

## 6. Costs

### 6.1 The basics

To deal with costs you need to be familiar with:

- The relevant parts of the CPR (see 'Civil Procedure' ('The White Book') which includes the rules and a comprehensive commentary).
- Costs Practice Direction (also in 'The White Book' etc).
- The Guide to the Summary Assessment of Costs (written by the SCCO but also in 'The White Book': para. 48.16 in the 2006 edition) – see Appendix 1 at the end of this section.

### 6.2 Bases of costs

#### *6.2.1 Solicitor-and-own-client costs*

'Solicitor-and-own-client' costs belong to the solicitor who will agree the method of charging (e.g. on an hourly rate or a fixed fee) with the client. Hourly rates reflect the cost of running the practice plus a profit element. Similarly counsel, through their clerk, will agree a fee.

Disputes over such costs are rare and are dealt with by costs judges.

#### *6.2.2 Inter-partes costs*

'Inter-partes' costs belong to the client and are awarded by the court to indemnify the client in whole or in part for the costs which the client has paid or agreed to pay to their solicitor. This is the aspect of costs which concerns all judges.

At the conclusion of a trial or hearing the successful party will invariably seek an order that the unsuccessful party should pay their costs. This must be dealt with by the trial judge who will decide whether to make an order for costs and if so on what terms. Unless the trial judge carries out a summary assessment (see below) the actual amount of costs will be determined later by a costs judge.

Owing to the fact that the costs belong to the client for the purpose of indemnifying the client, it follows logically that the inter-partes costs cannot exceed (and are often less than) the solicitor-and-own-client costs. This is the indemnity principle (see para. 47.14.4 of the 'White Book'.)

Do not confuse the indemnity principle with the indemnity basis. The former still exists (even though it sits incongruously alongside conditional fee agreements) but there is frequent talk of its abolition.

### 6.2.3 Public funding (Legal Aid)

Where a client is publicly funded the solicitor's (and counsel's) freedom to charge solicitor-and-own-client costs does not apply. Instead regulations prescribe hourly rates and other fees to be paid to solicitors and counsel. Public funding is considered further below.

## 6.3 The framework of the rules

The framework is presented in the following parts:

- **Part 43** – Scope of Costs Rules and Definitions
- **Part 44** – General Rules about Costs
- **Part 45** – Fixed Costs
- **Part 46** – Fast Track Trial Costs
- **Part 47** – Procedure for Detailed Assessment of Costs and Default Provisions
- **Part 48** – Costs – Special Cases
- **Costs Practice Direction**

## 6.4 Discretion to award costs

### 6.4.1 Section 51 SCA 1981

'Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –

- (a) the Civil Division of the Court of Appeal
- (b) the High Court Service
- (c) any County Court

shall be in the discretion of the court.'

Whether to make an order for costs and what order to make involves the application of CPR Pt 44.3:

Rule 44.3(1) The court has a discretion. It should be exercised by reference to the overriding objective and the framework of r.44.3, and where the order for costs is contested reasons must be given.

Rule 44.3(2) The general rule: the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order.

Rule 44.3(4) In deciding what order (if any) to make have regard to all the circumstances including:

- conduct (see r.44.3(5) for its expanded meaning)

- partial success
- offers to settle whether or not complying with Pt 36.

If the general rule is departed from there is a menu of orders: r.44.3(6) and (7). Rule 44.3(7) strongly discourages orders for costs relating to distinct parts. Therefore do not make orders for costs of particular issues, nor of claim and counterclaim separately. Using r.44.3(6)(a) – a proportion of the other party’s costs – is the best means of departure from the general rule, and it is not often necessary to go further down the list.

### 6.5 Interlocutory costs orders

Rule 44.3 applies to these as much as to the final order for costs in an action. But Pt 44 Costs PD 8.5 gives a table of the most commonly made interlocutory orders, with an explanation.

Particular orders:

- **Costs reserved** The decision about who should pay the costs is left to be decided later. Only do it in that rare case where a later judge will be in a better position to decide. If costs are reserved and not later revisited, then they will be treated as having been in the case.
- **No order for costs** Neither side will be able to recover the costs from the other in the future: i.e. each side bears his own costs. The effect of simply saying nothing about costs is the same: costs of proceedings or any part of proceedings are not recoverable from another party without an order saying so (r.44.13(1)(a)).
- **Claimant’s/defendant’s costs in the case** A useful halfway house between costs in the case and no order for costs. The party in whose favour the order is made will get his costs if in the end he is awarded the costs of the action; the other party will never get his costs of this part of the proceedings.

### 6.6 The basis of assessment of costs

There are two bases (r.44.4(1)):

1. the standard basis
2. the indemnity basis.

But the court will not, in either case, allow costs which have been unreasonably incurred or are unreasonable in amount.

The standard basis is the ‘default basis’ – see r.44.4(4).

#### 6.6.1 *The standard basis*

The court will:

- (a) only allow costs which are proportionate to the matters in dispute; and

- (b) resolve any doubt which it may have as to whether costs are reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

### ***6.6.2 The indemnity basis***

The court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

### ***6.6.3 When to order costs of the indemnity basis***

Ordering costs in this situation seldom occurs. The Court of Appeal has declined to set out circumstances in which indemnity costs are appropriate, except that the facts of the case or the conduct of the parties must be such as to take the case away from the norm. It is not enough to order indemnity costs that a party has simply lost: unreasonableness, underhandedness, deliberate time wasting, pursuing obviously hopeless or misconceived litigation, abuse of the court's procedure and oppressive conduct are examples of occasions for an order on the indemnity basis.

### ***6.6.4 Proportionality***

This is an important but elusive concept. The framework in the rules is as follows:

#### **'Part 1(2) the overriding objective**

- (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- (2) Dealing with a case justly includes, so far as is practicable –
  - (a) ensuring that the parties are on an equal footing;
  - (b) saving expense;
  - (c) dealing with the case in ways which are proportionate –
    - (i) to the amount of money involved;
    - (ii) to the importance of the case;
    - (iii) to the complexity of the issues; and
    - (iv) to the financial position of each party;
  - (d) ensuring that it is dealt with expeditiously and fairly; and

allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.'

When considering proportionality and reasonableness the court must have regard to all the circumstances (r.44.5(1)).

Part 44.5(3) provides further:

- ‘(3) The court must also have regard to –
- (a) the conduct of all the parties, including in particular –
    - (i) conduct before, as well as during, the proceedings; and
    - (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
  - (b) the amount or value of any money or property involved;
  - (c) the importance of the matter to all the parties;
  - (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
  - (e) the skill, effort, specialised knowledge and responsibility involved;
  - (f) the time spent on the case; and
  - (g) the place where the circumstances in which work or any part of it was done.’

