

What is in an estimate?

**James Wibberley and John Churchill
on *Newman v Gordon Dadds LLP***



Guildhall
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Outline

- Background to the decision
- Duties to provide estimates?
- Case law to date
- Decision in *Newman* and analysis

Newman v Gordon Dadds LLP [2020] EWHC B23 (Costs)

- Decision of Master Leonard in June 2020.
- Part of assessment proceedings, issue of estimates raised and formed preliminary issue.
- An outstanding balance of £61,205 sought on invoices of £87,919 between January and May 2018.
- Estimate of £10,000 had been provided in August 2017.
- Proposed proceedings involved unfair prejudice petition, employment claim and correspondence and a mediation on both matters.

Further issues

- Allegations of failure to provide proper advice.
- Allegations of causing financial loss and the deterioration of the Claimant's health.
- Who had authority to provide instructions to the solicitors?

The estimate

“The initial work will involve our advising you and representing you in the correspondence with Jabac Ltd and its directors and shareholders in seeking to establish the present operation of the company is unfairly prejudicial to your interests such that a petition should be issued under section 994 of the Companies Act 2006 ... It is currently intended that the threat of such action will bring the opposing parties to a mediation in an attempt to forge a way forward...”

“I estimate that our charges for the work set out in paragraph 1.1 above will be no more than £10,000 exclusive of VAT and disbursements (Estimate). The Estimate is based on the assumptions set out in paragraph 5.2 below and is only an estimate and not a fixed fee. As the matter proceeds, we will inform you if we consider that our charges will exceed the amount of the Estimate.”

The estimate

"If we are required to undertake work outside the scope of the work set out in paragraph 1.1 we will charge separately at a normal, applicable hourly rates. Where it is practicable to do so, we will provide an estimate for any such additional work in advance..."



Why estimates matter?

Solicitor & own-client costs assessed under CPR 46.9:

- “(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –
- (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
 - (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
 - (c) to have been unreasonably incurred if –
 - (i) they are of an unusual nature or amount; and
 - (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.”



Professional Duties

Section 31 of the Solicitors Act 1974 gives the SRA power to make rules governing professional conduct. Professional rules have statutory basis.

SRA Code of Conduct 2011:

- Required outcome 1.12: “clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them...”
- Required outcome 1.13: “clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter...”
- Indicative behaviour 1.14: “clearly explaining your fees and if and when they are likely to change”

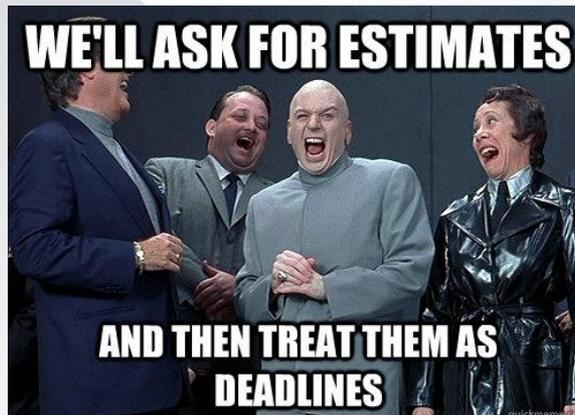
Professional Duties

More recently, the SRA Code of Conduct 2018:

- *“8.6. You give clients information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.”*
- *“8.7. You ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred.”*

Contractual Duties

- Retainers often promise estimates: do they have contractual effect?
- Implied term that will comply with professional obligations (therefore professional obligations to provide estimates)?
- Provision of estimates as an element of ‘reasonable care and skill’?
- Does it matter if you breach a contractual duty?



Please remember...

CFA CASES!!!

Implied Duties?

- The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013:

Creates statutory obligation to provide certain information (including about price). Criminal offence not to comply. Where information is given, it becomes a term of the contract (see Regs 19 and 13(6))

- Consumer Rights Act 2015:

Section 50(1):

“Every contract to supply a service is to be treated as including as a term of the contract anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service, if—

- (a) it is taken into account by the consumer when deciding to enter into the contract, or
- (b) it is taken into account by the consumer when making any decision about the service after entering into the contract.”

