IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

[2019] EWHC 1218 (Ch)

No. CH-2018-000249

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 1 May 2019

Before:

MS CLARE AMBROSE

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

HOWARD KENNEDY LLP — Appellant

- and -

SPARTAFIELD LIMITED — Respondent

MR J. MUNRO appeared on behalf of the Appellant.

MR B. WILLIAMS QC appeared on behalf of the Respondent.

J U D G M E N T

THE JUDGE:

1 This is an appeal from the decision of the Senior Costs Judge, Chief Master Gordon-Saker, a decision of 2 August 2018, when he made a detailed assessment of solicitor/client costs. These costs arose in litigation in the TCC between Spartafield Limited, a property developer, and a contractor called Penten Group Limited. This litigation, which proceeded to a trial on 4 to 8 July 2016, was heard by Recorder Nissen QC, sitting as a deputy High Court judge. It related to a property in East London. This appeal relates to costs that Howard Kennedy LLP, the appellant in this matter, invoiced its client, Spartafield, the respondent in this matter, in 2016 and which Master Gordon-Saker assessed on a detailed assessment in August 2018.

2 The grounds of appeal are that the Master wrongfully disallowed costs for the attendance of the appellant's solicitors at the trial after the first day of trial on the basis that they were instructed not to attend by the respondent. This was wrong because the appellant's solicitors were instructed to attend by the respondent. The other ground of appeal was that the Master applied a costs estimate as yardstick to assess costs which were incurred unexpectedly and were not included in the costs estimate when he had previously ruled that the client had placed no reliance whatsoever on the cost estimate.

3 The material I have before me are the transcripts of most of what was said before the Master in hearings in January 2018 and also in August 2018, and also transcripts of his extempore decisions. I also have some statements from the original proceedings in the TCC, in particular one from Spartafield's managing director, Mr Roger Leon, and one from Ms Nyman of the appellant. I have some selected correspondence and some selected parts of the judge's ruling in the original TCC proceedings. I have some of the bill of costs and the invoices under which the disputed decisions fall. I have the grounds of appeal and I have applications to extend time for serving of the bundle.

4 The test in this sort of appeal for intervention was common ground. It was, namely, that I should apply the test set out in *AEI Rediffusion v Phonographic Performance* [1999] 1 WLR 1507, namely,

> "Before the court can interfere, it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

5 Counsel for Spartafield suggests that the judge's decision was one of evaluation and not just discretion, but I consider that either way the test in *AEI Rediffusion* was the correct one to apply. It was also suggested that I take into account that the Master was exercising a specialist jurisdiction and he is the most senior costs judge.

6 I do take these matters into account and I also take into account that he had all the relevant documents going to costs and he had also heard evidence for the best part of two days and had a further two days' submissions covering all these points. However, ultimately, the test remains the same one, even for the most senior judge who has had the benefit of fuller evidence and argument.

7 Turning to the procedural background of the original dispute, the original TCC proceedings were commenced in April 2016, following an adjudication regarding this property in East

London. On 5 May 2016 the appellant came on the record. On 9 May 2016 there was a CMC at which the appellant did not attend; counsel acted on behalf of Spartafield. The trial took place between 4 and 8 July. Spartafield essentially succeeded at trial to a large extent, but Penten Group Limited is insolvent and so recovery of costs has been limited. Spartafield immediately challenged the costs claimed by its solicitor, the appellant Howard Kennedy, and it applied for a detailed assessment of all six bills under s. 70 of the Solicitors Act 1974. On 15 June 2017, an order for detailed assessment was made by consent.

8 There was a hearing before the Master on 31 January 2018 at which Mr Leon, managing director of Spartafield, was called, as well as Ms Lara Nyman, the partner involved at Howard Kennedy. Both gave sworn evidence and were cross-examined. A preliminary issue was raised at that hearing as to whether costs exceeding the estimate given by the solicitor should be recoverable. Master Gordon-Saker gave a detailed judgment on that issue on 31 January. This judgment is not appealed. There was a further hearing on 1 and 2 August, where both parties were represented by counsel. The Master made decisions in January 2018 and also on 1 and 2 August 2018. His order was dated 28 August 2018. Howard Kennedy issued a notice of appeal on 17 September 2018. The Master's decisions were effectively extempore and the time for serving of the appeal documents was extended twice to take into account the delay in obtaining the transcripts. These were received on around 25 March and the appeal bundle was submitted on 26 March 2019.