Pt 44.5 is supplemented by Costs Pt 44 PD 11.1-11.3:

‘Pt 44PD.5 Section 11 Factors to be Taken Into Account in Deciding the Amount of Costs: Rule 44.5

- 11.1 In applying the test of proportionality the court will have regard to rule 1.1(2)(c) The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.
- 11.2 In any proceedings there will be costs which will inevitably be incurred and which are **necessary for the successful conduct of the case**. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute.
- 11.3 Where a trial takes place, the time taken by the court in dealing with a particular issue may not be an accurate guide to the amount of time properly spent by the legal or other representatives in preparation for the trial of that issue.’

The leading case is the Home Office v Lownds [2002] EWCA Civ 365 (for an extract see Appendix 2 at the end of this section). The court fastened on the words underlined in Costs PD 11.2 above. Costs are not disproportionate if they are necessary for the successful conduct of the case. If they are necessary, then a reasonable amount should be allowed in respect of them.

## 6.7 Summary assessment of costs

### 6.7.1 *When summary assessment occurs*

The amount of costs to be paid by one party to another may be assessed summarily, or be the subject of detailed assessment by a costs officer (usually a district judge). The court making an order for costs must consider whether to assess them summarily. Unless there is good reason not to do so the general rule is that costs will be summarily assessed:

1. at the conclusion of a fast track trial, in which case the order will deal with the costs of the whole claim; and
2. at the conclusion of any other hearing, which has lasted not more than one day. If the hearing has disposed of the whole case (e.g. under Pt 24) the assessment will deal with the costs of the whole case.

Summary assessment has to be done by the judge who heard the case or application. It cannot be delegated or referred to anyone else; but it may be heard by the same judge on a subsequent day.

If you summarily assess costs you have the responsibility to go through the amount claimed and decide the figure. The parties can agree the amount of costs as a sum, in which case the amount is 'by consent £X'. Otherwise, even if no coherent fight is put up, you have to go through the items claimed and decide the sum for yourself, because you have to award a sum that is not disproportionate or unreasonable.

Payment on account: If detailed assessment is ordered, the court should consider whether to exercise its power to order the paying party to pay such sum of money as it thinks just on account of costs (see r.44.3(8)). As a general rule, if you have to order a detailed assessment, always order a payment on account.

### 6.7.2 *Particular cases: warning bells*

Where the receiving party is a Legal Services Commission funded client (i.e. legally aided). In this case the costs that are payable to him under an order must not be summarily assessed, but must be sent for detailed assessment (see Costs 44 PD 13.9).

Where the paying party is a Legal Services Commission funded client. There are restrictions on ordering such a person to pay costs. This is dealt with as a separate topic below.

Where the receiving party's costs are subject to a conditional fee agreement (CFA). CFAs are dealt with as a separate topic below.

Where costs are payable by or to a person under disability there should normally be a detailed assessment (r.48.5).

### 6.7.3 *The information you get and when*

You rarely get much information and typically at the last minute. A statement of costs estimated as closely as possible in Form 260 should be filed at court and served on the other party as soon as possible and in any event not later than 24 hours before the date fixed for the hearing. The statements are often served late. Not serving one in time (or even at all before the question of costs comes to be dealt with) should be met with a proportionate response, and disallowing costs entirely will not be proportionate. The question is, 'What prejudice has there been to the paying party and how can that be alleviated?' (*MacDonald v Taree Holdings Limited* [2001] CPLR 439; [1001] 1 Costs LR 147; [2000] *The Times* 28 December).

Form 260 gives effect to the rule in Costs 44 PD 13.5(2), which requires a party who intends to claim costs to provide a statement in the form of a schedule dividing up the items claimed as follows:

- (a) the number of hours to be claimed
- (b) the hourly rate to be claimed
- (c) the grade of fee earner
- (d) the amount and nature of any disbursement to be claimed, other than counsel's fee for appearing at the hearing
- (e) the amount of solicitor's costs to be claimed for attending or appearing at the hearing
- (f) the fees of counsel to be claimed in respect of the hearing, and
- (g) any valued added tax (VAT) to be claimed on these amounts.

The principal elements are:

- (i) solicitor's hourly rate
- (ii) solicitor's time
- (iii) counsel's fees
- (iv) expert's fees
- (v) other disbursements
- (vi) VAT.

Solicitor's time: There are four hourly rates:

- A Solicitors with over eight years' post-qualification experience including at least eight years' litigation experience
- B Solicitors and legal executives with over four years' post-qualification experience including at least four years' litigation experience

- C Other solicitors and legal executives and fee earners of equivalent experience
- D Trainee solicitors, paralegals and other fee earners

Current rates for different parts of the country are co-ordinated by the Senior Costs Judge and regularly updated (see Appendix 1 at the end of this section).

Two points to note:

1. The grade of fee earner used has to be justified as being reasonable. In smaller cases a Grade A or B can be justified for a small amount of time to supervise and oversee the case, with most of the work being done by Grade C or D.
2. What happens where the solicitor's firm is in an area that has higher rates than the court where the case is proceeding? For example, a West End solicitor (Rate B £210) conducting a case at Lincoln County Court (Rate B £152).

The question to be asked is was it reasonable for the party to engage this solicitor for this work, or should he reasonably have gone to a local cheaper one? See *Wraith v Sheffield Forgemasters and Truscott v Truscott* [1998] 1 WLR 132 (and the 'White Book' at 47.14.6).

### Counsel's fees

There are no guideline rates for counsel's fees. The classic statement of principle is that a proper measure is to estimate what fee a hypothetical counsel, capable of conducting the case effectively, but unable or unwilling to insist on the higher fees sometimes demanded by counsel of pre-eminent reputation, would be content to take on the brief (see Pennycuik J in *Simpsons Motor Sales (London) Ltd v Hendon Borough Council* [1965] 1 WLR 112). There is a table of counsel's fees derived from data collected in the Supreme Court Costs Office, set out in Appendix 2 to the guide to Summary Assessment of Costs (See Appendix 3 at the end of this section). . Have regard in particular to the appropriate seniority of counsel for the case.

Skeleton arguments are not usually provided on the fast track. Generally, preparation of a skeleton argument is included in the brief fee (*Loveday v Renton (No 2)* [1992] 3 All ER 184. (In the Court of Appeal see *Hornsby v Clark Kenneth Leventhal* [2000] 4 All ER 567).

