Limitation issues in solicitor/client costs

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Limitation periods arise in solicitor/client costs disputes in two ways: by a solicitor seeking recovery of fees, and by a client seeking to recover fees overpaid. The accrual of the solicitor's cause of action has not received significant attention. The treatment in case law is clouded by the doctrine of entire contract, which provides that a solicitor's entitlement to payment does not arise until the whole of the work is completed. The client's cause is not as straightforward as it seems and recent developments discussed below have illuminated this area.

Snapshot

- Practitioners need to take care in analysing the cause of action for recovery of fees and when it accrues, as it can differ from the client's cause of action for recovery of an overpayment of fees.
- The solicitor's claim for fees is one based in contract or quasi-contract and the distinction can make a difference to the limitation period.
- A client's right to recover fees overpaid to a solicitor is a cause of action which is in essence restitutionary and grounded in statute.

Identifying the cause of action

A solicitor's cause of action to recover fees arises either in contract or quasi-contract (*Coshott v Lenin* [2007] NSWCA 153).

The client's cause of action for overpayment, or overcharging, can spring from a number of sources: money had and received, breach of contract, tort, misleading and deceptive conduct and also a statutory cause of action which arises following an assessment of costs.

Recovery of fees by a solicitor

What type of contract is it?

It has been said that in 'ancient times' a solicitor's retainer was an entire contract (*Harris v Osbourn* 2 C. & M. 632). The nature of the entire contract was colourfully illustrated by Sir George Jessel MR in 1893, when he observed, 'If a man engages to carry a box of cigars from London to Birmingham, it is an entire contract, and he cannot throw the cigars out of the carriage half-way there, and ask for half the money; or if a shoemaker agrees to make a pair of shoes, he cannot offer you one shoe, and ask you to pay one half the price' (*In re Hall & Barker* [1893] 9 Ch D 538 at 545). While the entire contract was the rule in common law (*Harris v Osbourn 2 C. & M. 632)* it likely wasn't the rule in Chancery where it was recognised that litigation may take years, proceeding through stages and be the subject of natural breaks allowing the delivery of a bill at any point (*In re Romer & Haslam* [1893] 2 QB 286 per Lord Esher MR at 293).

Whatever the historical origins of the doctrine, they were tempered over time according to Simon Brown LJ in *Abedi v Penningtons* [2000] 2 Costs LR 205 where his Lordship stated, 'First the solicitor became entitled to determine the contract on reasonable notice. And then there developed a principle under which solicitors became entitled to bill their costs when a natural break occurred in the course of protracted proceedings. These possibilities apart, it has always been open to solicitors to agree the terms of payment under their retainer ... (at 205).

Written costs agreement

Having a written costs agreement, most solicitors include a term as to when payment is due. Terms such as 'Payment is due within 30 days of invoice' are common. Some solicitors have terms of seven or 14 days. In any of those cases, a breach of contract occurs on failure to pay within terms (*Samadi v WKA Legal* [2018] NSWSC 1159), and it follows that the cause of action arises in contract at that point. The fact there is a prohibition on suing until 30 days have passed since rendering a bill does not extend the limitation period by 30 days from that point (*Coburn v Colledge* [1897] 1 QB 702).

One of the difficulties in this area is whether that simple analysis holds true in all cases or whether the cause of action arises at an earlier point, such as when the right to issue an invoice arises. For example, where a contract is discharged by performance as a result of all work being done in the matter, it is difficult to conceive of a scenario where a solicitor has a right to issue an invoice more than six years after that point. Although grounded in principles of contract law, this issue is not the subject of decided cases in the context of solicitor/client costs. It must be said that each case will turn on its own facts and the construction of the agreement will be the primary task in identifying when a cause of action arises under a valid contract.

It has been said that '[I]n the absence of any contractual provision to the contrary, a cause of action for payment for work performed or services provided will accrue when that work or those services have been performed or provided. In such circumstances, the right to payment does not depend on the making of a claim for payment by the party who has provided the work or services' (*Birse Construction Limited v McCormick (UK) Ltd* [2004] EWHC 3053 at [7]).