9 Turning to the factual background, as I mentioned, the appellants, Howard Kennedy, were instructed in the TCC proceedings relatively late in the day on around 5 May 2016, very shortly before a CMC. They had sent a standard letter of engagement to Mr Leon on 4 May 2016, which gave an initial estimate of £5,000 to £10,000, but this made very clear that it was only an estimate regarding a very initial stage of costs. The appellants had been instructed on the recommendation of Mr Paul Darling QC who had been instructed on a direct access basis by Spartafield. Howard Kennedy's retainer was limited by the express instructions of Spartafield and, initially, the intention was to limit the appellants' work insofar as possible to being simply a post-box and technical administrator. The reason for this approach was that Spartafield, who had instructed Mr Darling on a direct access basis, were also using a surveyor, Mr Anthony Grant, who is experienced in litigation and it was intended that he would handle all the "solicitorial" tasks expected during the period of direct access. In a letter dated 6 May, Mr Leon wrote to the appellant and also counsel, explaining the role of Ms Nyman, who was a partner, and stated,

> "Her role is not to provide legal advice but, as agreed, is specifically and strictly limited to acting as technical administrator to keep us on the straight and narrow as regards the timing and filing of documents concerned and to act as a post-box so that Paul and I do not have to deal with the objectionable Mr Bailey. The intention is that I continue to deal with Paul on a direct access basis as far as the substantive issues are concerned, in particular the preparation of witness statements and response to any defence."

10 A CMC took place on 9 May and, prior to that, the appellant had prepared a costs estimate in the form of Precedent H. This provided for attendance by the solicitors at two days of trial at a cost of £8,000, disclosure costs in the region of £4,000, costs relating to the CMC at £6,750, solicitors' costs relating to witness statements at £8,600 and trial preparation at £10,250. The overall estimate of the solicitors' future costs was put at just under £42,000, in particular £41,500. The judge was not happy at that stage with either party's costs estimates and asked that the Spartafield's costs estimate as between the parties be reduced to closer to £85,000. The overall costs estimate, including both solicitors' costs and counsel's

costs, had come to around £105,000. As between Spartafield and the appellant, it was agreed that the original budget in the form of the Precedent H should stand as the costs estimate as between the solicitor and Spartafield as client.

11 I note that following the CMC and on 12 May, Mr Leon contacted Ms Nyman to emphasise the intended role of the solicitors. He wrote,

> "You are obviously aware that last week I signed your engagement letter prior to our meeting with Paul Darling and Tony" (this was Tony Grant who was the surveyor who was assisting in the preparation of the trial).
>
> "As I believe you are now aware, we do not need you to get involved in reading all the documentation or giving advice on the actual matter. However, as discussed, your role is to be effectively as technical administrator to ensure we do not fall foul of legal procedure and that relevant paperwork is submitted by the due date."

12 Two notable developments took place around the start of the trial on 4 July which affected the costs incurred and also affected the parties' relationship and were unexpected. Firstly, there was a decision made by the respondent to disclose a set of files that had been sent to Mr Darling by Mr John Shannon, who was a surveyor, and an issue had arisen on Spartafield's side as to when they should be disclosed and as to whether the appellant had complied with instructions from the client to disclose. These files were only disclosed to the other side on the morning of the trial, starting on 4 July, and there was substantial correspondence on this and the Master ruled in August 2018 that some work had been done unnecessarily because the appellant had failed to follow the client's instructions to offer disclosure of these files at the earliest opportunity. This finding, which was called the Shannon judgment, is not under appeal.