Where it was not reasonable to instruct counsel the fee should not be allowed, but for a hearing it will often be cheaper to instruct counsel than for a solicitor to do the advocacy. Attention will then move to the reasonableness of attendance on counsel, and whether there should be a trade off between the cost of counsel's paperwork and the solicitor's time spent or grade of fee earner.

#### 6.7.4 Miscellaneous rules

**Routine communications.** Routine letters, e-mails and telephone calls out are charged at 6 minutes each (ie one tenth of the hourly rate). Routine letters, e-mails and telephone calls in are not charged for.

**Travelling expenses.** Travelling expenses and waiting time are charged at the rate agreed with the client, subject to the maximum of the appropriate hourly rate for the fee earner concerned. Expenses for **local travel** are not allowed. That is normally taken as travel within a radius of 10 miles of the court concerned.

**Office and administration costs.** These are not allowed. The cost of them is included in the hourly rate allowed for the fee earner. Thus postage, couriers, telephone, fax and photocopying will not normally be allowed. Where a claim is being made for such items (e.g. for photocopying) it must be justified on the basis of exceptional circumstances.

**Cost of preparing the bill.** A claim may be made for the reasonable costs of preparing the bill of costs.

**VAT.** Where VAT is claimed between the parties, what is sought is not payment of VAT, but an indemnity against the amount of VAT that the litigant will have to pay his solicitor. If, therefore, the receiving party is registered for VAT and able to recover the VAT liability as an input from HMRC, no amount in respect of VAT is due from the paying party.

#### **6.8 The approach to assessment: *The Home Office v Lownds*; proportionality; reasonableness; necessity**

The Court assessing costs should adopt a two-stage approach:

1. Look at the total amount claimed and decide, applying Pt 44.5(3) and the overriding objective, whether the amount is proportionate
2. then go through the bill item by item. If the global amount was proportionate, then all that is required is to see that each item can properly be claimed and is reasonable in amount; if the global amount was or appeared to be disproportionate, then allow each item only if it was necessary for the conduct of the litigation.

The difference between the two approaches may be elusive. 'Necessary' is a more rigorous test than judging for reasonableness items in a bill, which is proportionate, and you will be more ready to reduce or disallow items where the global figure appears disproportionate.

#### **6.9 Conducting the summary assessment – practical tips**

It is easy for the assessment to turn into an unstructured conversation, with no adequate record of what has happened. These steps are suggested:

1. Expect the process to take about 30 minutes.
2. Decide the general order for costs and whether to assess summarily.
3. Have *both* parties' statements of costs in front of you. It is useful to be able to compare one with the other.

4. Hear the paying party and then the receiving party on whether the whole amount claimed is proportionate. Give your decision on that with reasons.
5. Hear the paying party and then the receiving party on the different items, whether you are applying the test of necessity or the less strict test of reasonableness. You can hear one side on all items and then the other, but some judges find it more convenient to hear both sides item by item. Take notes and amend the costs statement as you go along. Give reasons for your decision on each item orally so that they are recorded.
6. Get the advocates to check the resulting arithmetic at the end, and mark up the statement accordingly, leaving it in the court file.
7. Your order will separately record solicitors' fees, counsels' fees, disbursements, VAT and then give the total to be paid.

### 6.10 Fast-track trial costs

Apart from the small claims track, which has a limited costs regime, the main area where costs are directly controlled is that of fast-track trial costs. Part 46 governs such costs. It will be necessary to refer to its provisions when assessing costs. The main rules are as follows.

#### 6.10.1 Prescribed amounts

The costs of an advocate preparing for and conducting the trial are fixed. The court may not award more or less than the prescribed amount (Pt 46(2)). The amounts prescribed are:

##### Value of claim

Up to £3,000	£350
More than £3,000 but not more than £10,000	£500
More than £10,000	£750

The value is: for costs awarded to the claimant, the amount recovered excluding interest, costs, and any reduction for contributory negligence; and for costs awarded to the defendant, the amount specified in the claim form excluding interest and costs.

#### 6.10.2 Additional amount for attendance on advocate

Where the court considers it necessary for a legal representative to attend to assist the advocate a further £250 may be awarded. Necessary is not a low hurdle. Often attending counsel at a fast-track trial will not be necessary.

#### 6.10.3 Costs on trial of issue

Where a separate issue is tried rather than the whole case, the trial costs are not more than two thirds of the full trial amount, subject to a minimum of £350.

#### ***6.10.4 Occasions where the fixed amount can be departed from***

These are:

1. When the additional liability under a CFA can be added (r.46.3(2A)).
2. Where the costs are being apportioned to reflect, for example only partial success, the apportionment can be applied to the fixed amount (r.46.2(2)).
3. The fixed amount may be reduced or increased on account of unreasonable or improper behaviour on the part of one or other party at the trial (r.46.3(7) and (8)).

#### **6.11 Funding arrangements**

In practice these are success fees and insurance premiums that may be recovered as costs against the unsuccessful defendant in conditional fee cases.

It may be better to avoid on a summary assessment contentious issues arising from CFAs. However, the law is settling down and becoming clearer so more cases can be dealt with summarily.

##### ***6.11.1 Definitions***

A 'funding arrangement' is an arrangement where:

1. there is a success fee within the meaning of s.58(2) of the Courts and Legal Services Act 1990
2. a person has taken out an insurance policy to which s.29 of the Access to Justice Act 1999 applies (recovery of insurance premiums by way of costs)
3. a person has made an agreement with a membership organisation to meet his legal costs (typically a trade union).

'Additional liability' means the percentage increase (ie the success fee), the insurance premium or the additional amount payable in respect of provision made by a membership organisation.

'Base costs' are the costs other than the amount of any additional liability, i.e. the ordinary amount of costs.

##### ***6.11.2 Steps to take***

**At the interlocutory stage.** The court will not assess any additional liability until the conclusion of the proceedings or part of the proceedings to which the funding arrangement relates. Where the receiving party is being funded by a funding arrangement you can, and normally should, summarily assess the base costs, but do not order them to be paid. The assessed base costs are then available for later use if the funded party succeeds. State, in the order, the amount of solicitor's charges, counsel's fees, other disbursements, and VAT separately. Thus the clause in the interlocutory order might state:

'Subject to the Claimant being liable to his solicitor under his funding arrangement the Defendants must pay the Claimant's costs of this application. The base costs are summarily assessed as follows:

Solicitor's charges	£1250.00
Counsel's fees	£ 500.00
Other disbursements	£ 175.00
VAT	£ 306.25
<b>TOTAL</b>	<b>£2231.25'</b>

**At the end of the case**, where the additional liability is in issue, there is a choice:

1. Send the whole bill for detailed assessment. (Do not do this unless there is some other reason for ordering detailed assessment, which would be unusual).
2. Summarily assess all the costs, including the additional liability. Not for the faint hearted if the additional liability is seriously disputed. The law is not always straightforward; there are unresolved issues about the extent of the paying party's liability; the argument may get technical; and you may need more information than is likely to be available.
3. Summarily assess the base costs and order them to be paid, but make an order for detailed assessment of the additional liability if not agreed. (This is often the best course of action).

