Neutral Citation Number [2023] EWHC 2613 (SCCO)
Case No: SC-2023-BTP-000425

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC2A 2LL

Date: 19th October 2023

Before :

SENIOR COSTS JUDGE GORDON-SAKER

- -

Between :

MRS AMANDA KENTON	**Claimant**
- and -	
SLEE BLACKWELL PLC	**Defendant**

- -
- -

Mr Jonathan Gaydon (instructed by **Walker Thomas LLP**) for the **Claimant**
Mr Mark Brighton (Costs Lawyer) (instructed by **Slee Blackwell LLP**) for the **Defendant**

Hearing dates: 1st & 2nd August 2023

- -

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.

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SENIOR COSTS JUDGE GORDON-SAKER

Senior Costs Judge Gordon-Saker :

1. This judgment sets out the reasons for my decisions:

   i) That the amount that it is reasonable for the Claimant to pay in respect of profit costs is £40,000 plus value added tax.

   ii) That the reasonable success fee that the Claimant should pay is 50 per cent of the basic charges, namely £20,000 plus value added tax.

2. Those decisions were made at the outset of the detailed assessment of the bill dated 13th May 2022 rendered by the Defendant, a firm of solicitors in Barnstaple, to the Claimant, their former client. The Claimant chose not to argue the remaining points of dispute, while reserving her right to do so in the event that the decisions were overturned or varied on appeal.

The background

3. The Defendant acted for the Claimant in a claim for damages for professional negligence against another firm of solicitors. That claim was settled, following mediation, on terms that were the subject of a confidentiality agreement. I will refer to the solicitors against whom the claim was made as "ABC".

4. In 2013 the Claimant instructed ABC to investigate and bring a private prosecution against three individuals, BH, AG and AA. It was alleged that these individuals had conspired dishonestly to sell shares belonging to the Claimant's mother at an undervalue. The individuals were the mother's solicitor and two tax advisers. Informations were laid at Willesden magistrates' court and summonses were issued against the individuals in September 2017.

5. The individuals secured the intervention of the Director of Public Prosecutions, who discontinued the prosecution in February 2018. An application was made on behalf of the individuals for wasted costs pursuant to s.19 of the Prosecution of Offences Act 1985. In a judgment dated 27th February 2018, District Judge Ikram commented that the application had been made "on a simple enough basis that there had been a lack of full and frank disclosure and/or material non-disclosure to the judge who issued proceedings".

6. The case summary in support of the prosecution had given the clear impression that the Claimant's mother "was vulnerable and unreliable", which was not the case. Further, there had been material non-disclosure: (i) of the fact that the Claimant's mother had given a statement to the police that she had not been the victim of a fraud; (ii) that the Claimant had applied unsuccessfully in the Court of Protection to have the individuals removed as her mother's attorneys, in which application the mother had asserted that she had full mental capacity and had not been the victim of fraud; (iii) of the fact that the police had twice refused to investigate and, when the court learned of that, the Claimant had not informed the judge of the reason, namely that the sale of the shares had been made to old friends at the figure that they could afford; and (iv) of the fact that the Claimant knew that her mother thought that the sale price was "a feasible sum" for the purposes of capital gains tax.

7. District Judge Ikram concluded that the prosecution had never stood a realistic chance of success and that the application for the summons had been an improper act by reason of the material non-disclosure to the court.

8. In a subsequent judgment, dated 31st May 2018, District Judge Ikram ordered the Claimant to pay the individuals' wasted costs in the total sum of £210,691.

9. In March 2018 the Claimant approached the Defendant in relation to a proposed claim against ABC and/or leading counsel who had been instructed by them in relation to the prosecution. A conditional fee agreement was entered into on 15th May 2018 in respect of the proposed claim for damages for professional negligence, which provided for a success fee of 90 per cent if the claim concluded at trial, or 80 per cent if it concluded before then. The agreement, which incorporated modified Law Society conditions, provided for hourly rates for the 4 usual grades of fee earner of £300, £275, £250 and £200.

