Case No: CL1805128

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
Strand, London WC2A 2LL
Date: 04/06/2020

Before :

MASTER LEONARD

- -

Between :

Adam Newman	**Claimant**
- and -	
Gordon Dadds LLP	**Defendant**

- -
- -

Robin Dunne (instructed by **Fahri**) LLP for the **Claimant**
John Churchill (instructed by **Gordon Dadds LLP**) for the **Defendant**

Hearing date: 13 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MASTER LEONARD

Master Leonard:

1. On 16 November 2018, on the application of the Claimant, the court made an order under section 70 of the Solicitors Act 1974 for the detailed assessment of six bills rendered by the Defendant between 31 January and 31 May 2018. The bills, including VAT, come to £84,919.90. According to the evidence of Mr Nicholas Yapp, the Defendant's current head of dispute resolution for the Defendant, the first of this series, totalling £27,300.00, was part paid with an outstanding balance of £5,242.40. The rest are unpaid.

2. Most of these bills were rendered at the end of each calendar month, with some in between.

3. These were not the first bills rendered to the Claimant by the Defendant. Between 31 August 2017 and 31 December 2017 the Defendant had rendered a series of bills totalling £75,827.40, not included in the Claimant's application. Mr Yapp confirms that they were paid in full. I understand that one more bill rendered after 31 January 2018 was also not included in the Claimant's application**.** The Defendant claims an outstanding balance due from the Claimant of £61,205.

4. In his Points of Dispute the Claimant has raised the question of estimates, relying upon the only estimate given by the Defendant, in a letter of retainer dated 21 August 2017, of £10,000. The Claimant argues that the Defendant's recoverable fees should be limited to that figure. On 17 December 2019 the court ordered that the issue of estimates and their effect upon the Claimant's bills be heard as a preliminary issue. The purpose of this judgment is to address that issue.

The Retainer

5. The letter of retainer sent by the Defendant to the Claimant on 21 August 2017 was signed by Nick Goldstone, (then a partner in the Defendant and its head of dispute resolution) and insofar as pertinent reads as follows.

6. Under the heading "Scope of Our Work", at paragraph 1.1:

> "1.1 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…

7. At paragraph 1.2:

> "Our work will not include advising on… any tax, accounting, actuarial or financial aspect of the matter… any due diligence other than as expressly set out at paragraph 1.1 above… the laws of any jurisdiction other than England and Wales."

8. Under "Standard Hourly Rates":

> "The standard hourly rates exclusive of VAT of members of the Litigation and Dispute Resolution department are currently as follows…. Partners £375-£550… Associates £300-£375… Assistants £240-£300… Trainees/paralegals £130-£180… My hourly rate for this matter will be £450…"

9. Under "Fee Estimate", at paragraph 5.1:

> "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."

10. At paragraph 5.2:

> "The Estimate is based on the following assumptions… our work will not extend beyond the scope set out in paragraph 1.1 above… My time on the matter in the initial phase will not exceed 23 hours of chargeable time…

11. At paragraph 5.4:

> "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…"

12. Under "Invoicing and Payment Terms":

> "It is this Firm's policy to invoice on a monthly basis or earlier if appropriate…

13. At paragraph 11, under the heading "Accepting Instructions":

> "We have been dealing with you but you agree that we can also accept and agree to instructions from others you nominate or authorise during the course of this matter and it is intended that you/the Company will be bound by such instructions."

14. Standard terms and conditions accompanying the letter of retainer included confirmation where it was not possible to give a meaningful estimate the Defendant would endeavour to give the Claimant the best information available at the time.

The JFL Litigation

15. Underlying the matters upon which the Claimant sought the Defendant's advice and representation was a family dispute. The company in question was Jabac Finances

Limited ("JFL"), a lending company owned and controlled by members of the Claimant's family and of which he was a director with a 20% shareholding.

