

Mastercigars – more twists and turns on the rocky road to effective estimates

For those readers who have enjoyed the ever evolving body of jurisprudence on the effect of a solicitor's estimate as to costs the latest decision in the Mastercigars saga represents another difficult decision.

In Mastercigars Direct Limited v Withers LLP [2007] EWHC 2733 (Ch) Morgan, J. sitting with Costs Judge Campbell and Mr A Carter as Assessors had to grapple with a costs dispute arising from a relatively complex piece of commercial litigation.

The original dispute barely rates a mention in this context being a claim about parallel imports of cigars from Cuba to the UK and related trade mark infringements. Of much greater interest to aficionados of the estimates wars is the effort former client and former solicitor are expending on arguing amongst themselves about whether and if so to what extent Withers LLP (Withers) can recover more than an estimate of fees the firm gave to Mastercigars on 6 May 2005.

Withers estimated a figure of £206,750 plus VAT for a four day trial but failed to revise their estimate as the trial ran on for another 12 days with a further day for the delivery of the judgment. Total costs ran to about £1,050,000, according to Withers, although that figure is disputed by Mastercigars as is the amount said to have been paid on account.

There have already been two reserved judgments of Cost Judge Rogers and now the appeal to Morgan, J. I understand that an appeal from Morgan, J. is being contemplated.

The upshot is that the Court held (and so held despite the advice of both Assessors) that an estimate of costs given by a solicitor to his client is only something to be taken into account in determining a reasonable fee provided there has been some actual reliance by the client which can be proved (for example by seeking to increase ATE cover in the light of a higher estimate). The role of informed consent about estimated costs as a pre-condition to recovery of those costs by a solicitor from his client was rejected by the Court (paragraph 111) as incorrect.

Costs Judge Rogers handed down his Second Reserved Judgment in the solicitor and own client costs assessment on 4 June 2007. There followed 4 appeals which came before the High Court in October following which the Court handed down its judgment on 23 November. The High Court was dealing with what the Judge called four appeals but these were, in fact, three appeals and an application for permission to appeal. Being:

Title	Appellant	Issues
First	Withers	A section 70(4) Solicitors Act point about whether 10 of the 24 bills were out of time for assessment; being more than twelve months old at the time of commencement of the assessment. This was conceded by Mastercigars.
Second	Mastercigars	The permission application. It related to the imposition of a charging order under section 73 of the Solicitors Act, 1974. The application was granted but the appeal was dismissed.
Third	Withers	Against the Costs Judge's ruling that Withers were held to their 06.05.05 estimate save for an addition for the extra Counsel's fees and profit costs of the 13 further days of the trial.
Fourth	Mastercigars	Another appeal relating to the charging order.

The so-called Third Appeal is the subject of this article and once again we enter the embattled world of solicitors' costs estimates.

In a short article of this kind it is not possible to do justice to the very detailed treatment the Court gave the issues that were raised. Accordingly, I draw attention to the key arguments and offer some views about the way the issues might be developed and whether this decision helps, or hinders, the development of estimating jurisprudence.

1. Extra work means extra cost (paras 42-50)

The Court appears to conclude that simply because Withers carried out extra work they should be paid a reasonable fee, whatever that might mean. The position is not assisted by Mastercigars' argument that whilst Withers may only recover the sum which Mastercigars agreed nevertheless Mastercigars should pay Counsels' fees and Withers profit costs for the 13 additional and unexpected days of the trial of which Mastercigars was unaware.

2. The estimate has "a limiting effect" (para 60)

Withers contended that although the estimate of 6 May 2005 could not limit their fees it nevertheless had "a limiting effect" as it was put by their Counsel. Again another inconsistent argument which does not aid understanding of the issues.

3. Section 15 Sale of Goods and Supply of Services Act, 1982 – a reasonable fee (para 65)

The Court considered that the solicitor's retainer was caught by this section which provides that where the consideration for the service is not determined by the contract (or otherwise) then the supplier shall be entitled to a reasonable fee which sum shall be determined as a question of fact (section 15(2)). Yet the contract does provide for the consideration to be determined in that an hourly rate was specified and an estimate provided as it had to be in order to found an enforceable contract.

4. The effect of CPR 48.8 (para 73)

The Court reviewed this provision which enables a solicitor to recover costs from his or her client on the indemnity basis provided there was informed consent. Unfortunately there appears to have been no reference to the decision of Holland, J. sitting with Assessors – Master Wright and Anthony Cowen - in Macdougall v Boote Edgar Esterkin [2001-2002] CostsLaw Reports 118 where, at page 122, the Learned Judge makes clear that "informed approval" has to be in place before a solicitor can recover costs from his or her client.

As a decision of the High Court Macdougall is binding upon Morgan, J. and it is most unfortunate that the decision appears not to have been referred to him.

6. The effect of between the parties assessments on solicitor and client assessments (para 91)

In his decision the Learned Judge applies principles applicable to between the parties assessments to solicitor and client assessments which is not necessarily a helpful approach as the principles are different.

7. His Honour Michael Cook is wrong (para 112)

The Court held that the statement in the 2007 edition of Cook on Costs at page 15 that a solicitor cannot recover costs in excess of an estimate unless his or her client had been informed of the estimate does not correctly state the law.

It is unfortunate that this edition of Cook on Costs does not make reference on page 15 to the decision in Macdougall which is, of course, authority for the proposition found on page 15. There is however a useful reference to it in connection with the discussion on CPR 48.8 on page 12.

Why is this decision unfortunate? Because:

- It cannot be right to hire Assessors and then ignore their advice;
- The omission of any reference to an important decision on point diminishes the credibility of this authority and creates an unhelpful conflict of authorities;
- Clients (especially bulk purchasers such as in house solicitors and liability insurers) no longer have any certainty about how much they have to pay their solicitor;

Satellite litigation on the Learned Judge's formulation of the law is inevitable.

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