10. It is clear that Ms Slade, the partner with conduct of the case, spent considerable time considering the matter before the CFA was entered into. 12.5 hours was spent considering the Claimant's papers in March 2018, when a detailed email was also sent to counsel, and there was a 2 hour telephone discussion with the Claimant on 3rd May 2018.

11. Following favourable advice from counsel, a letter of claim was sent to ABC in August 2019. The letter of response denied liability but suggested mediation. In October 2020 ABC made a purported Part 36 offer. A mediation meeting took place on 30th November 2020 which resulted in a settlement on terms that ABC would pay the Claimant £295,000 together with her costs to be assessed.

12. An inter partes bill of the costs of the claim against ABC was drawn up in April 2021 in the total sum of £209,262, of which the profit costs were £152,210 excluding value added tax. An agreement was eventually reached in February 2022 whereby ABC agreed to pay the Claimant's costs in the sum of £138,000; about two-thirds of the sum claimed.

13. On 13th May 2022 the Defendant sent to the Claimant a bill, which is described on its face as both "final" and "interim", in the total sum of £342,738.60. After deduction of that sum from the damages and costs paid by ABC (a total of £432,000[1]), £93,126.40 was said to be payable to the Claimant.

14. The bill recorded profit costs of £146,520, which is less than the sum claimed in the inter partes bill and, on the face of it, in breach of the indemnity principle. That was further limited to £138,390 to which a reduced success fee of 70 per cent was applied, giving a total figure for profit costs and the success fee of £235,263 plus value added tax.

15. On 17th June 2022 the Claimant commenced proceedings for an order for the detailed assessment of the bill. Although the claim was listed for directions in July, the parties agreed that the hearing should be vacated to allow settlement discussions. In October 2022, following acknowledgment of service, the matter was relisted for directions, but the parties then agreed a consent order that the bill

[1] Although £295,000 + £138,000 = £433,000

dated 13th May 2022 be the subject of detailed assessment, restricted to the profit costs and success fee.

The costs information given to the Claimant

16. The Claimant served two witness statements in these proceedings. In the first, she explained that she had been let down by ABC and began to research solicitors who may be able to help her. She approached 5 firms, to whom she sent her papers and had a telephone discussion, and narrowed it down to the Defendant and another. She was impressed by Ms Slade at the Defendant firm who gave the impression that she could be trusted on costs "given her job was to hold [ABC] to account for failing to provide me with proper costs information in the first place". The Defendant was not the cheapest option but the Claimant "needed a solicitor I could trust on costs".

17. Communications between the Claimant and Ms Slade before the CFA was entered into were by telephone, letter or email. On 4th May 2018 Ms Slade sent to the Claimant's home address a conditional fee agreement, risk assessment form and case fact sheet.

18. The case fact sheet contained an estimate of costs:

> 4. Estimate of charges
>
> Our charges are based on the time we spend on your case. At this point it is not clear what issues will be in dispute. We therefore cannot say how much time we will need to spend on your case and therefore cannot give a precise estimate of our charges. In our experience the basic legal charges in a case like this are likely to be between £5,000 and £20,000 (excluding VAT, expenses and disbursements, insurance and success fee) if liability and quantum are not seriously contested and a settlement is reached within the protocol period. If liability and/or quantum are disputed then the costs will rise. Additional costs will be incurred if mediation is required and if the claim proceeds to a contested hearing the basic legal charges are likely to fall within the £30,000 to £50,000 bracket; in some cases substantially more.
>
> 5. Estimate of disbursements and expenses
>
> We have agreed to fund all reasonable disbursements and expenses excluding legal expenses insurance. You have agreed that we will be reimbursed in full from any damages awarded or agreed (on a final or interim basis) or by you if the CFA is terminated).
>
> It is difficult to accurately estimate what expenses and disbursements will be required at the outset of a claim. You may incur experts' fees, court fees, mediation fees, copying fees and travelling expenses. These disbursements and

> expenses are unlikely to exceed £5,000 unless the claim proceeds to a contested hearing or mediation. This estimate does not include provision for any legal expenses insurance you decide to take out or barristers' fees. It is anticipated that if a barrister is required they will work on a CFA basis.
>
> 6. Estimate of timescale
>
> Between 6 months and 2 years.
>
> 7. Cost benefit
>
> The proposed work is merited on a cost/benefit analysis.