**Additional liability not in issue: Fixed additional liabilities**

After years of uncertainty, there is a move towards fixed success fees. Where they apply, there should be no controversy and no need for that item to go for detailed assessment.

1. CPR Pt 45.15 to 45.19 applies to Road Traffic Accident litigation where the accident occurred on or after 6 October 2003. The percentage increase (success fee):

*On solicitor's fees is:*

100% where the claim concludes at trial (i.e. by settlement after the trial has commenced or by judgment)

12.5% where the claim concludes before trial has commenced

*Counsel's fees* are more complicated:

100% where the claim concludes at trial

On the fast-track 50% where the claim concludes 14 days or less before the date fixed for commencement of the trial, or the first day of the trial window if the date has not been fixed.

On the multi-track 75% where the claim concludes 21 days or less before the date fixed for commencement of the trial, or the first day of the trial window if the date has not been fixed.

If the case concludes more than 14 or 21 days before the date fixed for trial, on the fast-track and multi-track respectively (or before the window if the date has not been fixed), 12.5%.

Where the full liability value of the claim is or would have been more than £500,000 the Court will assess the success fee if asked and the fixed rates do not apply.

2. Employer's liability personal injury claims (except disease claims). The same scheme now applies under Pt 45 in respect of action that arose on or after 1 October 2004. The rates, however, are different from RTA cases:

*Solicitor's fees*

100% where the claim concludes at trial (i.e. by settlement after the trial has commenced or by judgment).

25% where the claim concludes before trial (or 27.5% if a membership organisation has undertaken to meet the claimant's liabilities for legal costs).

*Counsel's fees:*

100% where the claim concludes at trial

15% where the claim concludes before trial.

## 6.12 Litigants in person

Special rules, mainly in Pt 48.6 and the Costs PD 52, have to be applied in the assessment of costs to be paid to a litigant in person.

### 6.12.1 Who is a litigant in person?

A litigant in person includes:

- (a) a company or other corporation acting without a legal representative
- (b) a barrister, solicitor, solicitor's employee or other authorised litigant who is acting for himself.

### **6.12.2 What costs are allowed?**

These are:

- (a) costs for the same categories of work and disbursements which would have been allowed if the work had been done by a legal representative on the litigant in person's behalf
- (b) payments reasonably made by him for legal services relating to the conduct of the proceedings, and
- (c) the costs of obtaining expert assistance in connection with assessing the claim for costs.

### **6.12.3 The litigant's own time**

The amount allowed is limited:

- (a) for any item of work where the litigant can prove he has suffered financial loss in doing the work (typically loss of earnings during the time he attends court) he can recover the amount he has lost for doing the work
- (b) for any item of work where he cannot prove he has suffered financial loss in doing the work (e.g. preparing his case at home without losing earnings) the hourly rate is prescribed: £9.25.

Thus, going through his bill item by item, some of the time spent may be allowed at £9.25, and some at a higher rate if he suffered a financial loss at a rate greater than £9.25 per hour.

### **6.12.4 The overall cap**

Except for disbursements, the amount allowed must not exceed two thirds of what would have been allowed if the litigant in person had been represented by a legal representative.

### **6.12.5 Anomaly: fast-track trial costs**

The rules in their present form came into force on 2 December 2002. Before then a litigant who could prove any financial loss got two thirds of what would have been allowed if he had been represented. That jackpot effect has been done away with, as above. But the rule on fast-track costs was overlooked and has not been altered (r.46.3(5)).

- (a) If the litigant proves financial loss in attending the trial, he will be awarded two thirds of the amount that would otherwise be awarded (i.e. two thirds of £350, £500 or £750, as the case may be).
- (b) If he does not prove financial loss, £9.25 per hour for the time spent.

## 6.13 Costs against a party who is publicly funded

### 6.13.1 Section 11 Access to Justice Act 1999

Section 11 of the Access to Justice Act 1999 protects a party who is publicly funded just as the Legal Aid Act 1988 protected legally aided litigants.

The protection only applies for costs incurred during the period that the assisted person's certificate was in force: not (with some exceptions) before the grant of a certificate, and not after its discharge. If the certificate is revoked (e.g. because it was obtained as a result of misrepresentation) there is no protection at all.

Under s.11 the costs ordered against the funded litigant shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

- (a) the financial resources proceedings; and of all the parties to the proceedings, and
- (b) their conduct in connection with the dispute to which the proceedings relate.

Determination of the amount is not normally suitable for a judge trying the case or part of the case. It is done by a district judge on assessment under Costs 44 PD 23. If there is something about the conduct of any party that may assist the district judge in deciding how much the litigant should pay, you can record any relevant findings in the order (Costs 44 PD 22.6).

### 6.13.2 Procedure

The procedure for the trial judge is;

1. Make an order for costs against the litigant in the normal way, applying the Pt 44.3 criteria.
2. You can summarily assess the costs in the normal way, and state the amount in your order.

### 6.13.3 Form of order

An acceptable form of order is:

'The Claimant does pay the Defendant's costs of the action to be the subject of detailed assessment and determination of the amount of costs payable under Section 11 Access to Justice Act 1999.'

OR

'The Claimant does pay the Defendant's costs summarily assessed at £12485.25 subject to the determination of the amount of costs payable order Section 11 Access to Justice Act 1999.'

Where the litigant has had or may have a financial award made in his favour (e.g. of damages or costs) he is not protected by s.11 from having costs awarded against him taken out of the award, so having summarily assessed costs.

The costs to be paid by the claimant under this order may be set off against any damages or costs that may be payable to him in this action by the defendant, but subject to such set off the amount of costs payable under s.11 of the Access to Justice Act 1999 will be determined.

### 6.14 Wasted Costs Orders

The court may disallow or (as the case may be) order the legal or other representative concerned to meet the whole of any wasted costs or such part of them as may be determined (s.51(6) SCA 1981).