16. The intention referred to in the retainer letter of 21 August 2017 (of using the possibility of litigation to resolve matters in mediation at relatively low cost) was not achieved. His pre-action letters were sent in September 2017. On 6 November 2017, JFL suspended the Claimant and subsequently issued a claim against the Claimant for breach of fiduciary duty. I understand that it also made an application for pre-action disclosure. The Claimant's section 994 unfair prejudice petition was issued on 15 March 2018. He also issued whistleblowing and discrimination proceedings in the Employment Tribunal. The Claimant has become caught up in a web of interconnected litigation involving JFL and members of his family.

17. It would seem that a mediation did take place in March 2018, and from the evidence I have seen the parties came close to agreement at that time, but it was evidently ultimately unsuccessful. The contract of retainer between the Claimant and the Defendant terminated in May 2018 when the Claimant instructed his current solicitors Fahri LLP.

18. In June 2019, the Claimant issued a Part 8 claim against JFL and its solicitors seeking declarations that his purported suspension was unlawful; that JFL's solicitors (in acting for JFL as well as other respondents to the section 994 application) were acting in conflict of interest; that fees paid to them by JFL should be repaid; for disclosure and inspection of relevant documentation; and for an injunction preventing JFL from financing the unfair prejudice, employment tribunal and High Court proceedings.

The Claimant's Complaints against the Defendant

19. Although they are not matters raised for the purposes of this detailed assessment and I make no finding on them, I should refer to a number of complaints made by the Claimant against the Defendant which have an obvious bearing on his view as to how much the Defendant should be paid.

20. It would seem that Mr Goldstone was, by October 2017, engaged with other matters to the extent that he had to be effectively replaced by Mr Yapp. The Claimant expressed dissatisfaction with Mr Yapp's contribution to a conference with Counsel and the matter was then taken over by Mr David Gore (at the same charging rate as Mr Goldstone; £450 per hour).

21. The Claimant takes issue with much more than the Defendant's failure to provide any further costs estimates beyond that given on 21 August 2017. A non-exclusive list of his complaints is as follows.

22. The Claimant says that Mr Gore failed to set out his position in writing prior to a round table meeting with his fellow directors on 6 November 2017, and at the meeting itself failed effectively to present his case. Mr Gore did not challenge the fact that JFL was funding the defence of his section 994 petition, or that its solicitors were acting for JFL as well as other respondents to the section 994 application, which says the Claimant created a conflict of interest. He failed effectively to challenge the Claimant's suspension as director (whilst he remained as such on the public register), which was, according to the Memorandum and Articles of Association of JFL,

unlawful, or to advise on the appropriate remedy. The challenge raised by the Claimant in June 2019 should have been raised, on the Defendant's advice, at the time, and he says may have been raised too late.

23. The Defendant, says the Claimant, also failed to advise properly on the need to contact the Financial Conduct Authority ("FCA") and advise it of his suspension, forcing him to seek independent advice in that respect from Shakespeare Martineau, solicitors with whom he has incurred substantial fees to maintain his FCA authorisation. It included, as defendants to his section 994 petition two minority shareholders, forcing him to amend the petition and pay their costs, claimed at over £15,000. It failed to prepare his Employment Tribunal claim properly so that his current solicitors had to amend, or to obtain, is as it should have done, a copy of JFL's disciplinary procedures. It failed to give appropriate advice on the pre-action disclosure application, in particular on JFL's reliance on hearsay evidence or the fact that some disclosure would have to come from third parties.

24. The Claimant blames the Defendant for the deterioration of his health during the period of suspension for salary losses in excess of £200,000 and for avoidable damage to his reputation. He puts the cost of remedying various matters to which he blames the Defendant of £100,000.

25. He did not become aware of these failures on the Defendant's part, he says, until November 2018.

Bill Delivery and Communications about Costs: Witness Evidence

26. The Defendant relies to an extent on the fact that, even absent written (or, on the evidence, any) estimates of future costs, it did send bills to the Claimant on at least a monthly basis throughout the period of the retainer, so keeping him informed on accruing costs.