19. According to the Claimant's first witness statement (at paragraph 13):

> I had been told the rough value of the claim against [ABC] was in the region of £500,000. My understanding of the Case Fact Sheet was that if a settlement could be reached before Court proceedings were required, I could expect to pay Emma Slade between £5,000 - £20,000 for her basic charges and if the case went to a hearing I could expect to pay Emma Slade between £30,000 - £50,000 for her basic charges.

20. Having been "once bitten twice shy", as she put it, the Claimant queried the estimate in an email dated 10th May 2018, in particular the Defendant's agreement to cap the success fee to 50 per cent of the damages. In reply, after giving examples of how the cap worked, Ms Slade explained:

> What I can also say to you is that in nearly 23 years of practice, I have yet to have a single case where my basic fees have been £100k! The closest I have had is £85k and that was with a fully contested trial as well so hopefully that will put it in to a bit of context.

21. The Claimant signed the CFA and case fact sheet on 11th May and returned them by post.

22. The Defendant sent 5 costs letters to the Claimant between September 2018 and November 2020. Apart from the amount of costs specified, the letters were in identical terms, including the estimated time to the conclusion of the claim. That would suggest that little care was taken with their creation.

23. The letter dated 18th September 2018 reads as follows:

> **This is a standard letter - not a bill. You do NOT need to take any action in respect of this letter.**
>
> In accordance with Law Society regulations we are writing to update you on the costs and timescale of your case.

> According to our computerised records, the costs incurred to date are approximately £32,338 excluding VAT, disbursements and success fee. This figure is intended purely as a guide. The final figure will be based on a manual assessment of the file possibly carried out by the Court. It could therefore be higher or lower than the guide.
>
> Matters may not be resolved for at least another six to twelve months and future costs will very much depend on whether your opponent is reasonable and cooperative. We may incur further costs of a few thousand pounds but if it is necessary to take the case all the way to a contested hearing then the costs will be considerably more and I would refer you to the estimate contained in the case fact sheet.
>
> If we are dealing with your matter on a "no win - no fee" basis or under a legal expenses policy then your responsibility for paying costs will be regulated by the agreement entered into at the outset.
>
> We confirm that our basic charges are calculated according to how long we are engaged on your case, unless fixed fees apply.
>
> The hourly rates are currently: -
>
> • Partner and solicitor with 8 years' experience after qualification £300
>
> • Solicitors with over 4 years' experience after qualification £275
>
> • Other solicitors and legal executives and other staff of equivalent experience £250
>
> • Trainee solicitors and staff of equivalent experience £200

24. The amounts of profit costs indicated in the letters were:

11 September 2018	£32,338
20 March 2019	£56,753
3 September 2019	£78,178
25 June 2020	£109,650
16 November 2020	£120,100

25. The Claimant's evidence as to her reaction to these letters is set out in her second witness statement:

> 11. Over the course of the two-and-a-half-year period between May 2018 and the settlement of the damages in November 2020 I received 5 letters from Slee Blackwell {POD 38-45}which were all in the same standard form, each of them stated in bold at the top that it was a standard letter and that it

> required no action. Each of them gave a figure for what it described as a computerised time record of costs to date, which was a guide, and that the actual figure may be more or less, and then each of them also referred me back to the original estimate. I never received any worklogs of the time spent.
>
> 12. As stated previously, I was not sure what to make of these additional figures being put forward, nor, beyond my understanding outlined above, completely au fait with how the CFA actually worked; as the letter stated I needed to take no action, and referred back to the original estimate, and as the matter was never issued in Court, and these new figures were certainly not expressed as a divergence from the original estimate, I felt reasonably secure that the amount that I would have to pay, if not recovered as costs, would be at most £20,000 plus success fee and disbursements.
>
> 13. Since I only received the letters described above every six months, the figure mentioned sometimes jumped dramatically from one letter to the next. For example, when I received the 4th of these letters on or around 25 June 2020 I noted that the time costs in the letter were now over £100,000, so notwithstanding the fact that the matter had still not been issued, the figure was 5 times the estimate for pre issue work and more than the worst case scenario that Emma Slade had put forward to reassure me when I had questioned the initial information. I was shocked to see how the charges had escalated especially as I had also recently read an article in the Sunday Times about people who ended up in debt after litigating a case under a CFA.

