



The Essential Guide to Civil Costs and Litigation Funding

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About the Author

Robin Dunne is a barrister specialising in costs and litigation funding.

He qualified as a barrister in 2002 and thereafter cross qualified as a solicitor-advocate before returning to the bar. He was formerly an employed barrister and Partner at a leading London firm. He joined Clerksroom Chambers in 2014.

He has over ten year's experience in this complex area of law and has dealt with almost every type of costs claim, including numerous multi-million pound costs disputes and test cases. He acts for paying and receiving parties and has a friendly manner combined with a commercially astute approach.

Robin's costs practice covers the following areas:

- Detailed Assessment hearings
- Appeals (both first and second appeals)
- Costs Budgeting
- Costs of very high value Cat PI claims
- Fixed costs disputes (MOJ and PCR)
- Points of law
- Test cases
- Solicitor /client disputes
- Success fees and ATE disputes
- Interlocutory hearings regarding costs issues (default costs certificates, interim payments etc)
- Relief from sanctions Applications
- Costs involving Legal Expense Insurers
- Disputes involving fraud

His main other areas of practice are:

- personal injury
- enforcement and debt recovery
- employment law
- contractual disputes.

Disclaimer: This ebook is for general guidance only and does not constitute professional advice. Readers should consult a qualified professional if advice on a specific issue is required.

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Introduction

The Jackson reforms which were implemented on 1/04/13 represent the greatest change to the civil costs regime since the beginning of the CPR.

This has complicated an already complex regime and practitioners need to know which rules apply to their cases and what the implications of these new rules are. The answers to those questions are far from simple; the new rules have been placed at various parts of the CPR and in various statutes and regulations. Old rules which still apply to many cases have disappeared altogether and the transitional rules are hard to find.

This ebook has been written to help practitioners navigate through the post LASPO landscape.

It has been kept deliberately short and simple. Case references and citations of rules usually appear in the footnotes rather than the text and where possible neutral citations have been used to allow readers to quickly find cited cases.

Part One provides context to the new rules and contains a discussion of the Jackson Reforms and LASPO.

Part Two sets out the basics that everyone involved with a costs dispute will need to understand.

Part Three is a guide to the assessment process between the parties and will prove helpful to any lawyer or litigant in person who is required to assess costs.

In Part Four I discuss what is arguably the most important part of the new costs rules; costs budgeting. Every civil litigator needs to be familiar with these rules.

Part Five considers the key issues that practitioners must deal with when justifying or opposing a bill of costs between the parties.

In Part Six I set out the rules and practices in respect of solicitor and own client disputes.

Finally, Part Seven details the new funding rules and considers the options available to solicitors when assessing the best way to fund new claims.

The appendix contains the definition of types of orders, selected fixed costs figures, the guideline hourly rates and selected court fees.

Unless otherwise stated references to the CPR are to the revised CPR which was updated on 1st April 2013.

The law is correct as of February 2014.

Glossary

Additional Liability	A success fee or ATE premium
ATE Insurance	An insurance premium purchased after the event which gave rise to the litigation which insures against the risk of having to pay costs.
BTE Insurance	Insurance which exists prior to the event giving rise to the action which insures against having the pay legal costs.
Between the Parties Costs	Costs payable by one party within litigation to another
CFA / CCFA	<p>CFA: An agreement between solicitor and client which provides for the payment of the solicitor's fees only in specific circumstances.</p> <p>CCFA: An agreement as above but where the agreement is not limited to a specific case but covers particular classes of cases.</p>
CPR	The Civil Procedure Rules
Disease	A disease that the claimant is alleged to have contracted as a consequence of the employer's breach of statutory or common law duties of care in the course of the employee's employment, other than a physical or psychological injury caused by an accident or other single event.
EL	Employer's Liability
LASPO	The Legal Aid, Sentencing and Punishment of Offenders Act 2012 which implemented the elements of the Jackson reforms which required statutory implementation.
PL	Public Liability
Profit Costs	Fees charged by the solicitor, not being disbursements, for the legal services provided.
RTA	Road Traffic Accident

Receiving Party	The party with the benefit of the costs order.
SCCO	The Senior Courts Costs Office, a distinct part of the High Court, which assesses costs between the parties and between solicitor and own client.
Solicitor and Client Costs	Costs payable between solicitor and client under the terms of the retainer.
Success Fee	An uplift charged by the solicitor, in addition to their profit costs, to account for the risks of not recovering costs.