Case law to date

- Garbutt v Edwards [2005] EWCA Civ 1206
- Mastercigars (first instance and CofA)
- Dunbar v Virgo Consultancy Services Ltd [2019] EWHC B12 (Costs)

Garbutt v Edwards [2005] EWCA Civ 1206

Solicitor failed to give any costs estimate. Paying party sought to argue that this was a breach of professional obligations that rendered retainer unenforceable so no costs payable. Illegality challenge rejected, but CoA gave the following guidance:

“Where there is simply no estimate at all for the costs in dispute, then the guidance that I would give is that... the costs judge should consider whether and if so to what extent the costs claimed would have been significantly lower if there had been an estimate given at the time when it should have been given. If the situation is that an estimate was given, but not updated, the first part of the guidance given in *Leigh v Michelin Tyre plc* [2004] 1 WLR 846 can be applied here. The guidance was as follows, at para 26:

‘First, the estimates made by solicitors of the overall likely costs of the litigation should usually provide a useful yardstick by which the reasonableness of the costs finally claimed may be measured. If there is a substantial difference between the estimated costs and the costs claimed, that difference calls for an explanation. In the absence of a satisfactory explanation, the court may conclude that the difference itself is evidence from which it can conclude that the costs claimed are unreasonable.’”

Mastercigars v Withers



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Mastercigars Direct Ltd v Withers LLP

[2007] EWHC 2733 (Ch) and [2009] EWHC 651 (Ch) (Morgan J)

- M instructs W in relation to trademark dispute concerning import of Cuban cigars. Estimated costs of c.£356,000 vs actual costs of over £1million.
- M argues that W should be held to estimate. W says it should get estimate + plus 25% + costs not covered by the estimate.
- Morgan J (on appeal) disagrees with approach taken to estimates. Not a case of fixing the costs or limiting costs to estimate. Pursuant to section 15 of the Supply of Goods and Services Act 1982, retainer a contract for reasonable remuneration.
- Question of what is reasonable in the circumstances.

[2007] EWHC 2733 (Ch)

“Solicitors are entitled to reasonable remuneration for their services: see s 15 of the Supply of Goods and Services Act 1982. In considering what is reasonable remuneration, the court will want to know why particular items of work were carried out and ask whether it was reasonable for the solicitors to do that work and for the client to be expected to pay for it... .. Wong v Vizards [1997] 2 Costs LR 46 ...is an authority at first instance, prior to Leigh v Michelin Tyre plc, of a case where there was reliance by a client on his own solicitor's estimate. The judge in that case... indicated that ‘regard should be had’ to the level of costs the client had been led to believe he would have to pay. The question was then expressed as to whether it was reasonable for the client to pay much more than the estimated costs. In my judgment, the proper response to this decision is to hold that the court in that case was finding that, for the purpose of assessing reasonable remuneration payable to the solicitor, it is relevant as a matter of law to ask: ‘what in all the circumstances it is reasonable for the client to be expected to pay?’ Thus, even if the solicitor has spent a reasonable time on reasonable items of work and the charging rate is reasonable, the resulting figure may exceed what it is reasonable in all the circumstances to expect the client to pay, and to the extent that the figure does exceed what is reasonable to expect the client to pay, the excess is not recoverable.” (Emphasis added)
See [101]

[2009] EWHC 651 (Ch)

- Cost Judge knows the right approach ... limits costs to 20% over the estimate on the basis the estimate was relied upon by M ... W appeals again, including on basis findings on reliance not supported ...
- Key issue was reliance: Reliance not a 'but for' test; don't need to show would have acted differently, simply that client loses the opportunity of acting differently. Client doesn't need to show detriment (though it helps!).
- Court should look at whether relied upon. How relied upon. Then consider whether to reduce costs; a matter of judgment.
- Question of how to reflect reliance: (1) can't say that an explanation therefore disregard it; and (2) can allow a margin, but only if make necessary factual findings first.