26. On 6th July 2020, as the prospect of mediation loomed, the Claimant raised the question of costs in an email:

> Also - and please forgive me if you've already answered this point but I couldn't find your email about it - we happened to read an article in the Sunday Times about some people who ended up in debt after a case for which they had a CFA, so I'd like to clarify again: what percentage of any compensation offered will go on your fees and expenses or will that be covered separately?

27. That was answered the next day by Ms Slade:

> Regarding the final question, I think you may have misunderstood the workings of a CFA. We do not take a percentage of your damages, we take a percentage on top of our basic fees. I am afraid I cannot recall your success fee etc off the top of my head but let me give an example. Let us say that your success fee is 70%; let us say that my final costs are £10k. At the end of the claim, you will be responsible for the basic

> costs of £10k plus the uplift which will be £7k, ergo you are liable for £17k. The usual cost consequence is that that loser pays the winners costs. We can recover anything between 70-90% of the basic costs - not the success fee, we cannot recover anything for the success fee. Let us say we recover 85%. You will therefore be liable for £17k subject to the contribution of £8,500 by the other side. We do provide you with 6mo letters to let you know what our basic costs are currently running at and of course, I do bear in mind your costs liability when discussing settlement etc.

28. On 28th July 2020 Ms Slade sent to the Claimant copies of her time records in answer to the Claimant's request for a breakdown. The records show total time of 405.7 hours from 3rd May 2018 and total profit costs of £111,240.

29. According to the Claimant she became concerned that if she did not continue with the case and ended the CFA she would be liable for the whole of the Defendant's basic charges, expenses and disbursements; and would still have to pay the Defendant's success fee if she changed solicitors and went on to win the case. She concluded that challenging the size of the success fee would be "safer". In an email dated 13th August 2020 the Claimant wrote:

> As I explained when we spoke, 90% on top of £10k or even £40k doesn't seem unreasonable; when I received your latest statement showing that your fees had escalated to £110,000, which is an extremely high figure, it was quite a shock, as you acknowledged in our conversation. Whilst I appreciate that this was, as you explained, due the amount of time required to read through all the files, a 90% uplift on £110,000+ is an inordinately large amount.

30. On 14th October 2020 the Defendant sent the Claimant a spreadsheet during the course of a telephone conversation about the Part 36 offer that the Defendant had made and the offer which the Claimant might make. The spreadsheet set out the likely results for the Claimant if either offer were accepted on the basis that the Defendant's profit costs were "say £120,000". The Claimant's reaction, in an email dated 23rd October was "it appears that if I accepted an offer of £300,000, I would end up with £118,216 which is not acceptable".

31. The last costs information given to the Claimant was shortly before the mediation hearing when she was sent a schedule of costs prepared for the purposes of negotiation. That showed profit costs of £124,825 excluding value added tax, estimated costs of the mediation (including counsel's fees of £8,880) and estimated profit costs to trial of £75,000.

32. The day after the mediation meeting Ms Slade emailed the Claimant to say that she had made a mistake on the figures for costs and that, assuming a 70 per cent recovery of the inter partes costs and given the reduction in the success fee to 70 per cent, the Claimant should receive "about £103k". The Claimant replied that "is the best news I've heard in a long time". In the event, the sum due to the Claimant was £93,126.40.

The Claimant's arguments on the costs estimates

33. Mr Gaydon submitted that the estimates given to the Claimant were clear: the range given up to trial was £30,000-£50,000. The one case where the basic charges had reached £85,000 was exceptional and over £100,000 "was out of the question". For a claim which settled before proceedings were issued, the Claimant could expect to pay £5,000-£20,000.

34. The estimates were given before the Claimant entered into the CFA. Once she signed it she was bound to pay the Defendant's legal charges except in the event that she lost the claim. If she terminated the agreement, she would be liable for the Defendant's basic charges and disbursements on demand, win or lose, unless the Defendant decided to await the outcome and recover the success fee. It was incumbent on the Defendant to provide accurate costs information before the costs were incurred.