Part 1: The Jackson Reforms and LASPO

1.1 Background

In 2008 the Master of the Rolls asked the Court of Appeal Judge Sir Rupert Jackson to compile a report on the civil costs regime. Following a hugely in depth consultation and consideration of evidence a final report was published in January 2010. The forward to the final report read:

“In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice.”¹

The proposals for reform were accepted by the government and implemented via changes to the CPR or, where legislation was required, with the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO.)

The changes to the civil costs regime are far reaching. The main changes are:

- Additional liabilities are no longer recoverable between the parties
- 10% Uplift in damages
- Costs Budgeting
- Referral fees in PI claims are now unlawful
- Introduction of Qualified One Way Costs Shifting (QOWCS) in PI claims
- Fixed costs on the fast track (where a claim leaves the MOJ portals)
- Extension of RTA portal with new (reduced) fixed costs)
- New portals with fixed costs for EL / PL claims
- New forms of litigation funding became lawful

1.2 Additional Liabilities

Save in Clinical Negligence cases, LASPO² abolished the between the parties recovery of additional liabilities (success fees or ATE premiums) signed on or after 1/04/13. There was a huge number of CFAs and ATE policies taken out just prior to this date and additional liabilities, in historic cases, will continue to be claimed for many years to come.

LASPO does not render CFAs with success fees or ATEs unlawful; it simply means that the cost will be payable by the client themselves. See chapter five for more detail on the type of success fees allowable under the new rules.

1.3 10% Increase in Damages

Where a claim is not funded by a CFA signed prior to 1/04/13 and the claim (whether in contract or tort) is for:

- pain and suffering;
- loss of amenity;
- physical inconvenience and discomfort;

¹ Sir Rupert Jackson: Review of Civil Litigation Costs: Final Report (January 2010)

² s. 44 & s. 46 LASPO

- social discredit;
- mental distress
- loss of society of relatives.

The Claimant will receive a 10% uplift on general damages.³

1.4 ATE in Clinical Negligence Claims

There is a limited exception to the abolition of recovery of ATE between the parties where:

- The claim relates to clinical negligence
- The value of the claim, in relation to the clinical negligence is more than £1,000
- The premium (or part of it) insures against the risk of incurring a liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence

In these instances the court may make an order that the part of the premium relating to the risk of paying for the expert reports. That element will then be payable by the paying party.⁴

1.5 Costs Budgets

Costs budgeting is now a central part of civil litigation. Parties must now file costs budgets early in the litigation process and the court will approve or reduce these budgets at the CMC. Costs budgets are discussed in detail in chapter three. These rules apply to most cases where the claim form was issued on or after 1/04/13 and the matter is allocated to the multi track.

1.6 Referral Fees

LASPO bans the payments of referral fees in personal injury⁵ cases as of 1/04/13.⁶

A regulated person will be in breach of the rules if:

(a) the regulated person refers prescribed legal business to another person and is paid or has been paid for the referral, or

(b) prescribed legal business is referred to the regulated person, and the regulated person pays or has paid for the referral.

1.7 QOWCS⁷

The quid pro quo for claimants who lose their ability to recover additional liabilities from their opponent is the introduction of QOWCS. The idea behind QOWCS is that, save for the exceptions below, a claimant will not be liable for the defendant's costs (but the Defendant's potential liability is preserved.) As we shall see, the exceptions to the regime mean that in practice many claimants will still require ATE insurance, albeit paid for from their own pocket.

³ Per the revised judgment in *Simmons v Castle* handed down by the Court of Appeal on 10/10/12

⁴ The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013

⁵ This includes any claim with a personal injury element

⁶ LASPO s. 56 -60.

⁷ Pronounced 'Kwocks'

It is important to note the 'qualified' aspect of these rules- their effect is not to make Defendants unable to recover costs at all; but they do restrict the circumstances in which a costs order can be made or enforced. The costs order itself is still made in the usual way.

They relate to personal injury claims only (including claims made under the Fatal Accidents Act 1976.⁸) Parties should note that QOWCS does not apply to Pre action disclosure applications.

Retrospective

The rules are retrospective and apply to all claims where no ATE or Success Fee is claimed, regardless of the date of accident or issue. They do not, therefore, apply to claims where a CFA/ATE was signed prior to 1/04/13.

Part 36 and QOWCS

Part 36 still applies to claims involving QOWCS. Where a claimant fails to beat a Defendant's Part 36 offer the Defendant will be able to recover their costs, up to the amount of the damages received. This will still leave the Claimant with the potential liability for his own solicitor's fees and disbursements and could mean he is out of pocket, despite having 'won' his claim.