27. Mr Dunne, counsel for the Claimant, confirmed that it is not said that the Defendant's bills were not delivered to the Claimant as provided for in the 1974 Act (which is of course a prerequisite to his successful application for detailed assessment). Beyond that, the Claimant's position in relation to receipt and payment of bills by him or on his behalf, and his knowledge of such matters, is not easy to pin down.

28. In his written evidence Mr Yapp asserts that the Claimant was at all times aware, either himself or through his wife, of the amount of costs he was incurring on a month by month basis.

29. The Claimant, in his written evidence in response to Mr Yapp's, says that the invoices in dispute (which I take to be a reference to the bills which I am assessing) were not sent to him, but then admits to receiving "a few fee notes for disbursements but not many actual invoices", leaving it difficult to know what he admits to having received. He also says that "at no point did I receive the invoices on an ongoing basis personally", but it is not entirely clear to me what that is intended to mean.

30. What he does not say is that that he was not sent the undisputed bills, which come to £75,827.40; that he did not actually see any bills that were not sent to him; or that he

was unaware, notwithstanding the frequency and regularity with which bills were delivered, of the amount of the Claimant's costs as they accrued.

31. The Defendant has produced a cash account recording payments to the Defendant made by the Claimant or on his behalf totalling, by my calculation, £104,611.50. In his written evidence the Claimant states plainly that he has paid to the Defendant sums far in excess of its original £10,000 estimate. He makes no reference to payments being made by anyone other than himself.

32. Under cross-examination he was rather evasive on the point, saying variously that he did not know the payment position, that he was unsure whether he made particular payments, that it seemed as if payments had been made on his behalf, and that payments had been made by a third party.

33. The position was clarified to some extent not by the Claimant, but under cross-examination by Mr Yapp, whose evidence (derived largely from a review of the Defendant's file) seemed to me to be frank and clear (and who admitted to a degree of disappointment that the costs information supplied to the Claimant by the Defendant had not been more complete).

34. According to Mr Yapp, after the unsuccessful round table meeting of 6 November 2017 the Claimant became depressed. Mrs Newman sent an email to the Defendant explaining that the Claimant was under stress and asking the Defendant to deal with her, rather than the Claimant, in relation to costs matters. (This is consistent with subsequent correspondence to which I shall refer). The Claimant and Mrs Newman were nonetheless both sent a detailed breakdown of costs in December 2017.

35. As to the extent that Mrs Newman was authorised by the Claimant to deal with the Defendant's costs and the extent to which she discussed those costs with the Claimant, Mrs Newman herself has not given evidence and I found the Claimant's evidence on the point to be unhelpful.

36. The Claimant points out that Mrs Newman was not a party to the retainer set out in the letter of 21 August 2017, but that letter provided for the Defendant to take instructions from others nominated or authorised by the Defendant. Whether she was a party to the retainer seems to me to beg the question of whether she was actually so authorised.

37. The Claimant's written evidence skirts around the issue. He does not deny that Mrs Newman had his authority either to give instructions or deal with costs. He says rather that the Defendant has produced no evidence that she was so authorised. His oral evidence as to whether he had authorised payments to the Defendant was, as I have mentioned, unhelpful.

Bill Delivery and Communications about Costs: Documentary Evidence

38. I have seen a limited amount of correspondence that has some bearing on the issues of the Claimant's knowledge of the Defendant's costs and of Mrs Newman's authority to speak for him. In an email dated 13 October 2017 addressed to the Claimant and Mrs Newman, discussing the appointment of Mr Gore to take over from him, Mr Goldstone said:

> "… I think it is very clear that in future instructions now must come from Adam exclusively as the issues we are dealing with could have major ramifications for Adam personally, more so than anyone else "on your side" given the history of the company's accounting issues…"

39. On 5 March 2018, Mr Gore sent an email to Mrs Newman seeking authorisation for payment of counsel's fees and, in relation to the Defendant's costs, saying:

> "… You mentioned that you would be paying the balance of last month's bill this month. I have just been chased by my Accounts Department. Can you please let me know when you are anticipating paying."

