidance in this jurisdiction as to how this should be achieved. A Solicitor's practice is a business, the Solicitor trades upon professional expertise and the time taken to transact any business must have a direct bearing on the cost ultimately involved for the client. The level of expertise which it is necessary to apply to a particular issue may dictate the level of experience of personnel to be applied, whether by senior Solicitor, Solicitor or Legal Executive. Accordingly, hourly rates should be arrived at by means of application of some, at the very minimum, quasi scientific means.

1.6 THE EXPENSE OF TIME

The purpose of time recording is to assist the Solicitor in ascertaining whether work is being done at a profit or a loss. In a booklet entitled "The Expense of Time" the English Law Society explains the concept of time costing as involving the division of a firm into fee earners and non-fee earners and then dividing

projected overheads of the firm including the salaries of the non-fee earners between the fee earners, after building in various adjustments such as notional salaries for partners and applying the retail price index and the estimated rate of inflation. The object is to arrive at an hourly rate for each fee earner which should provide an annual return equal to the fee earner's projected share of overheads. This is known as the "A" factor. The "B" factor is the figure which is intended to make a contribution to the profits of the firm and is arrived at by adding a percentage charge to the total of the "A" factor. The extent of the percentage charge to be added is arrived at by having regard to the criteria already described namely skill, responsibility, value and such like. Thus, the client's Bill of Costs might be calculated as follows:-

Factor A

Time spent:

Senior partner – 6 hours at say €200 per hour (A Factor)

For skill and responsibility uplift (50-120%) (Factor B)

Assistant Solicitor – 10 hours at €150 per hour (B Factor)

Uplift (40-100%) (B Factor)

Legal Executive – 15 hours at €100 per hour (A Factor)

Uplift (30-90%) (Factor B)

Plus VAT and outlays

In general, the greatest problem with charging fees by reference to time is that such methodology tends to reward the inefficient Solicitor and may in fact

amount to an encouragement to inefficiency. Hence, the introduction of the B Factor in the United Kingdom which allows for a value judgment based on skill, performance and value.

Of course, questions can still arise as to whether the time involved was reasonably spent or whether the work performed could have been carried out by less experienced personnel at consequently lower rates. Rates may be adjusted up or down depending on the circumstances of any particular case. They are not scale figures and costs and fees exceeding the guidelines may well be justified in appropriate cases. Categories of fee earners might be as follows:-

1. Solicitors with over 8 years post-qualification experience.
2. Solicitors and Legal Executives with over 4 years post-qualification experience.
3. Other Solicitors and Legal Executives.
4. Trainee Solicitors and paralegals.

These categories are based upon experience and hourly rates should be fixed accordingly.

It appears to me that there is no reason why a Solicitor or firm of Solicitors could not arrive at an agreement with a client in regard to a range of hourly rates to be applied, *inclusive* of a profit element. This is the practice in practically every

other area of commercial life. Thus, for example, the senior Solicitor's hourly rate might be fixed at say €320 regardless of difficulty with corresponding lesser rates for other classes of fee earner.

However, I do not think it is permissible to agree a range of hourly rates with the client which plainly include profit elements and at the same time reserve the right to add a "B Factor" type premium to these rates based upon the criteria provided at Appendix W. This would give rise to double charging and even if the client were to agree to such, it is doubtful that, if the bill were challenged, a Court would uphold the agreement.

In my view, the current regulations concerning the calculation or measurement of Solicitors' fees in non-contentious matters have long since passed their proper expiry date. The regulations are so inexact in their terms that they are unfair to both Solicitors and clients. I would suggest that the charging of Solicitors' fees by reference to time expended, is reasonable provided the actual time involved can, if challenged, be shown to have been reasonably expended by the Solicitor or other fee earners.

In the one person practice the Solicitor must necessarily carry out all work and the basic hourly rate should reflect this.

However, in the larger practice, the category or seniority of fee earner assigned a task will have implications for the size of the bill ultimately proffered to the client. In the ordinary course, in many probate cases the work involved in extracting the Grant and administering the Estate may be relatively straightforward. In such circumstances, it might reasonably be expected by the client that the work should have been carried out by a Legal Executive or junior Solicitor at appropriate basic hourly rate. Of course, if such fee earners encounter complex issues in the course of an administration and overcome them without recourse to a senior Solicitor, the uplift to be applied to the basic hourly rate (the B Factor) might be correspondingly greater – say in the order of 60-90%.

Conversely, senior Solicitor rates should not be charged against the client if the work could have been carried out by a less senior fee earner.

I am aware that many firms already base their charges by reference to time but the practice is not by any means universal and there is certainly no universal standard in operation guiding or regulating how time charges may be fairly applied. Many sole practitioners and smaller firms do not operate any time recording system at all while others apply hourly rates to their time but reserve the right to charge a premium in addition, to reflect additional complexity or responsibility. There appears to be no practice of applying scientific means of arriving at the appropriate hourly rates, whether as to overheads or a fully

commercial rate. The result is that consumers may have a legitimate grievance as to how Solicitors' fees in regard to non-contentious work are calculated. I believe that the profession itself should be pressing for change in this regard rather than having it ultimately thrust upon it.

At the moment there is considerable public disquiet in regard to costs referable to contentious work. I think it is a testament to the good professional services which Solicitors provide to their clients in administration and trust work generally that the same level of disquiet is not apparent in regard to the non-contentious area.

This is all the more reason why, I believe, the time is now right for the profession to consider the drafting of new regulations which provide a more reasoned or scientific basis for the calculation of Solicitors' remuneration.