When can the Defendant enforce a full costs order without the permission of the Court?

In the following circumstances a Defendant may enforce a costs order without the permission of the court and to the full extent of the order (not limited to the amount of damages recovered.) Thus, where the following occurs the claimant loses all QOWCS protection:

- Where the claim is struck out on the grounds that:
 - (a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
 - (b) the proceedings are an abuse of the court's process; or
 - (c) the conduct of –
 - (i) the claimant; or
 - (ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct,is likely to obstruct the just disposal of the proceedings.⁹

As can be seen, for all QOWCS protection to be lost the proceedings must be struck out; obtaining summary judgment is not enough.

When can the Defendant enforce the full order with the permission of the court?

In the following circumstances the Defendant is able to enforce the order fully and without limit with the permission of the court:

- Where the claim is found on the balance of probabilities to be fundamentally dishonest.
- Where :

⁸ CPR 44.13

⁹ CPR 44.15

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) A claim is made for the benefit of the claimant other than a claim to which this Section applies.

The court may make an order for costs (to the extent that it considers just) against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made.¹⁰

'Fundamentally Dishonest'

This is a new concept and will be need to be properly defined by the senior courts. The interplay between exaggeration and dishonesty is likely to be a difficult question for the courts.

It is an obvious but important point to make that the issue of dishonesty must be raised before the trial judge and should not be left to the assessment.¹¹

Where the proceedings have been settled, the court will not, save in exceptional circumstances, order that issues arising out of an allegation that the claim was fundamentally dishonest be determined in those proceedings.¹²

Where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4.¹³

Discontinuing a Claim

Save where there is an allegation of dishonesty, there is no exception to QOWCS where a claimant discontinues a claim. In those circumstances the Claimant can simply walk away with no danger of being made to pay his opponent's costs (no matter how unrealistic or unreasonable the claim.)

1.8 Fixed Costs on the Fast Track

As part of the reforms rules were brought in which fix costs for RTA / EL / PL claims falling out of the MOJ portals. These are discussed in Part Two.

1.9 Extension of the MOJ Portals

The RTA portal has been extended to include all fast track claims (up to a value of £25,000.)

New portals have been introduced for EL and PL claims (also up to a value of £25,000.)

These rules are also discussed in Part Two.

¹⁰ CPR 44.16

¹¹ CPD- 44 12.4 (a)

¹² CPD -44 12.4 (b)

¹³ CPD-44 12.4 (c)

1.10 New Forms of Litigation Funding

In addition to ending the recoverability of additional liabilities between the parties, the new rules made damages based agreements lawful for the first time in civil proceedings. Furthermore, a number of new rules were implemented which set levels for success fees as between solicitor and client. These changes are discussed in Part Five.

Part 2: The Basics:

2.1 What are 'Costs'?

The CPR defines 'costs' thus:¹⁴

"costs' includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 46.5 and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track'

2.2 The Indemnity Principle

Save for a few exceptions¹⁵, the indemnity principle applies to all costs disputes. Simply put it states that the receiving party may not recover more by the way of costs than they are liable to pay their legal representatives.

Costs are not a penalty and a party should not profit from them.

A bill of costs / schedule of costs must contain a statement to the effect that the indemnity principle has been complied with. A solicitor's signature on a formal bill of costs or a schedule of costs for summary assessment will ordinarily satisfy the court that there is no breach of the indemnity principle.¹⁶

2.3 The Order for Costs

The order for costs is the starting point for any claim for recovery of legal fees. Where proceedings are issued the court may make orders for costs during the proceedings (in respect of interlocutory applications or following a liability trial) or at judgment. The court may also endorse consent orders lodged by the parties which include orders for costs.

Furthermore, the rules contain various provisions where deemed orders for costs are made by virtue of certain actions; for example, accepting a Part 36 offer.

It is important to recognise the court's discretion as to orders for costs. Per CPR. 44.2:

(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

Where proceedings have not been issued the receiving party must first obtain an order for costs before beginning assessment proceedings. This is usually obtained via Part 8 costs only proceedings.¹⁷

¹⁴ CPR 44.1

¹⁵ Examples include retainers involving a CFA 'lite', legal aid and costs assessed with reference to fixed costs or uplifts

¹⁶ *Bailey v IBC Vehicles* [1998] 3 All ER 570 CA

¹⁷ Although Part 8 is usually used, a party may also sue under Part 7 in respect of breach of contract to pay costs.

