

LACK OF A *section*

Every time a solicitor takes instructions to provide legal services, he must send the client a letter listing his charges, in accordance with section 68 of the *Solicitors (Amendment) Act, 1994*. But what happens when no section 68 letter has been sent? Patrick O'Callaghan reports on a recent case that dealt with this issue

- Lack of a section 68 letter
- *Goodbody v Colthurst*
- Disciplinary implications

The opening of every file demands the issuing of a section 68 letter. The important point that arose in *Goodbody v Colthurst and Tenips Limited* (High Court, unreported, 5 November 2003) is what happens when such a section 68 letter cannot be found, does not exist or was never sent to the client. Several points were litigated in that case, but the purpose of this article is merely to explore the section 68 aspect of the case.

In the absence of a section 68 letter, can a solicitor recover any or all of his monies due under a solicitor-and-client bill of costs? Or is the solicitor prejudiced by the lack of a section 68 letter when suing to recover all of his costs lawfully due? What right of recourse has a client where a solicitor fails to issue a section 68 letter? What role does the Law Society have to play in what is, in essence, a contract between two free-standing third parties, one of whom is a solicitor and subject to its disciplinary jurisdiction.

Facts of the case

The action came before Mr Justice Michael Peart by way of an appeal from a decision of the master of the High Court granting liberty for the entry of judgment by the plaintiff solicitors against the defendants in respect of a bill of costs. The plaintiff solicitors had been instructed by Charles Colthurst in relation to six separate contentious matters arising out of a dispute that he had with his parents. All matters had been settled between the various parties prior to hearing, but on the basis that each side should bear their own costs.

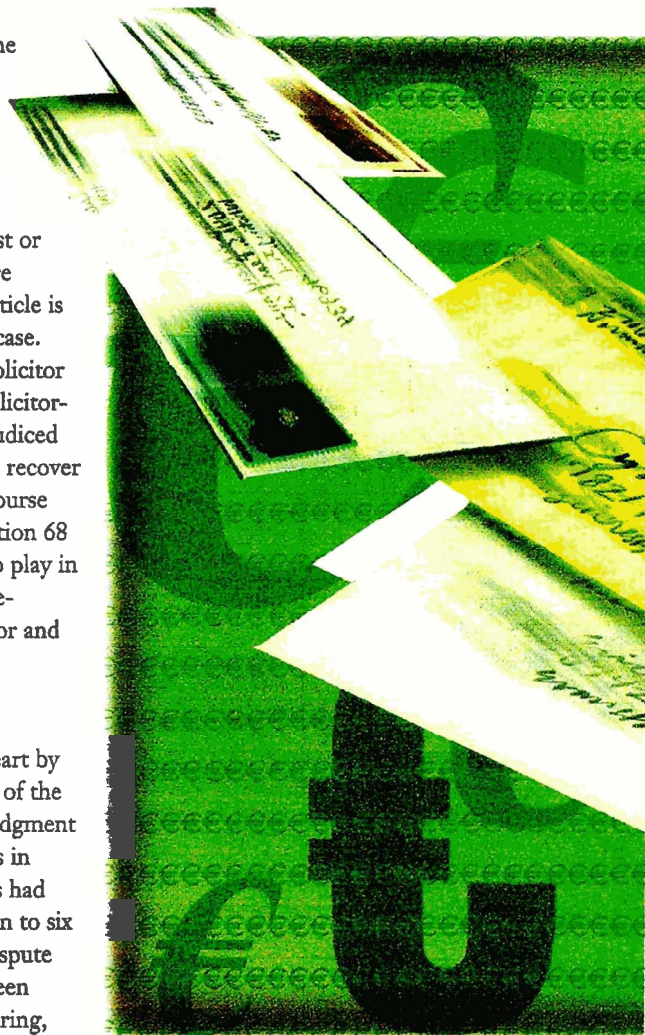
It was accepted by the solicitor who dealt with the files concerned that a section 68 letter could not be located. There was no such letter on file. However, it was averred that the defendant client was regularly apprised of the costs situation, both at the outset and during the course of proceedings. The case was put forward that the client was merely seeking another method to avoid paying for the legal services provided.

Decision in *Goodbody v Colthurst*

The decision of Mr Justice Peart is interesting in the manner in which it dealt with the various aspects of the differing requirements flowing from and impinging upon a consideration of the non-existence of a section 68 letter. These can be best approached by distinguishing between:

- The effect of the non-existence of a section 68 letter on the right to recover fees by action at law
- The quantification of the fees actually owing, upon taxation by the taxing master in a solicitor-and-client taxation, in the light of the non-existence of a section 68 letter
- The effect of the lack of a section 68 letter on a solicitor's professional obligations to the Law Society.

Mr Justice Peart held that the lack of a section 68 letter does not remove a solicitor's right to recover fees by action at law. Full recovery of all fees properly allowable upon taxation and owing can be obtained by legal action. He rejected the notion, put forward by counsel on behalf of the defendant client, Mr Colthurst, that section 68 operated to bar any right c



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recovery of costs by the solicitor where an appropriate letter had not been written to the client upon the inception of the retainer. Rather, section 68 is a 'stand alone' section, designed to put in place a number of requirements intended to provide greater protection to clients of solicitors in the matter of costs. He held that, despite section 68 being worded in mandatory terms, it was not designed to deprive the solicitor who has failed to send a section 68 letter of his right to recover his costs when taxed.

Effect on taxation

However, the *quantum* of those fees may be materially (and adversely) affected by the lack of a section 68 letter. Mr Justice Peart held that, in the absence of prior notification of the basis for certain charges contained in the bill of costs, the taxing master may,

in his discretion, attach such significance to the absence of a section 68 letter as he deems appropriate in any particular case. This clearly raises the spectre of certain charges being reduced or not allowed, where a section 68 letter has not been written. It is in this area that the provision most keenly bites – on the pockets – of defaulting solicitors!

It is the taxing master who is charged with the task of ensuring that a client is only charged appropriately for services rendered. The provisions of section 68 are not intended as a substitute for this. When a bill of costs is presented for taxation, only those charges that can be properly shown to have been rendered will be allowed – at the appropriate rate. If the fees being charged are in excess of what the taxing master considers appropriate in the absence of prior notification of the basis of charges, it will be something he can have regard to, even if he might be prepared to allow the same fees where a section 68 letter had been written. As a taxing master exercises a discretion that is of a judicial nature in relation to all fees properly allowable (*Kelly v Breen*, [1978] ILRM 63), this is of significant import.

Disciplinary impact

Ultimately, the underlying theme in the judgment of Mr Justice Peart is that section 68 is primarily a matter impacting upon solicitors' professional obligations. It is a breach of a solicitor's obligations to fail to send a section 68 letter. It affects his relationship with his statutory professional disciplinary body, the Law Society, and can lead to censure and a fine.

Accordingly, the lack of a section 68 letter does not affect the right to recovery by a solicitor under a bill of costs. It may affect the *quantum* of that bill when it is submitted for taxation, given the lack of prior notification of the basis for the charges made. Certainly, it does adversely affect a solicitor's professional obligations as a member of the Law Society.

It is in this regard that the adverse affects of failure to write a section 68 letter will most directly be felt by a solicitor in practice. **G**

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