Accordingly, depending on the wording of the costs agreement, the cause of action may arise when the work is done, at a time before any invoice is issued and practitioners should be aware of this possibility. It was averted to by Leeming JA in *Calvo v Ellimark Pty Ltd* [2016] NSWCA 136 at [156] where his Honour stated in *obiter dictum* that 'the prohibition on suing before rendering a bill does not enable the six year limitation period imposed to be side-stepped by a lawyer who fails to render a bill years after performing the legal services'.

No written costs agreement

Where there is no costs agreement – either because there never was one or because the contract is 'ineffective' – it will be more difficult to tell when the cause of action arises. Two matters become relevant: first, even if there is no costs agreement in writing there may still be a contract (of retainer) and the cause of action may be in contract (*Coshott v Lenin* [2007] NSWCA 153 (***Lenin***') at [9]). But that statement does not deal with issues arising out of the requirement in legal profession legislation that costs agreements be in writing. See, for example, *Jefferis v Gells Lawyers* [2018] NSWDC 288. Alternatively, if there is a cause of action in quasi-contract then 'time runs from when the defendant received the benefit that gave rise to the obligation to make restitution' (*Lenin* at [17]).

Under the *Legal Profession Uniform Law* it is likely that there will be more instances of ineffective costs agreements, given the terms of s 178(1), which provide that where there has been a failure of disclosure, any costs agreement concerned is void.

In such a case, when does the cause of action arise? Where the retainer is an entire one, the obligation will arise when the work is completed. Where the obligation is not entire, then 'time runs from when the defendant received the benefit that gave rise to the obligation to make restitution' (*Lenin* at [17]).

What must be done before the expiration of the limitation period

A number of cases have held that *court proceedings* must be commenced within the limitation period and that the commencement of a costs assessment is not 'an action on a cause of action' (*Coshott v Barry* [2012] NSWSC 850 (***Barry***') at [50]–[52]).

In some circumstances, such as where the solicitor completes the work, and the client has not paid but the solicitor cannot sue due to want of proper costs disclosure, it is the authors' view that it may be arguable that a costs assessment application is 'an action on a cause of action'. This is on the basis that where court proceedings are not available, but the costs assessment process is, the underlying cause of action remains contract or quasi-contract: it is simply that the debt cannot be recovered through court proceedings until the costs have been assessed. A judgment which represents the debt can be obtained, however, by filing a Certificate of Determination obtained through costs assessment. Both methods of recovery lead to a judgment debt: why in those circumstances is an application for assessment not an 'action' on a cause of action? It is the legislatively mandated manner by which a debt founded in contract or quasi-contract becomes a judgment debt and is then recoverable as such. However, it must be acknowledged that the decided cases do not support this view (see *Barry* at [52]; *Bennie v Grace* [2018] NSWDC 229 (***Bennie***') at [39]). In view of the authorities, the consequence for a practitioner is that they must either commence court proceedings or file the Certificate of Determination as a judgment within six years of the cause of action arising.

Client cause of action: overpayment

If an action by a solicitor to recover fees arises in contract, does an action by a client who contends he or she has paid too much in fees also arise in contract? Not necessarily: it depends on the terms of the contract, if there is one.

This is a difficult and relatively uncharted area of the law. If there is an express term that the solicitor is only entitled to charge fair and reasonable fees, then the cause of action arises on breach, i.e. when the solicitor charges more than a fair and reasonable amount. An action for money had and received may also be available where costs have been paid.

Some clients are asked to pay without a bill. Others are presented with an invoice. Other than an impression that they've been overcharged, how does a client know without an assessment whether they've been overcharged? In those circumstances when does the limitation period run against the client?

In the absence of an express term to that effect, it will be difficult to imply into a retainer a term that the solicitor will only charge fair and reasonable fees (*Bennie* at [37]). In such cases, the client has a statutory cause of action, which arises only following an assessment of costs (*Bennie* at [28]–[41]). If the costs are assessed and the amount determined to be fair and reasonable is less than the client has paid, then the amount of the excess may be recovered in a court of competent jurisdiction. In such cases the cause of action only arises once the assessment process is complete and the Certificate has been issued (see *Bennie).*

Conclusion

Limitation issues in solicitor/client costs disputes can involve some complexity and the area is likely to receive more attention in coming years given the introduction of the *Legal Profession Uniform Law*. Nevertheless, for solicitors, timely attention to billing will relieve many problems that might otherwise arise. **LSJ**