In order to begin Part 8 costs only proceedings the parties must be in agreement as to which of them is to pay the costs. It is essential to ensure that the claim is concluded on terms which include provision for one party to pay the other's costs. If the agreement is silent as to costs then the receiving party is unlikely to recover their fees.¹⁸

The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.¹⁹ However, there are numerous circumstances where the court may consider that the general rule should not be followed (for example, where there has been partial success.) In those circumstances the parties may seek an alternative order, such as an issues based order or an order allowing the opponent only a percentage of their costs. In some circumstances it may be appropriate to submit that there should be no order for costs.

The Court will take into account the following factors when making an order for costs:

- (a) the conduct of all the parties;
 - (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
 - (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
- (5) The conduct of the parties includes –
- (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
 - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
 - (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.²⁰

Unless the order states otherwise, a party must comply with an order for payment of costs within 14 days.²¹

2.4 Types of Order:

The various orders that the court may make is set out at CPD 4.2. A full list is set out in the appendix.

¹⁸ See, for example, *Moreira v Grench* (2008) LTL

¹⁹ CPR 44.2 (a) but see Part 4 – Exaggeration / Unsuccessful heads of claim

²⁰ CPR 44.2 (4)

²¹ CPR 44.7

Orders Silent as to Costs

Where the court makes an order which does not mention costs then the general rule is that no party is entitled to costs. If costs are sought then the party should specifically ask for them to be included in any order.²²

Where the court makes:

- (a) an order granting permission to appeal;
- (b) an order granting permission to apply for judicial review; or
- (c) any other order or direction sought by a party on an application without notice

and the order is silent as to costs then the order will be deemed to include an order for the applicant's costs.²³

2.5 Costs of Counterclaims

The general rule is that where there is a successful claim and counterclaim and each party is awarded their costs against the other, the claimant is entitled to the costs of the claim as if it had stood alone whereas the defendant / counterclaimant is only entitled to the costs which are solely attributable to the counterclaim itself.²⁴

In practice this can produce some very harsh results for the party bringing the counterclaim. It can be argued that the parties did not intend for the order to have the above effect and as a result, the usual principles should apply.²⁵

2.6 The Basis of Assessment

Costs will be ordered (and can be agreed) to be assessed on one of the following basis²⁶:

Standard Basis:

Bills served before 1/04/13:

Where costs are to be assessed on the standard basis the court will only allow costs which are reasonably incurred and reasonable in nature and are proportionate. The 'Lownds' test of necessity in relation to proportionality will apply.²⁷ Any doubt will be resolved in the favour of the paying party.

Bills served after 1/04/13:

²² CPR 44.10 (1)

²³ CPR 44.10 (2)

²⁴ *Medway Oil and Storage Company Ltd v Continental Contractors Ltd* (1929) AC 88

²⁵ See, for example, the Judgement of Master Campbell in *Bateman v Joyce* [2008] EWHC 90100 (Costs)

²⁶ CPR 44.3

²⁷ See Part 4 for a more detailed explanation of proportionality

The only costs to be allowed are those which are reasonably incurred and reasonable in amount. Disproportionate costs may be reduced or disallowed even if they were reasonably or necessarily incurred.²⁸

Indemnity Basis:

Where costs are assessed on the indemnity basis the court will only allow costs which have been reasonably incurred and are reasonable in amount.²⁹ Any doubt will be resolved in favour of the receiving party. Indemnity costs may be awarded by the court or be awarded as a consequence of Part 36.

The Different Basis In Practice

Indemnity costs awards are rare and should be avoided by the paying party; the resultant assessment will prove much more favourable to the receiving party.

Where an order does not specify the basis of assessment the costs will be assessed on the standard basis.³⁰

The court will usually only award indemnity costs where there is something in the conduct of the action or the circumstances of the case which takes the case out of the norm.³¹

It is not necessary for there to have been some sort of moral lack of probity or conduct deserving of moral condemnation for such an order to be made. It would however, be rare to make an indemnity costs order where there has been no unreasonable conduct.³²

Indemnity Costs and Part 36

Failure to beat a Part 36 offer can carry with it a deemed order for indemnity costs. See Part 2 for further discussion of the costs implications of Part 36.

2.7 Factors taken into account when deciding the amount of costs

The factors that the court will take into account at an assessment were known as the 'seven pillars of wisdom.' With the addition of a new clause relating to costs budgets they are now 'the eight pillars of wisdom.'

