Counsel's Fees

On 27 October 1987, the President of the Bar Association, R.V. Gyles Q.C. and the President of the Law Society K.H. Dufty signed a Joint Statement on Counsel's fees which is to regulate the charging of fees and procedures for their recovery.

Joint Statement

1. It is desirable that counsel's fees be marked on a brief by a solicitor before it is delivered.

   As an alternative to marking a fee the solicitor may endorse the brief in any of the following ways:

   "Top Supreme Court Scale unless otherwise agreed."

   This means that counsel is entitled to mark his fee at the top scale applicable for the time being in the Supreme Court:

   "Mid Supreme Court Scale unless otherwise agreed."

   This means that counsel is entitled to mark his fee at the mid scale applicable for the time being in the Supreme Court:

   "Lowest Supreme Court Scale unless otherwise agreed."

   This means that counsel is entitled to mark his fee at the lowest scale applicable for the time being in the Supreme Court.

   Similarly, briefs may be marked at top, mid or lowest District Court scale and corresponding meanings will attach to those expressions. These markings can be used even where the Court in which counsel has been briefed is not the Court referred to in the marking.

   Where a brief is so marked, or where a brief is marked with a Brief on Hearing fee only, in the absence of a special arrangement counsel should not charge for preparation or a time fee for reading a brief as this is already allowed in the brief fee. Similarly, counsel should not charge a set fee for each witness interviewed. The Court scales allow fees for conferences based on an hourly rate and this should be the only basis upon which counsel charges.

2. The circumstances of the litigation may be such that the marking of a fee is inappropriate, in which case an arrangement should be made between the solicitor and counsel as to the fees to be charged by counsel in various eventualities. Such arrangment should be made before the brief is delivered or as soon as possible thereafter. It is preferable that it be in writing.

3. If no fee is marked on the brief by the solicitor and no arrangement is made, counsel is entitled to and should mark his fee on the brief before the work is carried out.

4. The solicitor personally is in honour bound to pay to counsel whatever fees are charged by counsel unless:

   (a) A fee was marked on the brief and the fees claimed are not in accordance with such marking; or

   (b) An arrangement as to fees was made between solicitor and counsel and the fees claimed are not in accordance with that arrangement; or

   (c) In a case where no fee was marked on the brief and no arrangement was made, the fees claimed are unreasonable, or contrary to the practice of the Bar —

   but in each case the solicitor remains bound to pay the proper fee.

5. Counsel are entitled to prompt payment of their fees and it is the duty of solicitors to avoid delay or procrastination in dealing with memoranda of counsel's fees or in clearing up differences as to fees properly chargeable.

6. If counsel is unable to obtain payment from a solicitor of fees to which he considers he is entitled, he should report the matter to the Bar Association or, if he considers that professional misconduct on the part of the solicitor is involved, lodge a complaint with the Law Society. Counsel is also entitled, if he has reason to believe that the solicitor has received the fees from the client, after notice to the solicitor, to enquire of the client whether the client has in fact paid the amount of the fees or any part of them to the solicitor.

7. If a solicitor considers that the fees charged by counsel are in excess of what (having regard to para 4 above) he is bound to pay, or that he is not bound in all the circumstances of the particular case to pay

fees at all, and after his views have been fully represented to counsel the latter still presses a claim which the solicitor considers unjustified, he should report the matter to the Law Society which will take it up with the Bar Association.

8. Except as hereinbefore provided, a direct approach to clients by counsel on any question relating to counsel's fees is clearly improper.

9. If a solicitor does not within three months of the delivery of counsel's memorandum of fees dispute his liability to pay the fees charged, the fees shall be deemed not to be disputed provided, however, that where a solicitor establishes to the satisfaction of the Joint Tribunal hereinafter referred to:
   (a) That there are good grounds for disputing the fees charged; and
   (b) that, in the special circumstances of the case (including the circumstances associated with a delay beyond three months) the solicitor ought not to be precluded from disputing them- the preceding part of this paragraph shall not apply.

10. Where, in accordance with the provisions of para 7 above, a solicitor has reported a dispute as to fees to the Law Society, the Bar Council will enquire of the counsel concerned whether he still presses his claim and, if he still presses his claim, whether he is willing to have the dispute arbitrated by the Joint Tribunal on fees. If counsel still presses his claim but is not willing to have the dispute so arbitrated, the Bar Council will take no further action to assist counsel in obtaining payment of the fees in question. If the solicitor should refuse to submit to arbitration, the Law Society will not thereafter assist him.

11. The Joint Tribunal on fees shall consist of the President for the time being of the Bar Association (or such other member of the Bar as such President may from time to time nominate) and the President for the time being of the Law Society (or such other member of the Law Society as such President may from time to time nominate).

12. Where a dispute is to be arbitrated by the Joint Tribunal on fees:
   (a) The members of the Joint Tribunal on fees shall, before commencing upon the arbitration, select by lot, from a pool of names kept for that purpose and comprising not less than six representatives of each body, the name of an umpire to act in the event that they disagree as to the result of the arbitration; and
   (b) the parties may appear on their own behalf or be represented and may call evidence if they wish or, alternatively, the Joint Tribunal on fees may, if both parties agree, determine the dispute in the absence of the parties and on the basis of such written material and/or submissions (if any) as the parties may wish to put before it.

13. An agreement to arbitrate shall be deemed to be an agreement by the solicitor that he shall pay within twenty one (21) days of the publishing of the order made by the arbitrators or umpire (as the case may be) any amount stated therein to be due to counsel. □

Interpretation Act 1987

The Interpretation Act, 1987 came into operation on 1 September 1987. It repeals the Interpretation Act 1897.

In many ways the new Act is intended to re-enact provisions of the 1897 Act, albeit expressing those provisions in "modern language". In addition there are several significant new provisions.

S.33 requires a court when interpreting an Act or statutory rule to prefer a construction that would promote the purpose or object underlying the Act.

S.34(1) enables a court when interpreting an Act or statutory rule to consider extrinsic material either to confirm the ordinary meaning of the words contained in the legislation or, in the event of there being an ambiguity, to determine the meaning of the word. S.34(2) recites a list of extrinsic material which may be considered including, for example, reports of a Royal Commission of Law Reform Commission laid before either House of Parliament before the provision was enacted, relevant reports of a committee of Parliament or of either House of Parliament before the provision was enacted or made, the second reading speech and any document declared by the Act to be a relevant document for the purposes of s.34(2).

S.23 provides that unless otherwise provided an Act shall commence twenty eight days after the date of assent. This replaces the old rule whereby Acts commenced on the day on which Royal assent was given. It is intended to ensure that an Act is available for purchase at the time it becomes operational.

S.56 enables monetary penalties in legislation to be described by the use of penalty units rather than a dollar amount. A penalty unit is to read as a reference to an amount of money equal to the amount obtained by multiplying $100 by that number of penalty units. This means that the dollar amount of penalties can be increased by a simple amendment thus keeping penalties in line with inflation.

The second reading speech in respect to the new Act in the Legislative Assembly can be found in N.S.W. Hansard 3 December 1986 p.7920 and in the Legislative Council on 31 March 1987 p.9605. □

Classifieds

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