40. Ms Newman replied almost immediately:

> "… It will be towards the end of March as I am due a loan repayment and I authorise the payment of the fees."

41. An email sent by Mr Gore to the Defendant's credit controller on 14 March refers to confirmation, given by "the client" the previous day, that the Defendant's January and February bills (totalling £37,180.800 would be paid by the end of that month.

42. A further query from Mr Gore followed by email to a Mrs Newman on 25 April 2018:

> "… I did not mention the issue of our outstanding costs when we spoke earlier as Adam was in earshot and you have asked that I do not mention costs in front of him. I had a call from Credit Control today asking for an update and payment. Could you please let me know the position…"

43. Ms Newman replied:

> "… We are awaiting the funds from the settlement and other loans redemptions… Regarding fees the disclosure appn related to breach of fiduciary and it is the impact of how much we are wasting when this is where funds should have been sought from Jabac…"

44. In an email dated 2 May 2018 to Mrs Newman, Mr Gore said:

> "… I also attach an email… asking whether we have instructions to accept service of proceedings. The problem with the latter is that we are owed over £50,000 and we cannot continue to act on the existing claims and deal with a new claim unless outstanding costs are paid and we have funds on account. The first hearing for the Employment Tribunal is some way off but the first hearing of the Unfair Prejudice petition is in June and a reply to the Points of Defence needs to be served towards the end of this month.
>
> As things currently stand, we cannot confirm that we have instructions to accept service of the proceedings referred to above and we cannot continue to act for Adam unless we receive payment

> of the outstanding fees… Together with monies account or in the sum of £15,000 within the next 5 days.
>
> I will need to send this to Adam as well but I thought I would send it you first.
>
> In light of the urgency, I look forward to hearing from you and/or Adam as soon as possible…"

45. Ms Newman sent an email on 12 May, referring to matters that would seem to have been agreed in principle in the mediation and confirming that all bills would be settled as soon as agreement had been reached.

Bill Delivery and Communications about Costs: Conclusions

46. The Defendant has produced a cash account showing payments received from the Claimant. By my calculation, payments totalling £104,611.50 have been made by the Claimant or on his behalf to the Defendant, of which £75,855 was paid before the first of the bills which are the subject of this assessment was delivered. It would take very clear and cogent evidence to establish that such substantial sums were paid without his knowledge or authority, and he has not produced it.

47. The Claimant relies upon Mr Goldstone's email of 13 October 2017 in support of the proposition that the Defendant should not be able to rely, in support of its case, on communications from Mrs Newman. It seems to me that the email cannot bear so much weight.

48. The email records the position taken by Mr Goldstone as to how instructions should be taken. It does not extend, for example, to the suggestion that Mrs Newman should be excluded from receiving communications from the Defendant, from playing a supportive role, or for that matter from dealing with costs.

49. Nor can it be described as some form of binding agreement, altering the terms of retainer. I have no idea how the Claimant and Mrs Newman responded to Mr Goldstone's email, if they responded at all. It was a specification laid down by Mr Goldstone. His colleagues might take a different line, and it would in any case obviously have been subject to review if, for example, the Claimant's state of health made that necessary.

50. It would appear that, for a period after 6 November 2017, Mrs Newman was with Mr Gore's co-operation shielding her husband from the stress of liaising with the Defendant on the matter of its very substantial and rapidly increasing costs. The evidence does not support the conclusion that she was doing so without the Claimant's knowledge or authority.

51. It is also evident that Mr Gore intended to ensure that the Claimant was adequately informed. When, in May 2018, difficulties in meeting outstanding costs threatened to prejudice the Claimant's position it is clear that Mr Gore fully intended to advise the Claimant of those difficulties. He referred first, however, to Mrs Newman, as she had requested. I have no reason to doubt Mr Yapp's evidence as to the information provided to both the Claimant and Mrs Newman in December 2017.