35. The first costs information letter, sent 4 months after the CFA was entered into, did not say that the estimate had been or would be exceeded. The figure given was said to be only "a guide" and the final figure could be higher or lower. The Claimant was referred back to "the estimate contained in the case fact sheet" and no further estimate was given, except that "we may incur further costs of a few thousand pounds" or "considerably more" if the case goes "all the way to a contested hearing". The subsequent letters added nothing as they were in identical terms, apart from the figure for incurred costs. It does not help a solicitor who has given a mistaken estimate at the outset to give higher figures subsequently: *Reynolds v Stone Rowe Brewer* [2008] EWHC 497 (QB) at para 59. It was clear from the correspondence that the Claimant was concerned about costs.

36. The figure which the Claimant should reasonably be expected to pay should not exceed the estimate that she was given and Mr Gaydon contended for £20,000.

The Defendant's arguments on the costs estimates

37. Mr Brighton emphasised the qualifications made in the estimates and the costs information given subsequently. The costs letters sent to the Claimant gave her a good idea of what the costs were. The October 2020 spreadsheet informed the Claimant of the amount of costs and the effect that it would have on the amount recovered. Yet the Claimant did not complain about the costs or refer back to the original estimate. In her email dated 1st December 2020 the Claimant said that the fact that the Defendant's profit costs were £130,000, rather than £165,000, was the best news she had heard in a long time.

38. Given the amount of costs information that was given to the Claimant, including the explanations of the figures at the time that the inter partes costs were negotiated, Mr Brighton submitted that the Claimant's reliance on the initial estimate was unreasonable. Any reliance by the Claimant on the initial estimate was superseded by the subsequent costs information.

39. The reason why the bill far exceeded the estimate was, in Mr Brighton's submission, due to the unanticipated work required in considering the documents,

in particular the significant disclosure by ABC of their files. According to him, tens of thousands of documents were received and had to be reviewed.

The authorities

40. In *Mastercigars Direct Ltd v Withers LLP* [2007] EWHC 2733 (Ch)[2] Morgan J succinctly summarised the principles derived from the two recent relevant decisions of the Court of Appeal[3]:

> 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 v Edwards at [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.

41. Whether the client relied on the estimate is an important factor in how the court should take the estimate into account. Morgan J said[4]:

> On the question of reliance, Leigh v Michelin Tyre Plc is authority for reliance being relevant on an assessment of costs between a paying party and a receiving party. Dyson LJ does not spell out in detail what the consequences of such reliance might be but he does not seem to have in mind only those cases where the paying party could show an estoppel. Something less than an estoppel seems to suffice in terms of relevance. Conversely, something more than a belief that the costs are likely to equate to the estimate seems to be needed because Dyson LJ in [31] refers to the question of "how" the paying party relied on the estimate. Further, at the end of the inquiry, the deduction in the costs which is thought to be appropriate is left to the good sense of the court.

42. In *Wong v Vizards* [1997] 2 Costs LR 46, Toulson J (as he then was) concluded that:

> The correspondence amounted to a clear and considered indication of Mr Wong's maximum likely liability to Vizards, upon which Mr Wong was likely to rely and did rely. It is open to Mr Wong to argue that in determining what is a reasonable amount for him to pay for the work done, regard should be had

[2] At para 92
[3] *Leigh v Michelin Tyre Plc* [2004] 1WLR 846; *Garbutt v Edwards* [2006] 1WLR 2907
[4] At para 101

> to the level of costs which he had been led to believe represented a worst case assessment of his potential liability.

43. In *Wong* there was no satisfactory explanation as to why the costs exceeded the estimates and the court allowed a sum which equated to the estimate given on a worst case basis plus 15 per cent.

44. Until the decision in *Wong* was explained in *Mastercigars*, the commonly held view among costs practitioners, and indeed costs judges, was that where the client had relied on the estimate the court should limit the costs to the estimate plus a margin of 15 per cent.

