

Costs estimates: The new costs battleground?

Since October 2005, there have been 2 important developments in the law relating to costs estimates. Firstly, the Costs Practice Direction was amended from 1st October in relation to how the court will consider costs estimates provided to the court and one's opponent when assessing reasonable costs. Secondly, the Court of Appeal's long awaited judgement in the case of Garbutt v Edwards (2005) was delivered on the 27th October and set out the way in which the courts will deal with costs estimates provided by a solicitor to their own client. The combination of these two issues creates a new landscape for dealing with costs estimates and their effect on the assessment of reasonable costs and one can expect the area to become a frequent area of dispute in the future.

Costs Practice Direction section 6.

Prior to October 2005, section 6 of the Costs Practice Direction (CPD) had required a party to file an estimate of base costs (excluding any additional liabilities such as success fees or insurance premiums) at the allocation stage, the listing stage and whenever a court directed. Section 6.6 went on to say that a court may consider any such estimates filed by a party when assessing the reasonableness of any costs ultimately claimed by that party. The CPD did not make any attempt to explain when or how a court was to do this and the area was subject to much debate and argument at detailed assessment.

Leigh v Michelin Tyre plc

In light of the rather vague nature of the CPD, the Court of Appeal addressed the issue of interpretation of CPD section 6 in the case of Leigh v Michelin Tyre plc. The court set out 3 situations where the court could consider a discrepancy between a costs estimate and a final costs claim when assessing those costs:

1. Where the other party could show that they had relied upon the estimate.
2. Where the court could be shown to have relied upon the estimate.
3. In the absence of reliance by the other side or the court, where there was a substantial difference between an estimate and the final costs claimed and the party claiming costs could not provide a satisfactory explanation for the same.

In any of these situations the court could, in its discretion, consider the claimed costs to be, prima facie, unreasonable or disproportionate in light of the difference between the estimate and the final costs.

Unfortunately, this attempt to clarify the situation merely created more questions than it answered. How could a party show that they or the court had relied on an estimate? What was a 'substantial difference'? If the court was persuaded that the costs were prima facie unreasonable, how did this affect the assessment of those costs?

Civil Procedure Rules 40th Amendment

The 40th update to the Civil Procedure Rules (CPR) came into force on the 1st October 2005. Amongst the many changes was a little noted amendment to section 6 of the Costs

Practice Direction (CPD) that added a number of further provisions and was clearly influenced by the decision on Leigh.

Section 6.5A requires that where the costs being claimed by a party are at least 20% higher than their costs estimate, they must provide a written statement explaining why. The amended section 6.6 then states that if no such statement is served or the court is not convinced by its contents, the court may regard the discrepancy between the estimate and the final costs as prima facie evidence that the costs being claimed are unreasonable or disproportionate.

Alternatively, if a paying party can show that they have relied upon an estimate that is at least 20% too low, then they should provide a statement within the Points of Dispute setting this out, CPD 6.5A(2), and if the court is persuaded by the same, then it may again regard the discrepancy as evidence that the costs are unreasonable or disproportionate, CPD 6.6(2).

Does this clear everything up?

The answer has to be no. Whilst the 20% provision does at least answer the question of what is a substantial difference, there is still no suggestion of how a party can show reliance or, more importantly, how a court, once it has decided that the costs are prima facie unreasonable, should actually use this when assessing the costs. One suspects that, much like the infamous Court of Appeal test for proportionality in Lowndes v Home Office (2002), this is a test that seemed sensible at the time, but when one considers how it actually works in practice, one is left perplexed. The problem is that different judges will implement the test in different ways and yet another important area of costs law is left in a state of confusion.

One conclusion that one can draw from this amendment is that the courts and solicitors are supposed to take estimates seriously. The 20% threshold is quite a low margin for error and therefore it is incumbent upon solicitors to think long and hard when filing an estimate if they want to avoid a major argument when their costs come to be assessed.

So what about Wong?

So how does the above situation in relation to estimates served in accordance with CPD section 6 tie in with the stipulation in Rule 15 of the Solicitors Practice Rules to provide a costs estimate to one's own client? In Wong v Vizards (a firm) (1997) a solicitor had provided an estimate to their client and had then considerably exceeded this estimate without providing an update to the client. The Court held that the inadequacy of the estimate meant that the client's costs liability would be capped at 15% more than the estimate.

But what about the indemnity principle? If a client's liability is limited to the estimate plus 15%, surely the inter partes costs liability must be similarly limited. Not so, said the Court of Appeal in Leigh. Wong was distinguished on the basis that the client had expressly requested an estimate from his solicitor and in those circumstances, it was unreasonable for him to be held liable for costs that greatly exceeded that estimate.

