

## Time to start taking estimating seriously?

The latest case on fee estimates is a solicitor and own client assessment called Tracey Reynolds v Stone Rowe Brewer [2008] EWHC 497 (QB); a decision of Tugendhat, J. of 18 March 2008 which was noted in the April edition of this journal (p. 3).

### The facts

Ms Reynolds employed a builder to refurbish a property she owned in Kew. Work started in May 2004 but only 4 months later she had instructed solicitors because Ms Reynolds considered the builder's work to be sub-standard and incomplete. The total value of the building contract was £44,000 plus VAT. The builder was dismissed from the site and a Schedule of Outstanding Works was prepared by a surveyor. The builder claimed he was owed money. By December 2004 it was suggested that both parties should "walk away" from the dispute. By who is not clear but that person was clearly wisdom personified.

Unfortunately it was not the claimant who, despite being advised that litigation was costly and time consuming, was determined to resolve her dispute in the Courts. In fact the builder issued proceedings on 15 February 2005 suing for the balance due under his contract and damages for breach. Ms Reynolds counterclaimed.

Just 19 months later in September 2006 Stone Rowe Brewer had been sacked as a result of a costs dispute with their client, Ms Reynolds, and new solicitors retained to take the matter to the 5 day trial. At its conclusion Ms Reynolds obtained judgment for £55,380.80 but had become liable to pay £90,000 in costs to her solicitors. It is unclear whether the builder ever paid the sum adjudged to be paid.

Practitioners should bear the Judge's observations in mind (para 69):

*"This case has been a disastrous experience for the claimant, and little better for the solicitors. The claimant embarked on litigation which she could not by any means afford, on the understanding, conveyed by the solicitors, that she could just afford it...Unhappily, it is by no means uncommon for a claimant who recovers, as this claimant did, a judgment for some £55,380.80, to incur costs in excess of that amount in so doing. In this case it was never the intention of either the claimant or the solicitor that such a state of affairs should come about."*

## **What went wrong?**

It is difficult to see how Stone Rowe Brewer got it so wrong. Quite properly they revised estimates as the matter proceeded and always before the costs exceeded their previous estimates. There were unexpected developments such as contested applications for adjournments by the builder, determined prevarication by the builder throughout in particular he would fail to comply with orders making it necessary to apply to the Court. The client did not assist by sending many e-mails and insisting, against advice, that certain steps be taken.

Perhaps none of this should have been unexpected – all litigation involves the unexpected - but these were the grounds upon which Stone Rowe Brewer sought to defend the regular revisions to their fee estimate.

The real cause of the problem is not particularly well set out in the report and the lack of a reasoned judgment from Master Rogers did not assist. Tugendhat, J. however points to the problem originating from the original fee estimate being “unreasonably low” (para 60, final sentence) at £10,000 to £18,000 all in including the trial. This was a piece of civil litigation originally with a trial estimate of 3 days (subsequently increased to 5 days) over a dispute worth £50,000 or so including VAT with one expert witness. Costs were bound to be at least £50,000 and probably a good deal more.

How did reputable and experienced solicitors come to underestimate the costs? The question is never answered although the individual items of work done were not challenged as being unreasonable either in themselves or in the time spent on each.

The answer is at the beginning of the report in paragraph 5 where it identifies a trainee solicitor as providing the original estimate and the person who dealt with the matter throughout. Estimating costs is not for the inexperienced. In consequence Stone Rowe Brewer not only failed to recover about £25,000 but was ordered to repay £14,304.47. None of that, of course, takes into account the massive loss of time spent managing the client’s complaints or, indeed, the detailed assessment and the appeal, as the judge said “a disastrous experience”.

## **The flaw in the case**

Sadly neither side took the opportunity to challenge the flawed reasoning of Mastercigars Direct Limited v Withers LLP [2007] EWHC 2733 on estimates (see my article in December 2007’s Litigation Funding for more on this) indeed they accepted Morgan, J.’s reasoning.

Increasingly we have an approach to estimates which ignores the contractual nexus between solicitor and client in favour of a nebulous approach which looks at everything in the round leading to a view being taken about an appropriate outcome. This creates business uncertainty for solicitors and, paradoxically, makes estimates less reliable. Reynolds v Stone Rowe Brewer attaches great importance to the original estimate and makes it far less likely solicitors will be able to effectively revise estimates by subsequent updates.

## **Moral of the tale?**

If you estimate costs do so with careful planning otherwise you may find profitable business becomes loss making.

In this case an obviously inadequate initial estimate should never have been allowed to be sent to the client and has caused all sorts of problems for the firm in question, their client and the profession which increasingly faces a much more challenging task in ensuring estimates are binding.

I gather Stone Rowe Brewer do not intend to appeal.

This technical paper has been written as a general guide only. It should not be relied upon as a substitute for specific legal advice. No responsibility can be accepted by the author or the firm for any loss occasioned as a consequence of acting or refraining from action on the basis of this paper.

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