

'The Costs Column'



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Ever since Section 6 of the Costs Practice Direction was amended in 2005, I have been anticipating that the issue of costs estimates will become more prominent. Section 6 now provides a mechanism for the paying party to use a costs estimate filed by the receiving party to argue reasonable reliance or to dispute the reasonableness or proportionality of the costs claimed against him if there is a 20% or more difference between the costs claimed and an estimate previously filed.

*Leigh-v-Michelin Tyres*¹ pre-dated the amendment of Section 6 and gave guidance on costs estimates - they were a useful yardstick for judging reasonableness and they could be taken into account when the paying party had relied on an estimate and when the court would have made different case management directions if a realistic estimate had been given. *Leigh* stressed that it was wrong to limit a claim for costs just because the costs exceeded the amount of an estimate.

Many of you will remember the case of *Garbutt-v-Edwards*². Here, the paying party argued that the receiving party's solicitor had not provided the receiving party with a costs estimate, that this breached the Solicitors' Costs Information and Client Care Code so that the recovery of costs under the retainer was unlawful and that there would be a breach of the indemnity principle if the paying party was required to pay costs. Fortunately for the receiving party, the judgment confirmed that the purpose of the Code was to protect the interests of the client and the administration of justice, rather than to relieve paying parties of an obligation to pay costs which had been reasonably incurred and that it was a question of discretion whether to take into account any failure by the receiving party's solicitors to provide an estimate to the receiving party.

So, what about solicitor/client costs? Two recent cases have looked at the part played by costs estimates in solicitor/client assessments. The first case is *Mastercigars Direct Ltd-v-Withers LLP*³. The substantive litigation was extremely complex and arose out of a trademark dispute concerning the import into the United Kingdom of many well-known brands of hand-rolled Cuban cigars.

An initial costs estimate was sent to Mastercigars in March 2005 which was updated in May 2005. The revised estimate set out the costs already incurred together with a breakdown of future work - showing estimated hours for the solicitor and a trainee and an hourly rate and costs calculation.

Withers delivered invoices to Mastercigars totalling more than £1 million which was substantially more than the revised estimate of 6th May 2005 (£356,000.00 approximately). On detailed assessment it was ordered that Withers would be bound by the revised estimate save that they would be allowed extra profit costs and counsel's fees for further trial days which had not been envisaged when the revised estimate was issued. Not surprisingly, Withers appealed.

During the course of the appeal, Mr Justice Morgan (who sat with two assessors) decided that he had to look at two issues of principle in relation to solicitor/client costs - is reliance by a client on an estimate relevant and is there any rule as to the addition of a margin to a solicitor's estimate?

The court decided that estimates had relevance in solicitor/client detailed assessment as a yardstick for judging reasonableness and that where the lay client alleged reliance on an estimate, the approach in *Leigh* and *Garbutt* should be followed. Mr Justice Morgan made no ruling of principle as to the addition of a margin to an estimate and the court allowed the appeal and remitted the case back for detailed assessment.

Unusually, Mr Justice Morgan stated that his assessors had asked him to make it clear that they did not agree with the decision as to the outcome of the appeal, nor with all of the comments in relation to the margin.

I think that Mr Justice Morgan's assessors would have been more content with the decision in the case of *Reynolds-v-Stone Rowe Brewer*⁴ which arose out of a dispute between Tracy Reynolds and her builder. The builder sued Ms Reynolds and she counter claimed. She won on her counter claim and recovered approximately £55,000.00. Her total costs were approximately £90,000.00 (£60,000.00 for SRB and £30,000.00 for her replacement legal team). Ms Reynolds sought a detailed assessment of SRB's costs.

During a twenty month period, SRB had delivered eight costs estimates. The first, in December 2004, indicated that the costs of the litigation would be between £10,000.00 and £18,000.00. The fourth costs estimate was sent out in November 2005. The accompanying letter referred to the "real possibility that the escalating costs would be disproportionate". By June 2006, the estimate had been increased to £60,000.00 (it was subsequently decreased slightly to £55,000.00).

On detailed assessment, Master Rogers decided that the central issues were, to what extent Ms Reynolds could rely on the costs estimates given to her and why she had not been warned that the costs would be higher. Master Rogers limited the costs recoverable to £18,000.00 plus a 15% margin although, bizarrely, he held that counsel's fees and disbursements would be paid in addition. SRB appealed.

The solicitors argued that all of the estimates had been given before the total of the previous estimate had been reached and that even at the end of the case, the amount charged to the client was less than the estimate given in March 2006 taking into account the 15% margin. The solicitors said that the difference could be explained by various factors which they could not have known about when the costs estimate was given and that the client had had every opportunity to consider her position when the costs estimates were increased and to decide whether to continue.

Mr Justice Tugendhat held that in interpreting the first costs estimate as the parties had done - to include all legal costs to trial - the substantial revision of the costs estimate in November 2005 was an attempt to correct an earlier underestimate and was not attributable to any change of facts. What the client did when she received later warnings was not relevant. The appeal was dismissed and the original decision was upheld.

So, what lessons can be learnt from these latest cases? Whilst failure to give a costs estimate doesn't invalidate a retainer (*Garbutt-v-Edwards*), getting the costs estimate wrong can have disastrous consequences. The first assessment of the case is critical. If the first costs estimate is based on assumptions, be clear with the client as to what those assumptions are. If your assessment of the litigation changes over time, make sure that the costs estimate is updated accordingly - this is resonant of the *Lownds* decision on proportionality.

Finally, make sure that your allocation and listing questionnaires are accurate, both in relation to costs to date and future costs. Section 6 of the Costs Practice Direction requires copies of all estimates to be sent to your own client as well as the opposition - working with your costs draftsman to ensure that the information provided is accurate and realistic will give you the best possible protection from challenges by the opposition or your own client.

1. *Leigh-v-Michelin Tyres* [2004] 1 WLR 846
2. *Garbutt-v-Edwards* [2006] 1 WLR 2907
3. *Mastercigars Direct Ltd-v-Withers LLP* [2007] EWHC 2733 (Ch)
4. *Reynolds-v-Stone Rowe Brewer* [2008] EWHC 497 (QB)

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