This cannot be right. Just because Mr Wong was sufficiently astute as to require an estimate he seems to have been granted a particular level of protection from his

solicitor's excessive costs. What of the poor client who has no idea about legal costs and merely trusts his solicitor to stick to his estimate? It seems that, in accordance with Leigh, they could not rely on Wong and would have to take their chances with a complaint to the Law Society or a solicitor/client assessment. Surely the protection afforded to a client in relation to costs should not depend upon whether they have the foresight to demand an estimate at the outset? And what of the client who doesn't receive any estimate at all from their solicitor? What is the extent of their costs liability and how does this affect the position of a party paying their costs on an inter partes basis?

Garbutt v Edwards

It was precisely this question that came before the Court of Appeal in the case of Garbutt v Edwards (2005). A solicitor conducting a boundary dispute had advised their client of the hourly rate to be charged but had not provided an estimate of costs. The paying party argued that this failure to comply with Rule 15 of the Solicitors' Practice Rules rendered the retainer invalid and therefore the client had no costs liability. In accordance with the indemnity principle, no costs would therefore be payable inter partes. The Court of Appeal was not persuaded. Arden LJ held that the requirement in the Solicitor's Practice Rules was not mandatory and a failure to comply was a matter for the Law Society to determine if the client complains. It did not render the retainer invalid or unenforceable. However, the absence of an estimate could be considered by the court when assessing the reasonableness of the costs claimed if it could be shown that, had an estimate been provided, the costs claimed would have been less. Further, if an estimate is given but it turns out to be inaccurate, then the difference between the estimate and the actual costs may, in the absence of a satisfactory explanation, be prima facie evidence that the costs are unreasonable (following Leigh).

Summary of the position

Whilst Garbutt seems to confuse rather than clarify some of the issues one can now draw some general conclusions:

Estimate to client:

Where no estimate is provided at all, then the client can complain to the Law Society and on an inter partes assessment it is only relevant where the absence of an estimate can be shown to have increased the costs. Where an estimate is provided but this proves to be too low, then the client can still complain to the Law Society and on an inter partes assessment the court may infer that the costs are unreasonable if there is no satisfactory explanation. However, if the estimate is too low and the client has expressly requested an estimate, as in Wong, then the costs payable by the client (and therefore the paying party in accordance with the indemnity principle) are limited to the estimate plus 15%.

Estimate to the court/opponent:

The absence of an estimate does not appear to carry any specific consequences unless the court has ordered to the contrary. Where an estimate is too low by at least 20% and either the paying party can show reliance or there is no satisfactory explanation for the discrepancy, the court may infer that the costs are unreasonable.

Unanswered questions

There is, unfortunately, a third category of estimate that rather obfuscates the above distinction. By virtue of CPD section 6.4, any estimates filed at court and on one's opponent must be served on one's own client. Does this qualify as an estimate provided to one's own client or as merely a copy of one provided to the court and the opponent? What are the consequences of failing to comply with this mandatory provision and if the estimate is provided but it is too low, does the 20% rule apply, does the 15% rule in Wong apply, or is it only relevant where it can be shown that the failure to comply has increased costs?

Furthermore, how is all of this to work in practice? The Court of Appeal in Garbutt expressly ruled that paying parties could not require disclosure of costs estimates (or the absence of the same) at assessment unless they could show a good reason. How can one know whether the contents of an estimate are going to be relevant and therefore there is good reason to disclose the same, if you are not permitted to see the estimate in the first place? Catch-22 surely. If an estimate has been provided to the client for costs of £1000 and the actual costs are £10,000, surely this must be a relevant consideration for assessing the reasonableness of the costs and this information has to be evidence for the judge when assessing those costs. The justification for this decision is that by signing a Bill of Costs a solicitor is certifying its accuracy. With respect, the accuracy of a Bill and its reasonableness are two entirely different questions and one does not necessarily guarantee the other. Are solicitors supposed to voluntarily disclose when an inaccurate estimate has been served or indeed no estimate at all?

Clearly all of these arguments are going to surface in the future and it seems evident that costs estimates are going to be a continuing source of argument at costs assessments for the foreseeable future. Are costs estimates going to be the new costs battleground? It remains to be seen how the judges will interpret the rules, but it is certainly incumbent on all solicitors to become more aware of the importance of estimates and to be fully prepared for arguments in relation to the same.

Cases:

Garbutt v Edwards [2005] EWCA Civ 1206
Leigh v Michelin Tyre plc [2003] EWCA Civ 1766
Lowndes v Home Office [2002] EWCA Civ 365
Wong v Vizards (a firm) [1997] 2 Costs LR 46

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