The factors that the court must take into account are:

- (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;

²⁸ CPR 44.3 (2) (a)

²⁹ CPR 44.3 (1)

³⁰ CPR 44.3 (4)

³¹ *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson (Costs)* [2002] EWCA Civ 879

³² One example where indemnity costs may be reasonably ordered absent any unreasonable conduct given by Woolf CJ is where a party who has no interest other than the immediate issues is brought into a test cast.

- (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;
- (g) the place where and the circumstances in which work or any part of it was done; and
- (h) the receiving party's last approved or agreed budget.³³

2.8 Types of Costs

Generally, costs can be distinguished as being either assessed costs (sometimes called simply standard basis costs) or fixed costs. Occasionally within the rules one finds a mixture of the two.

³⁴

2.8.1 Fixed Costs

Fixed costs cover an increasing number of situations, particularly post 1/04/13 and are set out in CPR Part 45. The indemnity principle does not apply to fixed costs and the court has repeatedly found that there is no discretion to reduced or increase them.³⁵ The philosophy behind fixed costs is a 'swings and roundabouts' approach where solicitors will be over compensated in some case and under compensated in others.

The acceptance of a Part 36 order, which carries with it a deemed standard basis costs order, does not entitle the receiving party to recover any costs over and above fixed costs.³⁶

Tables of the fixed costs mentioned below appear in the appendix.

2.8.2 Fixed Commencement Costs

The rules are found at CPR 45.1 and apply to claims for a specified amount over £25 where:

- (i) judgment in default is obtained under rule 12.4(1);
- (ii) judgment on admission is obtained under rule 14.4(3);
- (iii) judgment on admission on part of the claim is obtained under rule 14.5(6);
- (iv) summary judgment is given under Part 24;
- (v) the court has made an order to strike out a defence under rule 3.4(2)(a) as disclosing no reasonable grounds for defending the claim; or

³³ CPR 44.4 (3)

³⁴ For example, pre 1/04/13 costs on the fast track were assessed but counsel's fees were fixed.

³⁵ See *Kilby v Gawith* [2008] EWCA Civ. 812 and *Lamont v Burton* [2007] EWCA Civ 429; but note the exceptional circumstances rule under CPR 45

³⁶ *Solomon v Cromwell & Oliver v Doughty* [2011] EWCA Civ 1584. Although this case concerned fixed RTA costs the logic of the judgment can be applied to all fixed costs regimes.

(vi) rule 45.4 applies;

(b) the only claim is a claim where the court gave a fixed date for the hearing when it issued the claim and judgment is given for the delivery of goods, and the value of the claim exceeds £25;

(c) the claim is for the recovery of land, including a possession claim under Part 55, whether or not the claim includes a claim for a sum of money and the defendant gives up possession, pays the amount claimed, if any, and the fixed commencement costs stated in the claim form;

(d) the claim is for the recovery of land, including a possession claim under Part 55, where one of the grounds for possession is arrears of rent, for which the court gave a fixed date for the hearing when it issued the claim and judgment is given for the possession of land (whether or not the order for possession is suspended on terms) and the defendant –

(i) has neither delivered a defence, or counterclaim, nor otherwise denied liability; or

(ii) has delivered a defence which is limited to specifying his proposals for the payment of arrears of rent;

(e) the claim is a possession claim under Section II of Part 55 (accelerated possession claims of land let on an assured shorthold tenancy) and a possession order is made where the defendant has neither delivered a defence, or counterclaim, nor otherwise denied liability;

(f) the claim is a demotion claim under Section III of Part 65 or a demotion claim is made in the same claim form in which a claim for possession is made under Part 55 and that demotion claim is successful; or

(g) a judgment creditor has taken steps under Parts 70 to 73 to enforce a judgment or order.³⁷

The rules are advantageous to a Defendant because if the sum in dispute is paid within 14 days of service of the claim form the only costs payable will be fixed commencement costs³⁸ (save for court fees which are allowed in addition to the fixed costs.³⁹)

2.8.3 Fixed Enforcement Costs

The matrix of fixed enforcement costs is found at CPR 45.8. They are reproduced in the appendix.

2.8.4 MOJ Portal Costs

The MOJ portals provide a simplified claims system for RTA⁴⁰ and EL/PL⁴¹ claims. They cannot be used for small claims.