13 The other development that arose around the start of the trial was that there was an issue in the trial as to whether Spartafield had conducted a sufficient search of its email archives and whether it had made proper disclosure of documents in this respect. Mr Leon was cross-examined on the first day and he admitted in cross-examination that his witness statement had been inaccurate regarding a certain category of internal emails. The judge ordered the appellant to produce a witness statement regarding the adequacy of Spartafield's disclosure and to carry out a search of these internal emails between Mr Leon and Mr Grant. Compiling a witness statement and carrying out the search was onerous work done overnight and the court made a further order requiring Howard Kennedy to review all communications. So, there was an intense period of work over the first couple of days of the trial that had not been anticipated.

14 Ms Nyman attended the trial all day on the first day, with a trainee in attendance. The trainee was not charged for. Ms Nyman's time was charged for but the decision regarding the fees of the first day is not under appeal. She then attended for two and a half hours on day 2 and also for an hour and a half on day 4. A trainee attended and was charged for on days 2, 3 and 5 of the trial and the judge's decision on these charges is under appeal.

15 Before the trial, Spartafield had written to the appellant saying that Ms Nyman was only to attend for an hour on the first day. The new developments regarding the disclosure of internal emails from Spartafield arose when Mr Leon was giving evidence and so he was effectively in purdah; he was not able to give instructions. In part of her evidence, Ms Nyman had indicated that she had been told to stay on in the morning of the first day, but the Master made a finding in his decision that Ms Nyman's note of the first day of the trial

on 4 July indicates that she attended with a trainee, but the attendance of the trainee had not been charged. It then records in the third paragraph that,

> "After court she discussed matters with counsel and counsel wanted her to be at court to deal with disclosure, and Mr Grant also agreed, and Ms Nyman told me today that they said that they would square the matter with Mr Leon."

16 On the evening of that first day of trial, at 7.21 in the evening, Mr Leon sent an email to Ms Nyman providing in the following terms,

> "A further point is that I emailed you advising that a junior would not be necessary but we would require your services for approximately the first hour to rebut any problems with GD law about disclosure. You turned up with a junior and eventually advised that she would not be chargeable.
>
> I then instructed you that we would not require your services once I started giving my witness statements but, despite that, you stayed for the rest of the day.
>
> I am your client and I am the person that instructs you and we do not require you to stay, nor do we require you tomorrow."

17 A further development in relation to the progress of the trial was that it lasted for five days rather than the originally estimated two days.

18 I turn now to the Master's decision. and when the detailed assessment first came before him on 31 January 2018, a preliminary issue was taken and the point taken was that the costs recoverable should not exceed the estimate that had been given at the outset. On that preliminary issue he ruled that,

> "I am satisfied that the claimant was concerned to control the costs of this claim. That is evident from the decision to instruct counsel directly. There are repeated instructions to Ms Nyman to limit her involvement in the belief that any costs incurred would not be recovered from Penten."

19 On that basis he ruled that the costs estimate that had been given in the form of Precedent H was not relied on by the respondent and, indeed, none of the costs estimates produced by the appellant had been relied on by Spartafield.

20 Having made that ruling, he went on to consider the significance of the costs information that the claimant was given and he concluded that,

> "Notwithstanding my conclusion on reliance the costs information provided by the defendant does, of course, remain relevant when considering the reasonableness of the defendant's fees. Initial budget (inaudible) costs of £3,845 and estimated profit costs of £41,500 would provide a useful yardstick as to reasonableness of the defendant's fees and, insofar as there is a difference with what has been billed, that will require an explanation."

21 He went on to point out that,

> "It is not a function of this court to punish solicitors for failing to comply with their regulatory or professional obligations. However, it seems to me that the defendant did not provide the claimant with the best possible information about the likelihood of all costs of the matter.

> While I accept that additional, unanticipated work was required, it is important to bear in mind that none of this work was the subject of any further estimate. The claimant was simply not told what this work was likely to cost until the final invoice. I cannot accept the defendant's assertion that it could not realistically be expected to provide estimates of this further work. Solicitors are expected to be in control of the costs incurred. Where unanticipated work is required, they should be able to inform the client of the likely costs of this further work before it is incurred. The defendant's failure in this case to provide costs information in respect of the work which was not included in the estimate that was given is a factor which the court should take into account when considering the reasonableness of costs of that work."