**Note:** The power to make an order for wasted costs is important, but the mere existence of the power seems to have had the desired effect and the need to use it is rare. Think very carefully before making one. Reasons must be expressly and clearly given. If you are thinking of making one then the materials are: Supreme Court Act 1981 s.51(6) and (7); CPR Pt 48.7; Costs PD 53; *Ridehalgh v Horsefield* [1994] Ch 204, CA. Read that material through, and then think again. But if you are not deterred then the following is useful.

#### 6.14.1 Definitions

'Wasted costs' means any costs incurred by a party (a) **as a result of any improper, unreasonable or negligent act or omission** on the part of any legal or other representative or any employee of such a representative; or (b) which in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect the party to pay.

**Improper** includes but is not confined to conduct that would be regarded as professional misconduct by the Law Society or Bar Council.

**Unreasonable** includes behaviour that is vexatious, designed to harass rather than properly advance the case. The test is whether the conduct has a reasonable explanation.

**Negligent** means advice acts or omissions which no member of the profession who is reasonably well informed and competent would have given or done or omitted to do.

#### 6.14.2 The main rules

The main rules come to this:

1. The court may make an order of its own initiative but should be slow to do so, because that involves being both prosecutor and judge, and if the order is not made, the parties will have incurred further costs.
2. There are two stages. First consider whether there is material which if unanswered

would be likely to lead to an order being made, and whether proceedings are justified notwithstanding the costs involved. Second, if the first stage was passed, decide whether to make the order *after giving the legal representative the opportunity to give reasons why the order should not be made*.

3. In general, wasted costs applications are best left until after the end of the trial.
4. The court may direct a costs judge or district judge to inquire and report to the court or may refer the question of wasted costs to a costs judge or district judge instead of making the order. Generally, the application should be heard by the trial judge: so you should usually do it yourself or not at all.
5. The court gives directions about the procedure that will be followed in each case in order to ensure that the issues are dealt with in a way which is fair and as simple and summary as the circumstances permit.
6. If an order is made the actual amount to be paid or disallowed must be specified.

## 6.15 The Future

### 6.15.1 Benchmark costs

The present system has failed to control costs, particularly on the fast-track, where only trial costs are fixed; at the lower end of the multi-track; and in clinical negligence cases. The Civil Justice Council has set up a Predictable Costs Working Party. For a limited list of standard proceedings, benchmarks were suggested for different parts of the country. The list does not include trials or applications in the course of ordinary proceedings. It does, for example, include appeals on quantum in the Court of Appeal, and simple appeals from district judges. They may be useful more widely, however, to judges assessing counsel's fees. The whole list of benchmark costs is at [www.courtservice.gov.uk/docs/using\\_courts/guides\\_notices/scco/app9.xls](http://www.courtservice.gov.uk/docs/using_courts/guides_notices/scco/app9.xls), but the benchmark system has met resistance and is unlikely to have a future.

### 6.15.2 Predictable costs

These are costs which are fixed according to a table, so that a swings-and-roundabouts system operates. They have been applied to costs only proceedings in road traffic accident cases that settle before issue of proceedings for an amount over the small claims limit but under £10,000. Predictable costs may be extended in the future to other categories of proceeding.

### 6.15.3 Capped costs

Judicial control of costs is developing as cases proceed. The court may order in advance that the recoverable costs for proceedings or particular parts of them shall not exceed a stipulated amount. Preparation of evidence and hearings before the district judge are involved, capping may therefore be expensive and is likely to be applied mainly to larger multi-track cases (see *King v Telegraph Group* [2004] EWCA Civ 613). Requests from one party that the other party's costs be capped are increasing in frequency at case management conferences.

## APPENDIX 1

### GUIDELINE FIGURES FOR THE SUMMARY ASSESSMENT OF COSTS

#### SOLICITORS' HOURLY RATES

The guideline rates for solicitors provided here are broad approximations only. In any particular area the Designated Civil Judge may supply more exact guidelines for rates in that area. Also the costs estimate provided by the paying party may give further guidance if the solicitors for both parties are based in the same locality.

The following diagram shows guideline figures for each of three bands outside the London area, and a further three bands within the London area with a statement of the localities included in each band. In each band there are four columns specifying figures for different grades of fee earner.

#### Localities

The guideline figures have been grouped according to locality by way of general guidance only. Although many firms may be comparable with others in the same locality, some of them will not be. For example, a firm located in the City of London which specialises in fast track personal injury claims may not be comparable with other firms in that locality and vice versa. In any particular case the hourly rate it is reasonable to allow should be determined by reference to the rates charged by comparable firms. For this purpose the costs estimate supplied by the paying party may be of assistance. The rate to allow should not be determined by reference to locality or postcode alone.

#### Grades of fee earner

The grades of fee earner have been agreed between representatives of the Supreme Court Costs Office, the Association of District Judges and the Law Society. The categories are as follows:

- A. Solicitors with over eight years post qualification experience including at least eight years litigation experience.
- B. Solicitors and legal executives with over four years post qualification experience including at least four years litigation experience.
- C. Other solicitors and legal executives and fee earners of equivalent experience.
- D. Trainee solicitors, para legals and other fee earners.

'Legal Executives' means a Fellow of the Institute of Legal Executives. Those who are not Fellows of the Institute are not entitled to call themselves legal executives and in principle are therefore not entitled to the same hourly rate as a legal executive.

Unqualified clerks who are fee earners of equivalent experience may be entitled to similar rates and in this regard it should be borne in mind that Fellows of the Institute of Legal Executives generally spend two years in a solicitor's office before passing their Part 1 general examinations, spend a further two years before passing the Part 2 specialist examinations and then complete a further two years in practice before being able to become Fellows. Fellows have therefore possess considerable practical experience and academic achievement. Clerks without the equivalent experience of legal executives will be treated as being in the bottom grade of fee earner ie trainee solicitors and fee earners of equivalent experience. Whether or not a fee earner has equivalent experience is ultimately a matter for the discretion of the court.

**Rates to allow for senior fee earners**

Many High Court cases justify fee earners at a senior level. However the same may not be true of attendance at pre-trial hearings with counsel. The task of sitting behind counsel should be delegated to a more junior fee earner in all but the most important pre-trial hearings. The fact that the receiving party insisted upon the senior's attendance, or the fact that the fee earner is a sole practitioner who has no juniors to delegate to, should not be the determinative factors. As with hourly rates the costs estimate supplied by the paying party may be of assistance. What grade of fee earner did they use? An hourly rate in excess of the guideline figures may be appropriate for Grade A fee earners in substantial and complex litigation where other factors, including the value of the litigation, the level of complexity, the urgency or importance of the matter as well as any international element would justify a significantly higher rate to reflect higher average costs.