A full description of the process is outside the remit of this ebook. The reader is assumed to be aware of the key stages in the process and the essential rules; what follows are the key issues in terms of costs disputes.

³⁷ CPR 45.1 (2)

³⁸ 45.3

³⁹ CPR 45.1 (4)

⁴⁰ Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013

⁴¹ Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims

Road Traffic Accidents

The RTA portal originally covered claims worth between £1,000 and £10,000.

The portal now includes claims up to £25,000.

When does the portal apply?

To issue proceedings in the portal the following must apply:

- the claim includes damages in respect of personal injury;
- the claimant values the claim at no more than the Protocol upper limit; and
- if proceedings were started the small claims track would not be the normal track for that claim.⁴²

The following claims should not be issued within the portal:

- A claim in respect of a breach of duty owed to a road user by a person who is not a road user;
- A claim made to the MIB pursuant to the Untraced Drivers' Agreement 2003 or any subsequent or supplementary Untraced Drivers' Agreements;
- Where the claimant or defendant acts as personal representative of a deceased person;
- Where the claimant or defendant is a protected party as defined in rule 21.1(2);
- Where the claimant is bankrupt; or
- Where the defendant's vehicle is registered outside the United Kingdom.⁴³

If the above is satisfied the question of whether a claim should be issued within the portal depends on the date of the accident:

Date of Accident	
Before 31 st July 2013	Claim should be issued within the portal if the value is between £1,000.01 and £10,000
On or after 31 st July 2013	Claim should be issued within the portal if the value is between £1,000.01 and £25,000

The original portal scheme included a matrix of fixed costs which were considered to be over generous once referral fees had been banned. As of 30th April 2013⁴⁴ these cases will attract the new lower costs.

The level of fixed costs depends on when the CNF was issued. All fixed costs are exclusive of VAT.

⁴² Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accident - 4.1

⁴³ Ibid. 4.5

⁴⁴ The key date is the date the CNF is sent via the portal

The Essential Guide to Civil Costs and Litigation Funding

The applicable costs are:

Claims worth more than £1,000 and less than £10,000:

Date CNF Issued	Amount of Costs Payable
Before 30 th April 2013	Stage 1- £400 Stage 2- £800 Stage 3- Stage 3- <ul style="list-style-type: none">• £250 for a paper hearing• £500 for an oral hearing (made up of £250 for the legal representative and £250 advocate's costs) <ul style="list-style-type: none">• £150 in respect of an advice on the amount of damages where the Claimant is a child
On or after 30 th April 2013	Stage 1- £200 Stage 2- £300 Stage 3- <ul style="list-style-type: none">• £250 for a paper hearing• £500 for an oral hearing (made up of £250 for the legal representative and £250 advocate's costs) <ul style="list-style-type: none">• £150 in respect of an advice on the amount of damages where the Claimant is a child

Claims worth between £10,001 and £25,000:

Stage 1	£200
Stage 2	£600
Stage 3	<ul style="list-style-type: none">• £250 for a paper hearing• £500 for an oral hearing (made up of £250 for the legal representative and £250 advocate's costs)

	<ul style="list-style-type: none">• £150 in respect of an advice on the amount of damages where the Claimant is a child
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If a CFA was signed prior to 1/4/13 the costs will also attract a success fee.

London weighting of 12.5% is payable in addition to the fixed costs. This will apply when a claimant lives or works in an area as set out in PD 45 and instructs a legal representative in that area.⁴⁵

Exiting the Portal

At stage one the claim will exit the portal where the Defendant:

(1) makes an admission of liability but alleges contributory negligence (other than in relation to the claimant's admitted failure to wear a seat belt);

(2) does not complete and send the CNF response;

(3) does not admit liability; or

(4) notifies the claimant that the defendant considers that—

(a) there is inadequate mandatory information in the CNF; or

(b) if proceedings were issued, the small claims track would be the normal track for that claim.⁴⁶

Where the Defendant fails to pay the Stage 1 fixed costs within the period specified the claimant may give written notice that the claim will no longer continue under this Protocol. Unless the claimant's notice is sent to the defendant within 10 days after the expiry of the period the claim will continue under the Protocol.⁴⁷

Reasonable Belief in Value

Where the claimant reasonably believes that the claim is valued at between £1,000.01 and the Protocol upper limit, but it subsequently becomes apparent that the value of the claim is less than £1,000, the claimant is entitled to the Stage 1 and (where relevant) the Stage 2 fixed costs.