45. Following the first appeal in *Mastercigars*, the case was remitted to a costs judge to determine whether the client had relied on the estimate. In the second appeal[5], Morgan J explained how the court should deal with reliance[6]:

> The court should determine whether the client did rely on the estimate. The court should determine how the client relied on the estimate. The court should try to determine the above without conducting an elaborate and detailed investigation. The court should decide whether the costs claimed should be reduced by reason of its findings as to reliance and, if so, in what way and by how much. Whether there should be a reduction, and if so to what extent, is a matter of judgment. Specific deductions can be made from the costs otherwise recoverable to reflect the impact which an erroneous and uncorrected estimate had on the conduct of the client. Such an approach requires the court to form an assessment of the impact of the estimate on the conduct of the client. 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.
>
> …
>
> 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.

46. As to the second question – how the client relied on the estimate – Morgan J explained[7]:

> Accordingly, in my judgment, 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 to be more advantageous to the client. In a case where the client satisfies the court that the inaccurate

[5] [2009] 3 Costs LR 393
[6] At para 54
[7] At para 47

> 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.

47. The extent to which the estimate is exceeded is also important. As Morgan J said in the first *Mastercigars* appeal[8]:

> A modest excess does not call for much explanation and a substantial excess calls for a great deal of explanation. In some cases it might be useful to say that anything below a norm or margin does not require much if any justification whereas anything above that norm or margin should be expected to be explained in detail. Another function which the notion of the margin might play is in relation to reliance. Because an estimate is not a fixed price or a maximum price, even where a client relies on the estimate, it will often be the case that the client appreciates that there is some room for movement so that he would not be very surprised if the final bill turned out at a figure somewhat above the estimate. A figure somewhat above the estimate might therefore be perfectly reasonable to expect the client to pay. If the final bill is a little above the estimate then a court might routinely hold that the excess does not prevent it being reasonable for the client to be expected to pay the full bill. Conversely, if the final bill is significantly above the estimate, a court might routinely feel that the bill had increased by too much so that it was no longer reasonable to expect the client to pay all of it. The court may then be required to exercise its judgment as to what figure could properly be added to the estimate so as not to exceed the sum which it would be reasonable to expect the client to pay.

48. Between the first and second appeals in *Mastercigars*, Tugendhat J considered similar issues in *Reynolds v Stone Rowe Brewer* [2008] EWHC 497. At the outset of a building dispute, solicitors had advised their client that her costs

> would be in the region of £10,000 to £18,000 plus VAT, and this is only of course an estimate which could be increased depending on how strenuously the matter is defended.

49. That estimate was increased as the case continued. The last estimate was £55,000 plus VAT. In concluding that the reasonable amount that the client should pay was £20,700, Tugendhat J explained[9]:

[8] At para 104
[9] At paras 69 and 70

> 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. The solicitors themselves thought that she could afford it. They were not contemplating, when they accepted her instructions, that they would be funding this litigation themselves by giving the claimant the credit which they in fact extended to her. If the solicitors had not withdrawn when they did, the total costs including the trial would no doubt have been less than the total of £90,000 which the claimant says they ultimately were. But they would have exceeded £60,000. 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. It came about because the estimates in 2005, including the November 2005 estimate, were unreasonably low.
>
> In my judgment the Costs Judge was fully entitled to come to the view that, if the estimates given at the start of the case had been such as are required by the applicable rules, then the claimant would not have acted as she did. She would clearly not have been able to afford to do so, and I think it unlikely she would have embarked on the course she did embark on. I bear in mind, as Mr Bacon submits, that, when confronted in 2006 with estimates nearer the reality, the claimant pressed on. But that is not a guide as to what she would have done if she had been faced with the reality in December 2004, at the time when she should have been.

50. That last point was developed earlier in the judgment[10]:

> There is no finding as to whether the estimates increased because they had originally been wrong, or because of unforeseen events, or partly one and partly the other. If the increase was because the figure had originally been wrong, then in my judgment it does little to advance the solicitors' submission that they gave a new, and higher, estimate, before the costs incurred exceeded the figure in the original estimate, or that, having been mistaken originally, they then gave a number of warnings as to when the estimates should be increased.