## Guideline Rates for Summary Assessment – January 2005

<b>BAND ONE</b>	<b>Grade*</b>	<b>A**</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>GUIDELINE RATES</b>		<b>184</b>	<b>163</b>	<b>137</b>	<b>100</b>
Aldershot, Farnham, Bournemouth (including Pool) Birmingham Inner Bristol Cambridge City, Harlow Canterbury, Maidstone, Medway & Tunbridge Wells Cardiff (Inner) Chelmsford South, Essex & East Suffolk Fareham, Winchester Hampshire, Dorset, Wiltshire, Isle of Wight Kingston, Guildford, Reigate, Epsom Leeds Inner (within 2 kilometres radius of the City Art Gallery) Lewes Liverpool, Birkenhead Manchester Central Norwich City Nottingham City Oxford, Thames Valley Southampton, Portsmouth Swindon, Basingstoke Watford					

---

**Guideline Rates for Summary Assessment – January 2005**

<b>BAND TWO</b>	<b>Grade*</b>	<b>A**</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>GUIDELINE RATES</b>		<b>173</b>	<b>152</b>	<b>126</b>	<b>95</b>
Bath, Cheltenham and Gloucester, Taunton, Yeovil Bury Chelmsford North, Cambridge County, Peterborough, Bury St E, Norfolk, Lowestoft Chester & North Wales Coventry, Rugby, Nuneaton, Stratford and Warwick Exeter, Plymouth Hull (City) Leeds Outer, Wakefield & Pontefract Leigh Lincoln Luton, Bedford, St Albans, Hitchin, Hertford Manchester Outer, Oldham, Bolton, Tameside Newcastle – City Centre (within a 2 mile radius of St Nicholas Cathedral) Nottingham & Derbyshire Sheffield, Doncaster and South Yorkshire Southport St Helens Stockport, Altrincham, Salford Swansea, Newport, Cardiff (Outer) Wigan Wolverhampton, Walsall, Dudley & Stourbridge York, Harrogate					

## Guideline Rates for Summary Assessment – January 2005

<b>BAND THREE</b>	<b>Grade* A**</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>GUIDELINE RATES</b>	<b>158</b>	<b>142</b>	<b>121</b>	<b>90</b>
Birmingham Outer Bradford (Dewsbury, Halifax, Huddersfield, Keighley & Skipton) Cumbria Devon, Cornwall Grimsby, Skegness Hull Outer Kidderminster Newcastle (other than City Centre) Northampton & Leicester Preston, Lancaster, Blackpool, Chorley, Accrington, Burnley, Blackburn, Rawtenstall & Nelson Scarborough & Ripon Stafford, Stoke, Tamworth Teesside Worcester, Hereford, Evesham and Redditch Shrewsbury, Telford, Ludlow, Oswestry South & West Wales				

---

**Guideline Rates for Summary Assessment – January 2005**

<b>LONDON BANDS</b>	<b>Grade*</b>	<b>A**</b>	<b>B</b>	<b>C</b>	<b>D</b>
City of London: <b>EC1, EC2, EC3, EC4</b>		359	259	198	122
Central London: <b>W1, WC1, WC2, SW1</b>		276	210	171	110
Outer London: <b>(All other London post codes: W, NW, N, E, SE, SW and Bromley, Croydon, Dartford, Gravesend and Uxbridge)</b>		198-232	149-198	144	105

There are four grades of fee earner:

- A. Solicitors with over 8 years post qualification experience including at least 8 years litigation experience.
- B. Solicitors and legal executives with over 4 years post qualification experience including at least 4 years litigation experience.
- C. Other solicitors and legal executives and fee earners of equivalent experience.
- D. Trainee solicitors, para legals and fee earners of equivalent experience.

Note: 'Legal executive' means a Fellow of the Institute of Legal Executives.

\*\* An hourly rate in excess of the guideline figures may be appropriate for Grade A fee earners in substantial and complex litigation where other factors, including the value of the litigation, the level of complexity, the urgency or importance of the matter as well as any international element would justify a significantly higher rate to reflect higher average costs.

## APPENDIX 2

Case No: B1/2001/1643

Neutral Citation Number: [2002] EWCA Civ 365  
IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL (CIVIL COURT)  
ON APPEAL FROM LEEDS COUNTY COURT  
(HIS HON. JUDGE LIGHTFOOT)

Royal Courts of Justice,  
Strand  
London, WC2A 2LL  
Thursday 21 March 2002

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES  
LORD JUSTICE LAWS  
LORD JUSTICE DYSON  
and  
MASTER HURST

Between:

Home Office  
-and-  
Lownds

Appellant

Respondent

(Transcript of the Handed Down Judgment of  
Smith Bernal Reporting Limited, 190 Fleet Street  
London EC4A 2AG  
Tel No: 020 7421 4040, Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)

Mr Alexander Hutton and Mr Mark Friston (instructed by the Treasury Solicitor)  
appeared for the Appellant  
Mr Graham Robinson (instructed by Lester Morrill, Leeds)  
appeared for the Respondent

**Judgment**  
**As Approved by the Court**

**Crown Copyright©**

In assessing costs judges should have no difficulty in deciding whether, in order to conduct the litigation successfully, it was necessary to incur each item of costs. When an item of costs is necessarily incurred then a reasonable amount for the item should normally be allowed. Any item that was not necessary should be disallowed.

In his advice the Senior Costs Judge drew attention to the problems that can arise from ‘double jeopardy’; in other words from making a deduction when considering the bill item by item and then looking again at the situation as a whole and making a further global deduction. This danger will be avoided if a party receives at least a reasonable sum for the items of costs which were necessarily incurred.

In other words what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This in turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.

The fact that the litigation has been conducted in an insufficiently rigorous manner to meet the requirement of proportionality does not mean that no costs are recoverable. It means that only those costs which would have been recoverable if the litigation had been appropriately conducted will be recovered. No greater sum can be recovered than that which would have been recoverable item by item if the litigation had been conducted proportionately.

Based on their experience costs judges will be well equipped to assess which approach a particular case requires. In a case where proportionality is likely to be an issue, a preliminary judgment as to the proportionality of the costs as a whole must be made at the outset. This will ensure that the Costs Judge applies the correct approach to the detailed assessment. In considering that question the costs judge will have regard to whether the appropriate level of fee earner or counsel has been deployed, whether offers to settle have been made, whether unnecessary experts had been instructed and the other matters set out in Part 44.5(3). Once a decision is reached as to proportionality of costs as a whole, the judge will be able to proceed to consider the costs, item by item, applying the appropriate test to each item.

Although we emphasise the need, when costs are disproportionate, to determine what was necessary, we also emphasise that a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required.