The key issue here is whether such a belief was 'reasonable.' Paying parties who consider the belief to be unreasonable will be able to argue that only small claims costs should apply.⁴⁸

⁴⁵ CPD – 45- the areas are (within London) the county court districts of Barnet, Bow, Brentford, Central London, Clerkenwell and Shoreditch, Edmonton, Ilford, Lambeth, Mayors and City of London, Romford, Wandsworth, West London, Willesden and Woolwich and (outside London) the county court districts of Bromley, Croydon, Dartford, Gravesend and Uxbridge.

⁴⁶ Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accident- 6.15

⁴⁷ Ibid. – 6.19. The time period is specified at 6.18

⁴⁸ Ibid. – 5.9

Public Liability, Employer's Liability and Disease Claims

EL & PL

These claims enter the portal where the accident occurred on or after 31st July 2013 and the value of the claim is more than £1,000 and less than £25,000.

Disease Claims

The key date here is the date of the letter of claim. Where this is sent on or after 31st July 2013 the claim should be issued via the portal. Once again, the value must be between £1,000.01 and £25,000.

When the portal should not be used

The portal should not be used in the following circumstances:

- Where the claimant or defendant acts as personal representative of a deceased person;
- Where the claimant or defendant is a protected party as defined in rule 21.1(2);
- In the case of a public liability claim, where the defendant is an individual ('individual' does not include a defendant who is sued in their business capacity or in their capacity as an office holder);
- Where the claimant is bankrupt;
- Where the defendant is insolvent and there is no identifiable insurer;
- In the case of a disease claim, where there is more than one employer defendant;
- For personal injury arising from an accident or alleged breach of duty occurring outside England and Wales;
- For damages in relation to harm, abuse or neglect of or by children or vulnerable adults;
- Which includes a claim for clinical negligence;
- For mesothelioma;
- For damages arising out of a road traffic accident (as defined in paragraph 1.1(16) of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents).⁴⁹

Exiting the Portal

An EL / PL claim will exit the portal for the same reasons as stated above (in respect of the RTA portal.)⁵⁰

Reasonable Belief in Value

As with the RTA process, where the value is reasonably believed to be more than £1,000 and less than £25,000 but it subsequently becomes apparent that it is worth less than £1,000 the claimant is entitled to the Stage 1 and (where relevant) the Stage 2 fixed costs. As before, the question of whether the belief was reasonable is key.

Amount of Fixed Costs

The fixed costs are:

⁴⁹ Pre Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability Claims)-4.3

⁵⁰ Ibid. 6.13

Where Claim is worth no more than £10,000	Stage 1- £300 Stage 2- £600 Stage 3- £250 for a paper hearing <ul style="list-style-type: none">• £500 for an oral hearing (made up of £250 for the legal representative and £250 advocate's costs)• £150 in respect of an advice on the amount of damages where the Claimant is a child
Where Claim is worth more than £10,000 but not more than £25,000	Stage 1- £300 Stage 2- £1,300 Stage 3- £250 for a paper hearing <ul style="list-style-type: none">• £500 for an oral hearing (made up of £250 for the legal representative and £250 advocate's costs)• £150 in respect of an advice on the amount of damages where the Claimant is a child

Additional Advice

In all claims (RTA/EL/PL) it is expected that the legal representative will be able to value the claim. However, where the damages are valued at more than £10,000 and additional advice from a specialist solicitor or counsel may be sought.

If the advice is reasonably sought the court may allow an additional award of fixed costs of £150.⁵¹

Disbursements

In all claims (RTA/EL/PL) the only disbursements to be allowed are as follows:

(a) the cost of obtaining –

(i) medical records;

(ii) a medical report or reports or non-medical expert reports as provided for in the relevant Protocol;

(aa) Driver Vehicle Licensing Authority;

(bb) Motor Insurance Database;

⁵¹ CPR 45.23B

- (b) court fees as a result of Part 21 being applicable;
- (c) court fees payable where proceedings are started as a result of a limitation period that is about to expire;
- (d) court fees in respect of the Stage 3 Procedure; and
- (e) any other disbursement that has arisen due to a particular feature of the dispute.

In a claim to which the RTA Protocol applies, the disbursements referred to in paragraph (1) are also the cost of—

- (a) an engineer's report; and
- (b) a search of the records of the—
 - (i) Driver Vehicle Licensing Authority; and
 - (ii) Motor Insurance Database.⁵²

Costs Implications of not complying with the Portal

In all claims the following rules apply:

Where the claimant –

- (a) does not comply with the process set out in the relevant Protocol; or
 - (b) elects not to continue with that process,
- and starts proceedings under Part 7.