22 This ruling was not appealed and, in this way, he decided that the costs estimate in the form of the Precedent H was not a cap for recovery and the matter was fixed to return to court in August 2018, when two days of court time were used.

23 When the matter came back, he heard the parties over 1 and 2 August 2018 and, on 1 August, he made a decision which was called the Shannon judgment, effectively concluding that the appellant had at least in part failed to follow the client's instructions regarding disclosure of John Shannon's files and that some work had been done unnecessarily and should be excluded from the bills of cost. This finding was not subject to appeal. On 2 August, the Master made the decisions which are now under appeal.

24 As regards ground 1, the decision appealed is set out in paras.6 to 12 of the judgment I was provided with. The appellant says that the nub of the decision challenged was at para.11. I need not set out these paragraphs now, but they are to be treated as incorporated into my judgment. As regards ground 2, the decision appealed is para.4 and paras.13 to 15 and para.29. Again, I need not set out these paragraphs verbatim here.

25 I turn to the appellant's position on the appeal, dealing first with ground 1. The appellant's position was that the decision was wrong to refuse the costs of attendance of the solicitors at trial after the first day on the basis that they were instructed not to attend, because the solicitors were instructed. The basis of this argument was essentially factual. Mr Munro, counsel for the appellant, argued that Mr Grant had required Ms Nyman to attend on the second day and that he was authorised to give instructions expressly under the letter of engagement and that he had said he would square it with the client and this was never challenged at the detailed assessment, and that Mr Leon had not objected when Ms Nyman had attended for a further two days. Mr Munro also submitted that I should take account of the fact that Mr Leon was not the client, that the client was Spartafield Limited, who had authorised Mr Grant to work on the litigation. On this basis, the appellant submitted that there was express contractual authority for Ms Nyman to attend on days 2 and 4 of the trial.

26 I note that this argument does not cover the disputed fees that were incurred in relation to the trainee's attendance. More importantly, the argument does not meet the test for intervention on an appeal of this sort. The judge took all the relevant matters into account. He took into account that there had been the discussion with Mr Grant and Mr Darling, when Mr Grant had said that he would square it with the client, and he had taken into account that Ms Nyman had attended the following days without evidence of objection. The Master did not need to spell out that he knew Spartafield had instructed the solicitors rather than Mr Leon personally. The Master was entitled to come to the view that Mr Leon's instructions, given

on the night of the first day of the trial, some hours after the parties had left court so that the after court discussions would not be assumed to be the most recent, prevailed over Mr Grant's request for Ms Nyman to attend the following day. He was certainly entitled to conclude that Mr Leon's instructions prevailed over counsel's assurances.

27 In coming to his conclusions, the Master made no error of principle or unreasonable or arbitrary factual finding and he made no failure to take into account relevant matters.

28 In conclusion, I dismiss the appeal made on this ground.

29 Turning to ground 2, here the appellant's objections that the Master applied the costs estimate in the form H Precedent as a yardstick to assess costs which were incurred unexpectedly and were not included in the costs estimate. The most concrete example of the error was given in relation to para.29 where the appellant had claimed fees for 15 hours of partner's time and 2 hours 24 minutes of an associate's time for work done considering and revising the costs budget for the purposes of applying for costs. Here, the appellant had already conceded that 1.8 hours was not something they would seek to recover, so the work in dispute was 13 hours of the partner's time and 2 hours 24 minutes of the associate's time. The Master allowed six hours of the partner's time plus one hour of the associate's time.

30 The appellant's larger objection in financial terms was as to the assessment of costs of the disclosure work that had to be done in the first few days of trial and also the trial preparation work that had escalated in the few days before trial and also during trial. In relation to disclosure, their invoice showed a headline sum of £32,500 for disclosure, having originally estimated £4,000 in the form H estimate. In total they claimed 102.3 hours on the extra disclosure and 154 hours for work done preparing bundles. The Master aggregated the time spent on the extra disclosure and the work done on trial and bundle preparation because these were aspects where there had been new work for which no estimate was given. For this work, he allowed 27 hours' partner time, 10 hours for assistance and 115 for the trainees.