Estimates: The Law

52. I have been referred to *Reynolds v Stone Rowe Brewer (A Firm)* [2008] EWHC 497 (QB), which (whilst it applies the principles to which I shall refer) has to my mind a limited amount in common with the facts of this case.

53. I have also been referred to my own decision in *Dunbar v Virgo Consultancy Services Ltd* [2019] EWHC B12 (Costs), in which I attempted to summarise the principles, as I understand them, relevant to a case in which little or no advance costs information has been given to a client.

54. In this case there was one estimate, but it was, expressly, very limited in scope. It did not extend to the conduct of the substantial litigation from which most of the Defendant's costs arise. To my mind the relevant principles from *Dunbar* are equally relevant to this one, so I will restate them.

55. Costs as between solicitor and client, by virtue of CPR 46.9, are assessed on the indemnity basis. The test is whether costs have been reasonably incurred and are reasonable in amount. A number of rebuttable presumptions apply, including that costs have been reasonably incurred if they were incurred with the express or implied approval of the client, and that they are reasonable in amount if their amount was expressly or impliedly approved by the client.

56. A solicitor undertaking work for a client has a professional obligation to provide the client with an estimate of costs and to keep that estimate of costs up to date. That obligation was incorporated in the SRA Code of Conduct 2011, as in effect at the relevant time. The opening words of chapter 1 were:

> "This chapter is about providing a proper standard of service, which takes into account the individual needs and circumstances of each client. This includes providing clients with the information they need to make informed decisions about the services they need, how these will be delivered and how much they will cost."

57. This general requirement was reflected in 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..."

and 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…"

58. The general requirement was also reflected in "indicative behaviours" 1.14, which required a solicitor clearly to explain to the client the solicitor's fees and if and when they were likely to change, and 1.16, which required a solicitor to discuss how the client will pay, including possible sources of funding.

59. The authorities show that failure by a solicitor to provide a client with adequate costs information in accordance with the Code of Conduct may reduce the amount payable

to the solicitor by the client, as well as the amount recoverable between opposing parties in litigation. The issue turns upon the solicitor's professional, rather than contractual obligations.

60. The effect upon recoverable costs of a failure by a solicitor to keep a client adequately informed in relation to those costs was considered by the Court of Appeal in *Garbutt v Edwards* [2005] EWCA Civ 1206. In that case, the defendants had been ordered to pay the costs of the claimants. The defendants argued that the contract of retainer between the claimants and their solicitor was unenforceable because the solicitor had not given an estimate of costs in accordance with the professional obligations imposed by the then current conduct rules, the Solicitors' Practice Rules 1990.

61. The defendants raised that argument because, in accordance with the indemnity principle, the order for costs required them only to indemnify the claimants for those legal costs that the claimants themselves were liable to pay. It followed that had the defendants' argument succeeded, they could have escaped any actual liability to pay, on the basis that there was nothing to indemnify.

62. The court found that failure by a solicitor to give an estimate did not in itself render a contract of retainer between a solicitor and a client unenforceable. It did however have an effect on recoverable costs. At paragraph 49 of a judgment with which Tuckey and Brooke LLJ agreed, Arden LJ set out these principles:

> "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.'
>
> However, the above guidance is at a very general level. Like the court in the Leigh case, I would stress that the guidance given above is not exhaustive since it is impossible to foresee all the differing circumstances that might arise in any individual assessment."

63. Although the Court of Appeal was addressing the amount recoverable between opponents in litigation, the underlying point is that if the amount payable by the receiving party to his or her own solicitor would have been lower had adequate costs advice been given, costs unreasonably incurred as a result will be irrecoverable from

an opponent. The same, of necessity, applies as between the solicitor and the client. A solicitor will not, on assessment, recover costs that have been unreasonably incurred as a result of failure by the solicitor to provide adequate costs advice.

