

COSTS

- a Summary of 3 Important Cases

by

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She is recommended as a Leading Junior in Property Litigation in The Legal 500, which observes that she has “a fantastic eye for detail” and that “the quality of her instructions and range of recent experience mark the arrival of someone set for success”.

Tiffany deals with cases involving rights of way, rights to light, restrictive covenants, adverse possession, trespass, nuisance, proprietary estoppel, service charges, leasehold enfranchisement, and all aspects of business and residential lease disputes. In common with most property practitioners she has recently seen an increase in credit-crunch-related instructions involving insolvency, mortgage fraud and professional liability and she regularly presents seminars and workshops on these (and other) topics.

Tiffany is a committee member of the Property Bar Association and contributes as a specialist editor to Hill and Redman's Law of Landlord and Tenant. She is also co-author of "The Commonhold and Leasehold Reform Act 2002" and has contributed to the Real Property section of Butterworths' Civil Court Precedents.

MASTERCIGARS DIRECT LTD v WITHERS LLP

[2007] EWHC 2733 (Ch) (2008) 3 All ER 417

Ch D (Morgan J) 23/11/2007

The Principles:

Solicitors who give an estimate of costs are not necessarily restricted to recovering the estimated amount in an assessment. The key is: what is reasonable remuneration for the services provided?

An estimate is a useful yardstick with which to measure the reasonableness of the final bill and a factor in considering what sum it is reasonable to expect the client to pay.

Withers appealed against the decision of a costs judge on a preliminary issue that they were bound by a costs estimate. Mastercigars appealed a charging order obtained by Withers.

The Facts

- Mastercigars win an appeal in a trade mark dispute; Court of Appeal orders the losing parties to pay Mastercigars £83,000 on account of the appeal costs and £300,000 on account of the first instance costs.
- Withers had been retained by Mastercigars at first instance and had given an estimate of costs. Withers had been replaced by new solicitors before the Court of Appeal hearing.
- Withers sent Mastercigars 24 invoices for their work; the last 14 were ordered to be the subject of detailed assessment under the **Solicitors Act 1974 s.70**.
- The costs judge directed the trial of a preliminary issue to determine what Withers' estimate of costs was intended to cover. He held that Withers were bound by the estimate with certain exceptions. Withers appealed.
- Withers submitted that a **margin of 20 to 25 per cent** should be allowed over the estimate and that a **reasonable amount** should also be allowed in respect of **matters not reasonably anticipated** at the date of the estimate.

- Mastercigars submitted that a **term was to be implied** into the retainer that Withers would abide by the terms of the Solicitors' Costs Information and Client Care Code, and that costs which exceeded an estimate were **necessarily unreasonable unless authorised** by the client.
- Withers obtained a charging order pursuant to s.73 of the 1974 Act over the sums of £83,000 and £300,000 that the losing parties had been ordered to pay on account. Mastercigars sought permission to appeal against that order on the basis that an order under s.73 could not be made by a costs judge but only by a High Court judge; and that the terms of the order for detailed assessment prevented Withers commencing any proceedings against Mastercigars in respect of the bills including the application for a charging order.

HELD:

- (1) Withers' estimate of costs was not a fixed quotation, nor was it an upper limit on costs, nor did it define the work to be done.

The retainer was subject to the **Supply of Goods and Services Act 1982 s.15** and it was therefore an **implied term** that Withers would be **paid reasonable remuneration** for its services.

Withers had given a contractual promise to update the costs estimate but that was not a condition precedent to them recovering any sum in addition to the sums set out in the estimate.

Where a costs estimate was given but the costs subsequently claimed exceeded the estimate, it did not follow that the solicitor would be restricted to recovering the sum in the estimate. The court could have regard to the estimate and it was a **factor in assessing reasonableness**.

(Leigh v Michelin Tyre Plc (2003) EWCA Civ 1766, (2004) 1 WLR 846 and Garbutt v Edwards (2005) EWCA Civ 1206, (2006) 1 WLR 2907 considered.)

For the purposes of assessing reasonable remuneration payable to the solicitor, it was relevant as a matter of law to ask **what in all the circumstances it was reasonable for the client to be expected to pay** (Wong v Vizards (1997) 2 Costs LR 46 QBD considered).

Leigh and Garbutt were not authority that a solicitor had any kind of automatic entitlement to add a **margin** to the estimate nor were they authority for allowing the client to **cap** his liability at the estimate plus a margin.

It was **not necessary to imply** into the contract of retainer a term that Withers had to comply with the Solicitors' Costs Information and Client Care Code in respect of updating costs information.

- (2) The passage in **Cook on Costs** (2007) which stated that unless the client was notified of the further sums payable, preferably before they were incurred, then the solicitor would be unable to recover costs in excess of the estimated amount, **did not correctly state the law.**

In so far as the costs judge relied on that passage, he was led into error in making his finding as to the contractual position. **Withers' appeal** against the decision that they were bound by the estimate was **allowed.**

- (3) An order under s.73 could be made by a costs judge by virtue of the provisions of CPR Pt 67.

The standard form of order which prevented Withers from taking "any proceedings" pending detailed assessment of the bills was intended to prevent proceedings on the bills in accordance with s.70(2)(b) of the 1974 Act and not to impose a wider restriction.

Precedent L to CPR PD 48 (Order for Detailed Assessment (Client) under Solicitors Act 1974) should reflect the statutory wording.