31 I asked the appellant to identify how the Master had erred in applying the estimate of a yardstick. The appellant's counsel did not give me a specific explanation or analysis of the causal connection between the estimate and the actual award of costs. The appellant's point was a broader and simpler one. It contended that it would be an error of principle for the Master to take into account the estimate as a yardstick for work that was outside the estimate. This would be a relevant question on appeal as to whether the Master erred in principle or took something irrelevant into account. The appellant's position was that it would be simply wrong for the Master to balance costs that are outside the estimate, including wholly new and unexpected costs, as against the costs that have been estimated, and he suggested that to balance these two sorts of costs against each other would be both unfair and unprincipled. In making this point, he relied on the Court of Appeal's decision in *Garbutt v Edwards*, and he suggested this was authority to suggest that it would be correct to take account of an estimate that turns out to be incorrect, but only where a costs judge had made a finding that the correct estimate would have made a difference to the outcome.

32 A point that was also made in the appellant's skeleton argument was that the Master should not have referred to the estimate as a yardstick or used it as such in circumstances where he had concluded that Spartafield had placed no reliance on the various estimates given.

33 I will not attempt fully to summarise Spartafield's case in answering the grounds of appeal. Essentially, on ground 1, Spartafield's position was that the Master was entitled to form the

conclusion that he had done, that he had heard both parties, he had all the information available to him, and it was a conclusion he was entitled to come to, particularly as a specialised costs judge. In relation to ground 2, the claimant's position was – I summarise very briefly – that the Master had been fully aware that the majority of the costs in question were unanticipated new costs that had not been covered by the estimate, that he had made the right decision in his decision in January 2018 when he had addressed the significance of the estimate and the significance of the information coming from the appellant regarding costs and that the judge had been quite correct to take into account that the appellant had not updated the estimate and simply had not given an estimate for large chunks of the work done.

34 I turn to my findings on the Master's approach to the costs and the estimate, in particular ground 2. There was much discussion in argument about the Master's reliance on "the yardstick". It perhaps would be useful and fair to explain how this terminology comes about. Perhaps the first use of the concept was in the Court of Appeal's case in *Leigh v Michelin Tyre* in 2003, which concerned an estimate that turned out to be inadequate, and there the Dyson LJ referred to the relevance of estimates and said at para.26,

> "What follows is not intended to provide an exhaustive guide as to the circumstances in which a costs estimate may be taken into account in determining the reasonableness of the costs claimed, but it should assist judges … 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."

35 The Master used similar language. That case was not dealing with a situation where the work in question was never in the estimate. The appellant says that the situation here is different; this is an "apples and pears" situation, so that the estimate cannot fairly be taken into account, even if "apples and pears" is my own crude explanation of the point.

36 Some further guidance on the role of an estimate has been given by Morgan J in two decisions called *Mastercigars Direct v Withers*, the first was reported as [2007] EWHC 2733 (Ch) and, the second, [2009] EWHC 651 (Ch). In the 2007 case he comments at para.92,

> "In my judgment, so far as a statement of legal principle is concerned, these cases are helpful and ought to be applied in the present context in the following way. 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 [that he referred to earlier] 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*, these two cases do not themselves provide very much detailed guidance as to how one should react on the facts on 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."

37 Then Morgan J in the 2009 case goes on to give quite detailed guidance regarding the situation where a client contends that its reliance on an estimate should be taken into account in determining the figure which it is reasonable for the client to pay. On that subject, he says, at para.54,

> "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."

38 The Master expressly adopted this approach in his decision on the preliminary issue as to the relevance of the estimate.

39 These dicta essentially deal with the specific situation where a party contends that its reliance on the estimate should be taken into account. Here, the Master found no reliance on the estimate and this was never relied upon as the basis for using the estimate as a yardstick, and it was never put forward by Spartafield either. On this basis, I reject the appellant's argument that, by having concluded that the estimate was not relied upon, that in itself meant that the Master made an error of principle and could not refer to it as a yardstick or otherwise take it into account.