64. The principles identified in *Garbutt v Edwards* have been considered and developed in a number of detailed assessments between solicitor and client.

65. In *Mastercigars Direct Ltd v Withers LLP* [2007] EWHC 2733 (Ch) and *Mastercigars Direct Ltd v Withers LLP* [2009] EWHC 651 (Ch) ("Mastercigars No 2") Morgan J considered the importance of any estimate of costs given by a solicitor to a client, and considered the extent to which that estimate might limit the amount that the client should pay the solicitor.

66. In his first *Mastercigars* judgment he considered, at paragraph 92, the appropriate application of the principles identified in *Garbutt v Edwards* and *Leigh v Michelin Tyre plc*:

> "In a case where a solicitor does not give his client an estimate, the result will not generally follow that the solicitor is unable to recover any costs from his client. In a case where a solicitor does give his client an estimate but the costs subsequently claimed exceed the estimate, it will not follow in every case that the solicitor will be restricted to recovering the sum in the estimate. What these two decisions of the Court of Appeal repeatedly state is that the court may "have regard to" the estimate or may "take into account" the estimate and the estimate is a "factor" in assessing reasonableness. For the reasons given by Arden LJ in Garbutt's case at para 50, these two cases do not themselves provide very much detailed guidance as to how one should react on the facts of a particular case because it was felt by the Court of Appeal it was impossible to foresee all the differing circumstances that might arise in any individual assessment".

67. He added, at paragraphs 98 and 102:

> "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."

68. In *Mastercigars No* 2 Morgan J (at paragraphs 47 and 54) considered the burden upon a client to demonstrate that a solicitor's failure to provide adequate costs information had had adverse consequences:

> "…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…the way in which the estimate should be reflected on the costs concerned was left to the good sense of the court… 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 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...
>
> …The court should consider the deductions which are needed in order to do justice between the parties. It is not the proper function of the court to punish the solicitor for providing a wrong estimate or for failing to keep it up to date as events unfolded. In terms of the sequence of the decisions to be made by the court, it has been suggested that the court should determine whether, and if so how, it will reflect the estimate in the detailed assessment before carrying out the detailed assessment. The suggestion as to the sequence of decision making may not always be appropriate. The suggestion is put forward as practical guidance rather than as a legal imperative. The ultimate question is as to the sum which it is reasonable for the client to pay, having regard to the estimate and any other relevant matter."

69. 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.

70. In order to demonstrate that it is right to limit the solicitor's recoverable costs in that way, it is not necessary for the client to prove on the balance of probabilities that he or

she would, if adequately advised, have acted in a different way which would have turned out more advantageous to him or her. It may be sufficient that the failure to provide adequate advice deprived the client of an opportunity of acting differently, though that is likely to carry less weight, particularly where it is not possible to do more than speculate as to the way in which the client might have acted, if properly advised.

71. The ultimate aim will always be to identify the sum that, in all the circumstances, it is reasonable for the client to pay.

72. Mr Churchill for the Defendant has suggested that the judgment of the Court of Appeal in *Garbutt v Edwards* is to be regarded as obiter in assessments between solicitor and client, and that the decision of the Court of Appeal in *Mastercigars Direct Ltd v Withers LLP* [2009] EWCA Civ 1526, should be regarded as the primary authority.

73. I cannot entirely agree. *Garbutt v Edwards*, although addressing costs as between opposing parties, turned on solicitor/client principles. The Court of Appeal's decision in *Mastercigars* is of course highly persuasive, but being a decision on permission to appeal from the judgements of Morgan J (which was refused) it is not binding.

74. I do not however think that we differ to any material extent on the principles to be applied. In particular I agree with Mr Churchill as to the importance of the point made at paragraph 34 of Lord Neuberger's judgment, to the effect that if one simply holds a solicitor to the amount of an estimate as if it were a binding quotation, that may produce a windfall for a client who may not have relied upon it or who would (given a more accurate estimate) have taken the same course of action, but with other solicitors. That has a particular bearing on this case.

