When “shall” means “when it suits you”

A chronological tour of precedents leads to the recent case of Garbutt v Edwards, which brings new debate to the issue of costs

BY TONY GUISE

Practice Rule 15 provides that solicitors “shall give information about costs and other matters”. Like all the other rules which govern our professional lives as solicitors, rule 15 has statutory effect as we learn from the House of Lords’ decision in *Swain v The Law Society*. The rules made by the Law Society under the Solicitors Act 1974 have statutory force as if they were part of the Act because Parliament has given the Law Society that power.

The need to give estimates before undertaking work, save in specified and highly limited exceptions, is therefore not only good professional (and business) practice, but also a statutory, mandatory, requirement.

This much is clear from *Awwad v Geraghty*, in which the court held that a failure to adhere to the rules concerning Conditional Fee Agreements may disentitle the solicitor to his or her fees. Schiemann, LJ said: “...the present case is one where it seems to me that, if such an agreement is against public policy... then it should not be enforced by the courts. It would be inappropriate to leave the enforcement of public policy purely to the disciplinary processes of the professional body”.

On 12 March, 2002, Costs Judge Wright held in the case of *Islington and Shoreditch Housing Association v Beachcroft Wansbroughs* that providing estimates was a statutory requirement and failure to provide estimates amounted to a special circumstance justifying the bill being assessed out of time.

The next decision in our chronological tour of the precedents in this highly esoteric but (certainly to the profession) highly important area of law is *Slade v Boyes Turner*, in which, on 29 September, 2003, Costs Judge Campbell held that a failure to provide accurate estimates or to notify the Slade brothers of increased hourly rates disentitled the solicitors to recover their costs in full. The solicitors were held to lower hourly rates and estimates which were significantly lower than the costs actually incurred.

That brief review summarises the common law and statutory context of the mandatory imperative in rule 15 that solicitors “shall” give estimates of their costs.

Garbutt v Edwards is a case that reached the Court of Appeal (Lady Justice Arden was the lead judge) on 13 July, 2005. The judgment was handed down on 27 October. Like so many of these costs decisions, its facts are unremarkable. There was a long-running boundary dispute between neighbours; allegations of trespass and a claim for an injunction were, in due course, added. Orders were eventually made as to the payment of costs and it was discovered that whilst the receiving party had been made aware of the hourly rate he would be charged, he was never given an estimate of the likely total costs. Nor, it would seem, had any estimates been provided at either the allocation or listing questionnaire stage.

Would this failure disentitle the receiving party from recovering any costs? In brief, the argument that ensued in *Garbutt v Edwards* ran as follows:

- the indemnity principle entitles the receiving party to recover from the paying party such sum as the receiving party has reasonably incurred and is obliged to pay;
- rule 15 requires costs estimates to be provided to entitle a solicitor to properly charge his or her client;
- if no estimates are in fact provided, such a breach of the statu-

tory requirement disentitles the solicitor from recovering any sum from his or her client; and

• therefore, if the receiving party has no obligation to pay his or her own solicitor then, under the Indemnity Principle, he or she has nothing to recover from the paying party. The paying party has no liability.

This sequence of steps would certainly follow from the decisions we looked at earlier, in particular, *Awwad and Slade*. This was not the outcome in *Garbutt v Edwards*.

Lady Justice Arden gave the lead judgment with which Lord Justice Brooke and Lord Justice Tuckey agreed. They sat with Costs Judge Campbell (who decided the case of *Slade*, above) and I understand the Senior Costs Judge also made a contribution to the decision.

In the court below, HHJ O'Brien had held that whilst a solicitor who gives an estimate which he or she exceeds without notification may be held to recover an additional sum limited to a maximum of 15 per cent of the estimate (see *Wong v Vizards*), in the case where a solicitor gives no estimate, he or she may recover fees free of any such restrictions. The judge's reasoning was that a client knows he or she will be charged something and, therefore, should pay something.

Lady Justice Arden's conclusions in *Garbutt v Edwards* were:

• the rules are there to protect the client, not to relieve paying parties of their obligations to pay costs which have been reasonably incurred;

• failure to give an estimate does not make performance of the retainer unlawful and therefore unenforceable;

• in rule 15, the word "shall" is not mandatory but exhortatory; and

• whilst the Law Society (who intervened) did not contest the proposition that failure to provide estimates would mean a solicitor cannot recover any remuneration at all (consistent with *Slade* and the earlier Court of Appeal decision of *Awwad*), nevertheless this Court of Appeal found such reasoning repugnant.

The Law Society's response to the outcome was: "The Law Society views the Court of Appeal's decision in *Garbutt v Edwards* as sensible. The Society submitted to the court that the effect of breaching rule 15 is not to render the fees irrecoverable. The court agreed with the Society that there are disciplinary sanctions available, namely under the Solicitors Act 1974 in relation to the Council of the Law Society. The Society believes that if a relevant breach has occurred then the solicitor should be called to account and a reasonable and proportionate sanction should apply".

Lady Justice Arden summed up the situation with these words: "Where there is simply no estimate at all for the costs in dispute, then the guidance 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".

There will, I am sure, be few receiving parties likely to accept that they would have paid less (and, therefore, be able to recover less) when such an Arden inquiry is undertaken.

The result is that a solicitor who gives an estimate but fails to keep it updated may find he or she limited to no more than an extra 15 per cent of that estimate under *Wong*. Whereas, by not providing any estimate the solicitor may charge what he or she likes. Some solicitors may be led to believe by *Garbutt v Edwards* that it makes more business sense not to give any estimate at all.

The need to give estimates before undertaking work, save in specified and highly limited exceptions, is therefore not only good professional (and business) practice, but also a statutory, mandatory, requirement.

Another issue concerns the professional position. Is it now arguable that failure to provide a costs estimate does not amount to inadequate professional service?

Garbutt v Edwards only concerned a claim by a paying party to take advantage of the receiving party's solicitor's failure to give estimates in order to avoid liability to pay. In other words, this was an inter-parties costs assessment. It may be open to argument (I gather this is the view of the Supreme Court Costs Office) that the decision in *Garbutt v Edwards* about the status of estimates cannot assist a solicitor in a solicitor and own client assessment. That point of principle will shortly be tested as my firm is retained in a case where our client previously instructed a solicitor who appears to have failed to give any estimates leading the client to pay a six figure sum in costs for some court proceedings. The part 8 claim was issued recently and will come before the SCCO shortly.

Tony Guise is a partner in GUISE, the specialist solicitors' compliance practice, and a member of the Solicitors' Assistance Scheme.