40 I turn to the situation here where the Master expressly acknowledged that the work in question was new and unanticipated work that was not covered by the estimate. The question arises as to the relevance of an earlier assessment in that situation. The appellant says that there is no clear authority covering this situation and it is a somewhat new question. The appellant, as I explained above, says that the estimate is not relevant and cannot be used as a yardstick unless there is a finding as to what would have happened if the estimate had been correct or had been corrected. I do not accept that *Garbutt v Edwards* is authority for the proposition put forward by the claimant. First, it is a case governing *inter partes* costs. Secondly, it lays down a broad proposition that where a judge is assessing costs, it is a matter for her discretion as to whether to take into account any failure by a solicitor to give an estimate. Indeed, Arden LJ recognises that in a situation between client and solicitor, it may be open for the party to argue that in deciding the reasonable amount to pay for work done, regard should be had to the level of costs which he had been led to believe represented a worst case assessment of his potential liability. The Master recognised the existence and scope of this discretion by saying that the purpose of assessment between a client and solicitor is not to penalise a solicitor for breach of compliance with regulatory requirements or professional good practice. He recognised the estimate could not be used to disallow all costs. As a matter of principle, I also consider that a judge, especially a costs judge who will understand the estimates and have strong experience of them, may usefully take those estimates into account in assessing the reasonableness of costs that have arisen outside the estimate but are new and unexpected.

41 In addition, it cannot be said that the Master here erred in considering the estimate as a yardstick such that it was the only relevant consideration he took into account. To the contrary, the Master made clear beyond doubt that he took into account the fact that the

costs in issue were new costs and unanticipated. And he also made clear that his decision was heavily influenced by the fact that the appellant had failed to update their estimate or give any estimate in relation to significant quantities of work, contrary to the expectations of the professional regulations, and that they had also been responsible for some of the work created due to the late disclosure of the Shannon file.

42 I accept Spartafield's submission that it is significant that the Master did not disallow the new and unexpected costs, so he did not use the estimate as a means for blocking the recovery of costs for matters not included in the assessment. To the contrary, he accepted that the costs in question were outside the scope of the estimate and actually allowed the appellant to recover 185 per cent of the profit costs that had been originally estimated. In my view, the term yardstick is not to be given some strict or literal interpretation. It is not intended to mean a strict benchmark or some strict or technical table of conversion. At most, the term is referring to an earlier measurement that a judge may find useful in allowing heads of costs or assessing the reasonableness of costs claimed. Typically, the term is used to measure heads of cost that have already been anticipated, but the judge could use an existing estimate of some work in order to estimate the reasonableness of fees for separate and perhaps unanticipated work. One example raised in argument would be where costs of dealing with certain witnesses had been estimated; that estimate might be relevant and properly taken into account in assessing the costs of new and unexpected witnesses.

43 Here, the Master had carefully considered the relevance of the estimate in his decision in January 2018 that was not appealed. He had correctly come to the conclusion that he could take it into account in assessing fees and also that in regards to unanticipated work he could take into account the failure of the appellant to provide an estimate of what those costs would be.

44 When, in August, he came to the next stage of the detailed of assessment, he was entitled to take into account the earlier assessment, together with the appellant's failure to provide an updated estimate or any estimate in relation to new work.

45 In my view, the original estimate was of some use in making clear that this was a case where counsel was taking a leading role, where solicitors were being expected to keep costs to a minimum and where, in that context, £42,000 was considered a reasonable estimate of solicitors' costs to the end of trial. The Master made it clear beyond doubt that it could not be regarded as decisive in face of unanticipated costs, but it represented how both sides had estimated costs at that stage, in particular how the appellants had given an estimate that had crossed the line at that stage which was less than three months before trial. I regard it as significant that the estimate was not used by the Master as the sole factor to guide his assessment and it did not dictate what costs would be recovered. Indeed, the appellant could not identify any direct link relating to the estimate that established an error of principle. The complaint was simply in the Master referring to it as a yardstick.

46 In my view, the Master correctly took the estimate into account as one of many factors in assessing what was a reasonable sum to allow for the costs in question. His decision, whether regarded as an evaluation or an exercise of discretion, was one he was entitled to come to and reflected a careful and fair consideration of all the matters put before him by both parties.

47 In conclusion, I do not allow the appeal on either of the grounds of appeal.

CERTIFICATE

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