“In my earlier judgment in the present case at [100] and [101], I attempted to set out in more detail my understanding of what was required. I held that the client did not have to go so far as to show the ingredients of an estoppel against the solicitor. One part of my reasoning was that it would often be difficult for a client to show that “he would have” acted differently but the client may be able to show “it is possible he might have approached the litigation differently” if he had been given a more accurate estimate. Thus, my formulation of what is required does not go so far as to require the client to prove on the balance of probabilities that he would have acted differently. I also pointed out at [101] that, at the end of the enquiry, the way in which the estimate should be reflected in the costs recovered was left to the good sense of the Court. ... Accordingly, in my judgment, it is not necessary for the client to prove detriment in the sense of showing on the balance of probabilities that it would have acted in a different way, which would have turned out to be more advantageous to the client. In a case where the client satisfies the court that the inaccurate estimate deprived the client of an opportunity of acting differently, that is a relevant matter which can be assessed by the court when determining the regard which should be had to the estimate when assessing costs. Of course, if a client does prove the fact of detriment, and in particular substantial detriment, that will weigh more heavily with the court as compared with the case where the client contends that the inaccurate estimate deprived the client of an opportunity to act differently and where the matter is wholly speculative as to how the client might have acted.” (emphasis added) See [47]

Mastercigars Direct Ltd v Withers LLP [2009] EWCA Civ 1526

Lord Neuberger MR at [34]:

“The argument that the estimate of May 2005 was binding on Withers in the sense that it could not be exceeded appears to me unsustainable...it produces a potential windfall result for a client who, for instance, as pointed out again by my Lord, may not have relied on the estimate or would have proceeded with the action but with other solicitors. Why should they not pay at least a reasonable sum reflecting that?”

Dunbar v Virgo Consultancy Services Ltd [2019] EWHC B12 (Costs)

- Decision of February 2019 (Master Leonard).
- Bills of £84k on work responding to and defending criminal charges in Greece.
- A retainer did exist but the terms were vague and no terms agreed on fees and hourly rates.
- No estimates had been provided and the solicitors declined to provide any indication of fees until after the work had been completed. The only agreement was on a £10k deposit for fees and €30,000 for the Greek advocacy team.
- Defendant firm's witness unreliable, the Claimant was found to be more consistent.

Dunbar

- Claimant unhappy with the figures which were put to him, albeit incomplete and in a way which did not make clear how that figure was calculated.
- Costs only provided once they had accrued which completed undermined the Claimant's financial planning.
- No express or implied authority from the Claimant to exceed the level of £10k to the Defendant and €30,000 to the Greek legal team. That figure (converted into sterling at contemporary exchange rates) was the correct figure to pay.

Decision in *Newman*

“From those authorities one can distil the following principles. If, on the assessment of costs between a solicitor and a client, it is found (a) that the solicitor has never provided the client with an estimate of the costs that the client was likely to pay and (b) that if a proper estimate had been given, the client would have paid less than the solicitor is claiming, it may be appropriate to limit the amount payable by the client to the solicitor to an amount that it is reasonable, in all the circumstances, to expect the client to pay. That may be less than would otherwise be payable for work reasonably done by the solicitor at a reasonable rate.”

Newman—the outcome, Part 2

- Hardly no advice (and no written advice) on cost estimates had been provided as the matter developed
- This was a breach of both professional and contractual obligations
- What is the reasonable sum for C to pay? The C suggests £10k.
- It would be wrong to limit the solicitors to what was expressed to be a narrow initial estimate. By January 2018, that was a “historical footnote”. The client would have gone to alternative solicitors.
- Claimant’s evidence not sufficient to identify a cost for alternative solicitors or an alternative approach: “[T]he difficulty is that his evidence gives me no reliable idea of what he might have done, when he might have done it and what the financial consequences might have been.”

Newman –the outcome Part 3

- Merely paying the invoices as they accrued is not substitute for an estimate but it does have bearing on the question of whether the client would have gone elsewhere.
- Any idea that alternative solicitors would have been instructed on costs grounds alone “tainted” by the dissatisfaction that the client felt on other grounds.
- Unclear that the specific examples of alternative firms were of assistance. One was not referred to in witness evidence, another was not a London firm and not necessarily representative of the costs of litigation in London.
- It would therefore be wrong to limit D’s costs to a specific figure when the evidence of the Claimant was not sufficient to identify a fair and reasonable figure for the Claimant to pay.

Analysis

- Comment in *Dunbar* and the impact of consumer rights legislation (for example s.50 CRA)?
- Importance of the client identifying, or at least providing sufficient evidence from which a figure can be identified, what is a reasonable and fair sum for the client to pay.
- It may be unrealistic, and produce a windfall for the client, to merely rely upon an original estimate.
- Even in *Newman* even though a specific figure was not identified at the preliminary issue stage, the effect of the judgment was to revive the issue of estimates during the detailed assessment hearing.