Therefore the order did not prevent the application for a charging order. **Mastercigars' appeal was dismissed.**

LISA CARVER v BAA PLC

[2008] EWCA Civ 412 (2008) 3 All ER 911 : (2008) PIQR P15 : Times, June 4, 2008

CA (Civ Div) (Ward LJ, Rix LJ, Keene LJ) 22/4/2008

The Principles:

The new Part 36 provisions herald a change of approach by permitting a wider review of all the circumstances of a case in deciding whether the judgment was worth the fight.

The purpose of the new provisions is to replace the old system of payment in with offers to settle and to apply the same costs consequences irrespective of whether the offer is for the payment of a sum of money in a money claim or an offer of terms and conditions on which to settle non-money claims.

The appellant (C) appealed against a decision ordering her to pay the costs of the respondent (BAA) in respect of a personal injury claim after the time for accepting the payment in had expired.

The Facts

- C had suffered an injury to her ankle when she fell into a defective lift on premises for which BAA was responsible. BAA conceded liability.
- After seeing C's initial medical reports BAA made a global settlement offer of £3,486 on a CPR Pt 36 basis.
- C instructed a further medical expert and brought her claim for damages in excess of £5,000. BAA then made a further Part 36 **payment into court** so that the total offer came to **£4,520**.
- C **did not make any counter offer** to BAA's Part 36 offer. C rejected the offer and filed a claim in excess of £19,000. A further medical opinion then reduced C's claim back to a sum in excess of £2,700. No agreement was reached and the matter went to trial.
- Judgment was entered for C for **£4,686.26 inclusive of interest**.
- The judge found that in relation to costs, the claim was one in which C had not succeeded in obtaining a judgment **more advantageous** than BAA's Part 36 offer. It was common ground that the new rule relating to Part 36 offers, effected by the Civil Procedure (Amendment No.3) Rules 2006 r.7, applied.

- C submitted that, giving the language of CPR r.36.14 its ordinary meaning, a claimant **did not fail to obtain a judgment more advantageous** than the defendant's Part 36 offer **if the judgment was for a penny more than the offer**, albeit that the advantage was a slim one.
- BAA submitted that the change in the wording of the rules involved a change in approach to the issue of costs and that the new rule expanded the judge's area of discretion beyond a strictly financial comparison of payment in and judgment debt.

HELD:

- (1) The change in the language of Part 36 resulted in a **change of approach**.

Under the old rule, C would have recovered her costs. In the context of the new Part 36, where money claims and non-money claims were to be treated in the same way, **“more advantageous” was an open-textured phrase** which permitted a **more wide-ranging review of all the facts and circumstances** of the case in deciding whether the judgment, which was the fruit of all the litigation, was worth the fight.

The answer must take account of the **modern approach to litigation**. The CPR, and Part 36 in particular, encouraged both sides to make offers to settle. **Money was not the sole governing criterion**.

- (2) It followed that the judge was right to look at the case broadly and was entitled to take into account that the small amount extra gained was **more than offset** by the **irrecoverable cost** incurred by C in continuing to contest the case for as long as she did.

He was entitled to take into account the **added stress** caused to C as she waited for the trial and the stress of the trial process itself. **No reasonable litigant would have embarked on that campaign for such a small gain**.

- (3) The judge was fully justified in marking his displeasure by making no order for costs in respect of part of the action. The manner in which the litigation was pursued struck the judge as worthy of condemnation. **The Part 36 offer was relevant and was a reasonable and not a derisory one**.

The claim was an exaggerated one and C must bear ultimate responsibility for the manner in which her claim was conducted on her behalf.

BUSINESS ENVIRONMENT BOW LANE LTD v DEANWATER ESTATES LTD

[2008] EWHC 2003 (TCC)

QBD (TCC) (Judge Toulmin QC) 31/7/2008

The Decision:

Claimant landlord to pay the defendant tenant's costs on an indemnity basis as the landlord had persisted, both before and after issuing proceedings, in advancing a substantial (and exaggerated) claim for breach of repairing covenants in a lease which it knew or ought to have known was unsustainable.

The Facts

- Claim for breach of repairing covenants in a lease brought by L against T. L had claimed a sum in the region of **£400,000**, which it maintained both before and after issuing proceedings against T.
- The claim was supported by a **schedule of dilapidations** that had been revised on several occasions, and a statement of truth had been **signed by L's legal representative** to a POC pleading that the work had been carried out.
- However, 2 years later, following the hearing of a preliminary issue, and following a meeting of experts, L conceded that the work that had by then been carried out was not referable to dilapidations but to L's wholesale refurbishment of the building. L therefore made a Part 36 offer to settle the claim for just **£1,073** (plus costs).
- Both parties had incurred substantial costs in the litigation. L maintained that as this was a straightforward case T should pay its costs. T submitted that as it was the successful party it was entitled to its costs which should be assessed on an indemnity basis because L's conduct of the litigation was such as to take the situation away from the norm and L had no business in authorising its legal representative to sign the inaccurate statements of truth and particulars of claim.

HELD:

Costs to be paid by L on an indemnity basis.

L had represented to T both before and after the start of the litigation that it had a substantial dilapidations claim. **L had known** what work it intended to carry out from the time when it made its initial claim and had persisted in making that claim at the time of the service of the particulars of claim. The statement of truth, made on its behalf on the claim form and in the particulars of claim, had attested to the fact that this was a genuine claim for dilapidations and that the work claimed had been carried out.

Any proper investigation of the claim both before the particulars of claim had been served and afterwards would have revealed that the external works had not been carried out and that it was **not a genuine claim for dilapidations**. Even in the schedule of dilapidations, **L had persisted in a substantial claim that it knew or ought to have known was unsustainable**.