51. I have been referred to a number of decisions by my fellow costs judges. They do not purport to set out principles which conflict with those set out above, but reflect the appropriate exercise of discretion on the facts of the particular cases – the "good sense of the court" as referred to by Morgan J.

[10] At para 59

The effect of the estimate

52. The Defendants chose neither to seek to cross-examine the Claimant on her witness statements nor to put in their own evidence in relation to the estimate, the costs information that was given, or the reason why the costs far exceeded the estimate. Ms Slade's witness statement goes only to the risk assessment for the success fee.

53. However at paragraph 9 of that statement, Ms Slade explains that:

> … the claim was very likely to be document-dense. The Claimant had already tried to bring a number of claims which [ABC] would have needed to give consideration to in order to formulate the private prosecution. All of this would need to be considered which would have required a considerable investment by the firm and indeed a very high risk if there wasn't evidence of a claim.

54. That would seem to be inconsistent with the explanation that the increase in costs over the estimate was due to the size of disclosure by ABC. In any professional negligence case against a firm of solicitors, those acting for the claimant will need to consider carefully the defendant's files. A solicitor working in this field should have a reasonable idea of how big those files are likely to be.

55. In the absence of any evidence as to why the costs incurred far exceed the estimate, it is difficult to reach any other conclusion than that the estimate was inadequate. Based on my experience, the figures that the Claimant was given were hopelessly unrealistic. This was a professional negligence claim which would probably be brought in the High Court seeking damages in excess of £300,000. As Ms Slade anticipated, the case would be document heavy and a considerable amount of work would be required. Realistic estimates would be multiples of the figures that were given. In my judgment, a realistic estimate of reasonable profit costs to settlement before the issue of proceedings would have been about £50,000, and a realistic estimate to the conclusion of a trial would have been at least £150,000.

56. It follows that, in my judgment, not only were the estimates unrealistic but the costs that were incurred are likely to be unreasonable.

57. Did the Claimant rely on the estimate? It is clear that costs were important to the Claimant. Before she signed the CFA she queried the likely outcome of the claim, setting out figures based on profit costs of £80,000 ("the maximum fees you say you've charged in the past")[11].

58. How did the Claimant rely on the estimate? According to her first witness statement, she "decided to proceed and signed the Case Fact Sheet". She also signed the CFA. Had the Claimant been given an accurate estimate of the Defendant's charges, along the lines of the figure that was eventually billed, she would have had the opportunity to consider whether she wished to continue with the claim and whether she wished to obtain an estimate from other solicitors.

[11] email 10th May 2018 timed at 1435

59. What, if anything, is the effect of the subsequent costs information? By the date of the first costs letter, 4 months after the CFA, the costs exceeded the top end of the estimated bracket for pre-issue costs by 50 per cent. The costs letters are confusing. The client is told that the costs may be more or less than the figure recorded and is referred back to the estimate in the Case Fact Sheet.

60. By that point, the Claimant had signed the CFA and, if she terminated the retainer, she would be liable, at the Defendant's choice, for their costs whether she won or lost. In that way, she was in a worse position than the claimant in *Reynolds*, who had received regular bills and updated assessments, but would be no worse off if she had terminated the retainer earlier than she did, once she saw the mounting costs. The Claimant in the present case was hooked by the initial estimate and could not escape it.

61. The Defendants did not provide the Claimant with proper costs information. She was not given any updated estimate until the mediation. The back-of-the-envelope calculations in the October 2020 spreadsheet did not set out the estimated costs to trial in the event that the claim did not settle. The costs letters, setting out the costs incurred to date, were confusing.

62. In circumstances where the client was given a hopelessly inaccurate estimate, relied on the estimate by entering into a conditional fee agreement, lost the opportunity of doing something different, was not given proper costs information, was billed a sum several times the amount of the estimate, and where the solicitor failed properly to explain the difference between the estimate and the costs incurred, the amount that the client should reasonably be expected to pay must be a figure close to the estimate upon which she relied. The claim settled before issue and following mediation. The estimate given for that outcome was £5,000 to £20,000 plus "additional costs for mediation". Taking the top end of that bracket and adding £20,000 for mediation would give £40,000. That is just under half of the figure which Ms Slade referred to as the most she had ever charged for a case which went to trial. It is also not far off the amount that I would expect to have seen estimated and incurred. £40,000 seems to me to be the reasonable sum which the Claimant should be expected to pay.