The danger of setting too high a standard with the benefit of hindsight has to be avoided. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent practitioner should be able to achieve without undue difficulty. When a practitioner incurs expenses which are reasonable but not necessary, he may be able to recover his fees and disbursements from his client, but extra expense which results from conducting litigation in a disproportionate manner cannot be recovered from the other party.

In deciding what is necessary the conduct of the other party is highly relevant. The other party by co-operation can reduce costs, by being uncooperative he can increase costs. If he is uncooperative that may render necessary costs which would otherwise be unnecessary and that he should pay the costs for the expense which he has made necessary is perfectly acceptable. Access to justice would be impeded if lawyers felt they could not afford to do what is necessary to conduct the litigation. Giving appropriate weight to the requirements of proportionality and reasonableness will not make the conduct of litigation uneconomic if on the assessment there is allowed a reasonable sum for the work carried out which was necessary.

Turning to the specific points of principle raised by May LJ (paragraph 11 above), where a claimant recovers significantly less than he has claimed, the following approach should be followed:-

Whether the costs incurred were proportionate should be decided having regard to what it was reasonable for the party in question to believe might be recovered. Thus

- (i) The proportionality of the costs incurred by the claimant should be determined having regard to the sum that was reasonable for him to believe that he might recover at the time he made his claim.
- (ii) The proportionality of the costs incurred by the defendant should be determined having regard to the sum that it was reasonable for him to believe that the claimant might recover, should his claim succeed. This is likely to be the amount that the claimant has claimed, for a defendant will normally be entitled to take a claim at its face value.

The rationale for this approach is that a claimant should be allowed to incur the cost necessary to pursue a reasonable claim but not allowed to recover costs increased or incurred by putting forward an exaggerated claim and a defendant should not be prejudiced if he assumes the claim which was made was one which was reasonable and incurs costs in contesting the claim on this assumption.

The approach which we have sought to explain and which is required by the CPR will not make litigation inexpensive but should help to ensure that costs are kept within proper bounds. Costs assessed in the way we have indicated will also underline the advantages to a claimant, before embarking on litigation, of making a formal offer to settle which will avoid the risks of litigation if the offer is accepted or provide a real prospect of obtaining an indemnity order for costs if the offer is rejected.

## APPENDIX 3

### COUNSEL'S FEES

The following table sets out figures based on Supreme Court Costs Office statistics dealing with run of the mill proceedings in the Queens Bench and Chancery Division and in the Administrative Court. The table gives figures for cases lasting up to an hour and up to half a day, in respect of counsel up to five years call, up to ten years call and over ten years call. It is emphasised that these figures are not recommended rates but it is hoped that they may provide a helpful starting point for judges when assessing counsel's fees. The appropriate fee in any particular case may be more or less than the figures appearing in the table, depending upon the circumstances. The table does not include any figures in respect of leading counsel's fees since such cases would self evidently be exceptional. Similarly, no figures are included for the Commercial Court or the Technology & Construction Court.

#### TABLE OF COUNSEL'S FEES

<b>QUEENS BENCH</b>	<b>1 hour hearing</b>	<b>1/2 day hearing</b>
Junior up to 5 years call	£245	£425
Junior 5 – 1 years call	£365	£725
Junior 10+ years call	£550	£1,100
<b>CHANCERY DIVISION</b>	<b>1 hour hearing</b>	<b>1/2 day hearing</b>
Junior up to 5 years call	£275	£525
Junior 5 – 1 years call	£470	£880
Junior 10+ years call	£715	£1,320
<b>ADMINISTRATIVE COURT</b>	<b>1 hour hearing</b>	<b>1/2 day hearing</b>
Junior up to 5 years call	£360	£550
Junior 5 – 1 years call	£660	£1,100
Junior 10+ years call	£935	£1,650

If the paying parties were represented by counsel, the fee paid to their counsel is an important factor but not a conclusive one on the question of fees payable to the receiving party's counsel.

In deciding upon the appropriate fee for counsel the question is not simply one of counsel's experience and seniority but also of the level of counsel which the particular case merits.

Counsel's fees should not be allowed in cases in which it was not reasonable to have instructed counsel, but it must be borne in mind that, especially in substantial hearings, it may be more economical if the advocacy is conducted by counsel rather than a solicitor. In all cases the court should consider whether or not the decision to instruct counsel has led to an increase in costs and whether that increase is justifiable.

## APPENDIX 4

### Notes on the summary assessment of costs

IN THE

COURT

<b>Summary of Assessment of Costs</b>	<b>Claim No.</b>
	-v-

#### Pre-hearing

<b>Description</b>	<b>Rule</b>	<b>Comment</b>
Costs statement filed more than 24 hours ago	CPD 13.5(4)	Note 1 – McDonald v Taree
Does the bill conform with N260	CPD 13.5(3)	
Is the bill signed, if so, in accordance with Pt 22	CPD 13.5(3)	Note 2
Is VAT legitimately claimed	CPD 13.2(g)	Note 3
Is there an accurate description of fee earners	CPD 13.5(2)	Note 4
Are the solicitors local to the court		Note 5
Is the hourly rate at the appropriate rate		Note 4
Has the block item for counsel been exceeded	CPR 46.2	Note 6
Is the bill calculated in 6 min units		Bwanaoga
Any direction on expert costs	CPD 35.4(4)	Note 7
Any direction on other costs		Note 7
Compare the party's costs estimate		Note 8
Look at the costs estimates with the Allocation and Listing Questionnaires	CPD 6.4 & 6.6	Note 9
Compare the time spent on documents with those on the file		Note 13
Other matters		

**The costs decision**

Who will pay the costs?	CDR 44.3	Note 10
Will this be all or some of the costs?	CPD para 8	Note 10
Basis of assessment: Standard/Indemnity Costs	CPR 44.4	Note 11
Where does the burden of proof lie	CPR 44.4	Note 11

**The assessment**

Global approach – Is the bill proportionate?	CPR 44.5(3)	Note 12
Which Test A) – necessity and reasonable OR B) – reasonable	CPD 11	Home Office v Lownds [2002] EWCA Civ 365
Documents – is there a breakdown?		Note 13
Letters – delete all incoming letters		Included in writing letters
Do phone calls exceed letters?		Note 14
Is solicitor's attendance claimed	CPR 46.3(2)	Note 15
Has the block item for solicitor been exceeded?		Note 15
Strike out travel		Note 15
Photocopying		Note 16
Time to Pay	CPR 44.8	Payment is in 14 days unless otherwise stated

