

## More Mastercigars – estimates up in smoke again

When I wrote about Morgan, J.'s first decision in the Mastercigars costs litigation (Litigation Funding December 2007 p 24) I had hoped that sense would prevail and the parties would resolve their differences through a mediation. I gather mediation may be back on the agenda for the parties and we wait to see whether that bears any fruit although, once again, Mastercigars is talking of taking the issues to the Court of Appeal.

For those (few) readers who are unfamiliar with the litigation you are referred to my previous article but, in brief, Withers acted for Mastercigars in litigation which Mastercigars won. The between the parties costs award has yet to be assessed because of apparently insoluble issues arising in the solicitor and client detailed assessment. Those concern an estimate for the trial of approximately £250,000 which became £1,050,000 leading to a slippage of roughly 4 times the original estimate (ca £800,000). The assessment has ceased to be about the costs recovery for the trial and has become a classic example of the cost of costs driving the assessment.

Following Morgan, J.'s first decision the assessment was referred back to a different Costs Judge (Master Simons) and it is an appeal and cross-appeal from Master Simon's decision which came before Morgan, J. on 16 and 21 January. The judgment was handed down on 30 March.

The outcome of this hearing as to estimates may be summarised as follows:

- \* The decision of the Court of Appeal in Leigh v Michelin Tyre PLC [2003] EWCA Civ 1766 (a decision affecting the status of estimates in Allocation Questionnaires between the parties) applies equally in cases involving assessment between solicitor and client.
- \* The question of reliance on estimates has become crucial in solicitor and client assessments. The Learned Judge has held that this need not be equivalent to the quality of reliance to establish an estoppel i.e. it is not necessary to establish the client would have acted differently merely that he might have approached the litigation differently. The Court, it was held, would place greater weight on the client's arguments if the client can show how he would have acted differently rather than simply speculate as to the steps he or she might have taken.
- \* Reliance was found because Mastercigars used the estimate to support calls for cash to meet Withers' fees.
- \* Withers' argument that reliance was limited to the profit costs element of the estimate rather than the estimate as a whole was dismissed.
- \* Master Simons applied a 20% margin to the slippage and that was considered wrong by the Learned Judge as being arbitrary rather than calculated. Unfortunately Master Simons gave no reasons for his choice of percentage.

- \* The decision of Tugendhat, J. in Reynolds v Stone Brewer[2008] EWHC 497 (another division of the QBD) followed the first decision of Morgan, J. (see my article on this case in Litigation Funding, June 2008). Using Tugendhat, J.'s approach Morgan, J. confirmed that the correct approach to an estimate's effect on recoverability was the following process:
  - ◇ What are the explanations for the difference between the estimate and the bill?
  - ◇ Did the client rely on the estimate and what was the quality of that reliance?
  - ◇ What is a reasonable sum to pay?
  - ◇ One does not apply a margin percentage without some real calculation being used to justify the chosen percentage.

Although the parties agreed that Morgan, J. could decide the effect of the estimate on the sum claimed the Learned Judge chose not to do so preferring instead to request a report from his assessors specifically the Senior Costs Judge about "the outstanding questions". Those questions cannot readily be discerned from the judgment apart from the obvious issue about the extent of the effect of the estimate. This is of course the only question in the detailed assessment and it is surprising that despite all of the judicial attention which has been paid to the case we seem no closer to an answer. The Senior Costs Judge appears to have received (another) unenviable task.

Mastercigars did secure a further £150,000 of funding in anticipation of slippage from the estimate and Morgan, J. rightly considered this aspect of the funding important in possibly fixing the sum properly due. One of the questions which the Senior Costs Judge might helpfully be asked is the nature of that payment and its effect on fixing the sum due. Close consideration would need to be given to the evidence from Mastercigars about its purpose which in Morgan, J's decision is said to be for slippage but elsewhere the Learned Judge says it was for "administration expenses".

Once again the decision in Macdougall v Boote Edgar Esterkin [2001-2002] 118 (which held that estimates are binding as a result of informed consent) does not appear to have been considered by the Court. Given it was decided by another division of the Queen's Bench Division (Holland, J. sitting with assessors) what is required is an appeal to resolve this unfortunate dichotomy.

The contractual nexus approach to estimates appears to be dead unfortunately. Business uncertainty for solicitors, which the Boote approach avoided, will be significant. There have been calls for Lord Justice Jackson's review to reinstate the Boote position. We can only hope that sense prevails both for the parties in the Mastercigars litigation and for practising solicitors.

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