The success fee

63. CPR 46.9(3) provides:

> (3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed—
>
> (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
>
> (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;

64. CPR 46.9(4) provides:

> (4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.

65. The Defendant's risk assessment form used a system of scoring. The methodology used is not at all clear on the face of the form. Both "Multi track" and "Multi defendant" were assessed as "very high risk" and each was given the maximum score of 5. "Limitation issues" were assessed at 4, which seems odd given that the costs order in the magistrates' court was made after the Defendant was retained. "Causation" issues were also assessed as very high risk. That seems odd given that the costs order obviously followed from the alleged non-disclosure. Applying a table set out in the form, the total of 53 gave rise to a success fee of 90 per cent.

66. Mr Brighton submitted that the points of dispute did not challenge the methodology used for the risk assessment. However, at point 2 it was contended that:

> The percentage uplift charged to the client ought to be based on the aggregate of the relevant factors which go to risk.
>
> The Risk Assessment Form purports to be a bespoke assessment of risk based on the individual circumstances of the case with the success fee set in accordance with the risks identified.
>
> However, the Risk Assessment Form does not identify risks but instead applies a numerical score to factors which do not relate to risk.
>
> The result is that the percentage uplift was not calculated by reference to the relevant risk factors of the specific case. The success fee is therefore unusual.

67. Given the amount of work done by Ms Slade considering the Claimant's papers and the time spent in taking instructions, one would expect a rather more honed and reasoned assessment of the risk.

68. In her witness statement Ms Slade seeks to explain the approach taken in the risk assessment. "Multi track" appears to relate to the amount of costs likely to be incurred, rather than the risk of failure. "Multi defendant" referred to the fact that there were two potential defendants – ABC and leading counsel – and it was not then known who had drafted the summons. It was possible that significant costs may not be recovered against an unsuccessful defendant. Again, it is difficult to see this as a real risk. If proceedings were brought against two defendants and they blamed each other, the usual order would be that the unsuccessful defendant would pay the costs of the successful defendant. "Causation issues", as explained by Ms Slade, seems to be breach of duty, rather than causation. She described that as "the biggest concern". Ms Slade's assessment of the "Limitation issues" appears to have been linked to the date of breach rather than the date when the cause of action

accrued. Ms Slade explained that "Potential ATEI issues", which were assessed as high and scored at 4, related to the risk that the claim would not meet the insurers' requirement of 60 per cent prospects of success. That seems to be somewhat circular. Either the claim has prospects of success of 60 per cent or it does not. Reducing the prospects of success because the prospects of success may not be 60 per cent or more, seems to underline the unusual approach to risk assessment in this case.

69. The approval of the client for the purposes of r.46.9(3) "means informed approval in the sense that the approval was given following a full and fair explanation to the client": *Herbert v HH Law Ltd* [2019] EWCA Civ 527, para 37.

70. In my judgment the risk assessment in this case was not a proper assessment of the prospects of success. It does not justify the staged success fees of 80 and 90 per cent. It cannot therefore be said that the Claimant's approval of the success fees was informed and accordingly the presumption of reasonableness does not apply.

71. Were the success fees nevertheless reasonable? That the Defendant adopted a staged success fee is relevant. However, the difference between the two stages is only 10 per cent. The first stage success fee of 80 per cent represents a chance of winning of about 55 per cent. That seems to me to be pessimistic. This is not a case where the solicitor can say that the prospects are so uncertain that they were little better than 50/50. District Judge Ikram's February 2018 judgment clearly set out the failings in the prosecution. There may be issues as to who was to blame for those failings, as between the Claimant and ABC. However it would be difficult to see how ABC could have been unaware of them. The costs order clearly followed from those failings.

72. In my judgment the assessment of the risk was unreasonable. It was more likely than not, by more than a minimal margin, that the claim would succeed. A realistic and reasonable assessment would have been 67 per cent, giving a success fee of 50 per cent.