Estimates: Conclusions

75. The Claimant says that there was hardly any discussion with the Defendant, and no written advice from the Defendant, about what he might expect with regard to future costs as matters developed.

76. The evidence entirely supports his case in that respect. It seems to me that the Defendant should have been preparing careful advice on future costs at least from the point of the unsuccessful roundtable meeting on 6 November 2017. The original estimate had already been exceeded by then, and there was every indication that matters were likely to progress (as they did) far beyond the very limited scope of the 21 August 2017 retainer letter and into very substantial, and very costly, litigation. Failure to give any further estimate of costs after the beginning of November 2017 was a breach of the Defendant's professional and contractual obligations to the Claimant.

77. Whether it is possible to identify a reasonable sum to which the costs recoverable by the Defendant should, in consequence, be restricted is another matter. The only figure suggested by the Claimant himself is £10,000, being the amount (exclusive of VAT and disbursements) estimated by the Defendant on 21 August 2017. It seems to me fairly self-evident that that cannot be right, for these reasons.

78. The Claimant could reasonably claim to have relied upon the 21 August 2017 estimate as an estimate of initial work, as expressly stated, aimed at achieving an early settlement at mediation.

79. By the time the roundtable meeting of 6 November 2017 failed and the Claimant was suspended as a director of JFL, it would however have been clear to everyone concerned that the strategy upon which the £10,000 estimate had been based had failed. It had already been superseded: according to its cash account the Defendant had been paid £15,524 by the end of October. The estimate could have no bearing upon the potential cost of the multiple litigation that was to follow and the Claimant could not reasonably have relied on it as such. By the time the first of the bills which I am assessing was rendered, it was no more than an historical footnote.

80. The other obvious objection to holding the Defendant to a figure of £10,000 is that it takes no account of the expenditure that the Claimant would inevitably have incurred if he had gone to other solicitors, as he says he would.

81. The Claimant says that had he been provided with an accurate estimate of future costs, he would have engaged, at lower cost, the services of either Shakespeare Martineau LLP or Walker Morris, with both of whom he had an existing commercial relationship and both of whom knew the issues relating to his shareholder dispute.

82. Given that the Defendant's failure to provide any further estimates of potential future costs after August 2017 deprived the Claimant to make an informed choice as to whether to seek out less expensive representation for the litigation that followed, then there might well be a case for limiting the costs recoverable by the Defendant between January and May 2018 to the likely expenditure that the Claimant would have incurred on choosing another solicitor to represent him in that litigation. The evidence provided by the Claimant in that respect is not however sufficient to allow a figure to be identified.

83. In oral evidence the Claimant said that his family and the Defendant between them had led him into a personally and financially disastrous situation. Whilst the Defendant cannot be held accountable for his differences with his family I fully accept that the Claimant found himself, by late 2017, struggling with unforeseen financial and personal pressures that have caused him, and continue to cause him, great distress.

84. It may well be that, armed at an earlier stage with a better idea of the potential cost attendant on his family's robust response to his threatened unfair prejudice petition, he would have taken steps to alleviate those costs. The 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.

85. I have already observed that the Claimant has not, in his written evidence, denied being aware of the Defendant's costs as, month by month, they accrued. All I could glean from his oral evidence is that he had known more than he was prepared to admit.

86. Mr Dunne points out, rightly, that billing a client in arrears, even monthly (or more frequently) as in this case, is no substitute for the provision of the best possible

estimate of future costs. When considering the appropriate response to the failure to provide such an estimate, however, the Claimant's knowledge and understanding of the extent to which costs had been accruing, and were likely to continue to accrue, has some bearing on the contention that he would, if properly advised, have gone elsewhere.