**Additional Liability (CFAs only) – Trials only [assess after the base costs (CPD 11.5)]**

Has a N251 been served?	CPR 44.15 CPD para 19	Note 17 and CPR 44.3B
Is any objection raised to the form of the CFA		Note 18
What type of funding supports the CFA		Note 19
Is the level of funding reasonable	CPD 11.7-11.1	Note 20
Comments		

## Notes on the summary assessment of costs

- Note 1 CPD 13.5(4) the notice must be filed and served 24 hours before trial date. BUT *McDonald v Taree Holdings* [2000] TLR 28.12.2000 Ch.D look at alternatives to disallowing the costs – adjournment? Written submissions?
- Note 2 CPD 13.5(3) requires the bill to be signed CPD 1.5 applies Part 22. The effect is that the rules governing those who can sign a statement of truth apply to costs statements. The solicitors are signing to say that the bill is accurate and does not exceed those costs the client is required to pay ('the indemnity principle'). The certificate is not required for a publicly funded party or where an 'in-house' lawyer.
- Note 3 The bill must show an VAT claimed CPD 13.5(2)(g) but VAT is only to be claimed where the receiving party will suffer a net loss (the indemnity principle). If the receiving party is registered for VAT it will probably offset the payment against VAT paid and there will be no loss. Full details for the inclusion of VAT appear at CPD 5.
- Note 4 4 grades of fee earner are now permitted. All are 'experienced based'. A-D. Consult the 'Guide to the Summary Assessment of Costs' for the detailed categories and the appropriate rate for the court you sit in.
- Note 5 If the solicitors are not local to the court check if their charge out rate exceeds the guide rate for your court. If so, it is reasonable in all the circumstances for the party to employ out of area solicitors at extra cost? See *Truscott v Truscott and Wraith v Sheffield Forgemasters* [1998] 1 All ER 82 and *Sullivan v Co-operative Insurance* (1999) TLR 19th May.
- Note 6 Counsel can only receive a fixed brief fee on fast track trials – see CPR 46.2 for the current rates presently £350 (where the figure is up to £3,000), £500 (if the figure is £3001 to £10,000) and £750 (for figures in excess of £10,000). For the Claimant the fee is calculated on the sum recovered, for the Defendant on the sum claimed.
- Note 7 The court has a power under CPR 35.4(4) to limit the costs of experts this will appear in an earlier directions order. Prior to the trial it is worth noting whether there are any costs limits or reserved costs to pick up.
- Note 8 Comparison of the parties N.260s will give an insight into the way in which the other party approached the case. What level of fee earner did they use?, what was Counsel's involvement? How long do they think that they spent on their opponent?
- Note 9 CPD 6.4 requires the parties to file and serve costs estimates with the Allocation Questionnaire and again with the Listing Questionnaire. CPD 6.6 permits the court to have regard to the costs estimates in deciding the reasonableness of costs. See *Leigh v Michelin Tyres plc* [2003] EWCA Civ 1766.

- Note 10 CPD para 8.5 defines the costs orders available. CPR 44.3 sets out the criteria. For cases concerned with reducing costs of a successful party see Phonographic Performance v AEI Rediffusion [1999] 1 WLR 1507, CA, Johnsey v The Secretary of State for the Environment [1001] EWVA Civ 535 [2001] NPC 79, CABCCI v Ali and others [No. 2], Shirley v Casell [2000] Lloyds Rep 955, Firle Investments Ltd v Datapoint International Ltd QBD [unreported], Mars UK Ltd v Teknowledge Tims 8th July 1999, Antonelli v Allen and Another (No. 2) [2000], NLD 29.11.2000 – ChD.
- Note 11 The choices are Standard basis or Indemnity Costs. Standard basis places the burden of satisfying the court on the receiving party. Indemnity costs contain no notion of proportionality and reverses the burden of proof (see SPR 44.4). Refer to Part 36.20 and 36.21 for the consequences of failing to beat a Part 36 offer. This includes offers before commencement of proceedings [CPR 36.10]. The award of indemnity costs does not necessarily imply criticism of a parties conduct. McPhilemy v Times (no 4) TLR 03.07.01 CA, Reid Minty v Gordon Taylor CA.
- Note 12 Home Office v Lownds [2002] EWCA Civ 365 has clarified the approach to proportionality (see the flow diagram in the materials). At the outset consider whether the costs are proportionate with reference to CPR 44.5(3). If the costs are prima facie disproportionate then allow only that which are necessarily, incurred and reasonable to quantum. Otherwise allow those that are reasonably incurred and reasonable in quantum. See para 31 Lownds.
- Note 13 The cost statement should break down the time spent on individual documents so you can assess whether each is reasonable. In particular look at the time spent on preparing the bundle (is this a solicitors job? Can it be delegated?). Compare the documents on the file with the time claimed. This will give a general idea of the reasonableness of time recorded.
- Note 14 It is sometimes useful to compare the letters written with telephone calls. The old DJs nostrum is to become suspicious when the telephone calls exceed the letters. Note that it is the time of the call that is being claimed, it matters not who made the call. For an overall consideration of telephone calls also consider whether longer calls have already been claimed as attendances.
- Note 15 It should be unusual for solicitor and counsel to attend a fast track trial. The solicitors attendance can only be allowed if the criteria in CPR 46.3 are met, principally that the court considers that it was necessary for the solicitor to attend to assist the advocate. If you allow the attendance, then allow the block item (see 46.3) currently £250. This includes travel to and from court.
- Note 16 Photocopying is an overhead unless it is substantial and it was reasonable to do that amount of copying.

- Note 17 CPR 44.15 and CPD para 19 sets out the requirement to serve information. This is in the Form N251. CPR 44.3B(1)(c) states that the lawyer may not claim an additional liability for any time when notice was not given. This is a sanction and thus susceptible to an application made under CPR 3.9 for relief.
- Note 18 The CFA must be in proper form, it is an exception to the common law rule against contingency funding. However consider the test in Hollins v Russell [2003] EWCA Civ 718 para 107, 'if there is a departure from the regulations does it adversely affect the receiving party or the administration of justice'? If not then waive the breach.
- Note 19 There are three types of funding. A success fee to the solicitor expressed as a % of the base costs, an insurance premium or membership of an authorised body.
- Note 20 For the criteria for the reasonableness of the additional liability see the factors referred to in CPD para 11.8 to 11.11. The test is applied at the time when the CFA was entered into. One has to decide on reasonableness at that time (CPD Para 11.7). For case law see Callery v Grey, the decision of the CA in Halloran v Delaney, and the Claims Direct Test Cases [2003] EWCA Civ 136.