87. Nor was cost the only consideration in the Claimant's choice of solicitor. Under cross-examination he indicated that he instructed the Defendant because he thought that it was a large, strong firm. Despite his stated acquaintance with other firms that he might have chosen to represent him at lower cost the Claimant chose the Defendant as the right representative for the task in hand.

88. He was ultimately disappointed with the outcome of that choice, but on wider grounds than cost. Whether and when, given a reasonable estimate of future costs, he would have disinstructed the Defendant on costs grounds alone is unclear: his evidence in that respect seems to me to be tainted by his ultimate dissatisfaction with the service he received.

89. The evidence he has produced in order to demonstrate that he would, if properly advised on future costs, have instructed other solicitors at lower cost also seems to me to be inadequate to allow me to reach a firm conclusion on what that lower cost might have been. He has produced retainer documents from Shakespeare Martineau, one of the two firms he says he would have instructed, but not from the other, Walker Morris. In place of Walker Morris he has produced retainer documents from Fahri LLP, who I understand took over from the Defendant in May 2018.

90. Fahri LLP is based in Whetstone, London N20. The Claimant has produced retainer documentation from May 2018 in which, unsurprisingly, the recorded hourly rates are significantly lower than those of the Defendant, a commercial firm based in central London. The retainer appears to relate to another matter in which JFL is making a claim against Mrs Newman and Pripay limited (a company described as hers) rather than the matters which the Defendant had been handling for the Claimant, and the letter offers no estimate of future costs.

91. I am nonetheless prepared to accept that Fahri LLP could, if instructed, have conducted the JFL litigation at significantly lower hourly rates than did the Defendant. Fahri LLP is however the firm that took over from the Defendant in May 2018, after he had incurred the costs of which he now complains. It is not one of the two firms to which the Claimant in his written evidence says he would have turned in the event of receiving an accurate estimate from the Defendant before those costs were incurred. I found his attempts, under cross-examination, to suggest that he would have done so to be unconvincing. If such were the case he would have said so in his written evidence, which was clear and specific on the point.

92. Fahri LLP's charging rates are, for those reasons, not of assistance.

93. Shakespeare Martineau LLP, in a letter of retainer dated 13 December 2017 sent from its Birmingham office, offered to the Claimant an hourly rate of £310 for work on the specific issue of the claimant's status as an FCA-authorised person.

94. Shakespeare Martineau LLP's specified hourly rate was for one Birmingham-based individual for one specific task. I have no idea what sort of hourly rates Shakespeare Martineau LLP might have charged for commercial litigation based in London, how they would have compared with the range of hourly rates offered by the Defendant or what, had he instructed them to take on the litigation being managed by the Defendant (which, notwithstanding the contrast between their stated hourly rate and the Defendant's rates, he did not do) the Claimant might ultimately have spent.

Summary of Conclusions

95. The Defendant failed to provide to the Claimant any estimates of potential future costs other than a very limited estimate, in August 2017, of £10,000 (plus VAT and disbursements) for initial work intended to lead to settlement of a corporate/family dispute without litigation.

96. The Defendant's failure to advise adequately on estimates was in breach of its contractual and professional obligations and deprived the Claimant of the opportunity to make an informed choice as to whether to seek alternative, less expensive representation for the litigation that followed.

97. The August 2017 estimate could never reasonably have been relied on by the Claimant for the purposes of anticipating the cost of the litigation that followed, and it was exceeded long before the first of the bills with which I am concerned was rendered. It would be wrong to limit the Defendant's recoverable costs to that figure.

98. There might well be a case for limiting the costs recoverable by the Defendant between January and May 2018 to the likely expenditure that the Claimant would have incurred on choosing another solicitor to represent him in that litigation. The evidence produced by the Claimant however is not sufficient to identify a reliable and fair figure.

99. For those reasons, it seems to me that would be wrong for me to conclude, on *Mastercigars* principles, that the costs that the Defendant can reasonably recover from the Claimant should be limited to any specific figure.