(2) Where a judgment is given in favour of the claimant but –

- (a) the court determines that the defendant did not proceed with the process set out in the relevant Protocol because the claimant provided insufficient information on the Claim Notification Form;
- (b) the court considers that the claimant acted unreasonably –
 - (i) by discontinuing the process set out in the relevant Protocol and starting proceedings under Part 7;
 - (ii) by valuing the claim at more than £25,000, so that the claimant did not need to comply with the relevant Protocol; or
 - (iii) except for paragraph (2)(a), in any other way that caused the process in the relevant Protocol to be discontinued; or

⁵² CPR 45.19

(c) the claimant did not comply with the relevant Protocol at all despite the claim falling within the scope of the relevant Protocol,

the court may order the defendant to pay no more than the fixed costs in rule 45.18 together with the disbursements allowed in accordance with rule 45.19.⁵³

Parties should note that the power of the court to order that no more than MOJ portal costs should apply is discretionary.

Fixed Costs on Exiting the Portal (RTA/EL/PL)

Prior to 31st July 2013 a claim exiting the RTA portal (the EL & PL portals were not in place before this time) would be subject to fixed RTA costs if the claim settled before proceedings were issued. Once proceedings were issued the claim would be subject to standard basis costs.

After 31st July 2013 all claims (save for disease claims⁵⁴) leaving the portal are subject to fixed fast track costs. There is now no escape clause and these are the only costs that will apply.

The fixed costs to apply are as follows:

RTA Claims which no longer continue under the MOJ portal:

Where the Parties reach a settlement prior to the Claimant issuing Part 7 proceedings:

Agreed Damages	At least £1,000 but not more than £5,000	More than £5,000 but not more than £10,000	More than £10,000 but not more than £25,000
Fixed Costs	The greater of- (a) £550 or (b) the total of – (i) £100; and (ii) 20% of the damages	The total of- (a) £1,100; and (b) 15% of damages over £5,000	The total of – (a) £1,930; and (b) 10% of damages over £10,000

If Proceedings issued under Part 7 but the case settles before trial:

Stage at which case is settled	On or after the date of issue but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial
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⁵³ CPR 45.24

⁵⁴ Disease claims leaving the portal automatically attract standard basis costs

Fixed Costs	The total of – (a) £1,160; and (b) 20% of the damages	The total of- (a) £1,880; and (b) 20% of the damages	The total of- (a) £2,655; and (b) 20% of the damages
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If the Claim is disposed of at Trial:

Fixed Costs	The total of – (a) £2,655; and (b) 20% of the damages agreed or awarded and (c) the relevant trial advocacy fee
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EL / PL Claims which do not continue under the MOJ Portal:

Where the Parties reach settlement prior to the Claimant issuing Part 7 proceedings:

Agreed Damages	At least £1,000 but not more than £5,000	More than £5,000 but not more than £10,000	More than £10,000 but not more than £25,000
Fixed Costs EL Claims	The total of- (a) £950; and (b) 17.5% of damages	The total of- (a) £1,855; and (b) 12.5% of damages over £5,000	The total of – (a) £2,500; and (b) 10% of damages over £10,000
Fixed Costs PL Claims	The total of – (a) £950; and (b) 17.5% of damages	The total of – (a) £1,855; and (b) 10% of damages over £5,000	The total of- (a) £2,370; and (b) 10% of damages over £10,000

If proceedings are issued but the claim settles before trial:

Stage at which case is settled	On or after the date of issue but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial
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Fixed Costs EL Claims	The total of – (a) £2,630; and (b) 20% of the damages	The total of – (a) £3,350; and (b) 25% of the damages	The total of – (a) £4,280; and (b) 30% of the damages
Fixed Costs PL Claims	The total of – (a) £2,450; and (b) 17.5% of the damages	The total of – (a) £3,065; and (b) 22.5% of the damages	The total of – (a) £3,790; and (b) 27.5% of the damages

If the Claim is disposed of at trial:

Fixed Costs - EL	The total of – (a) £4,280; (b) 30% of the damages agreed or awarded; and (c) the relevant trial advocacy fee
Fixed Costs - PL	The total of – (a) £3,790; (b) 27.5% of the damages agreed or awarded; and (c) the relevant trial advocacy fee

RTA / EL / PL Trial Advocacy Fees

In all claims which leave the portal the following fees apply:

Damages agreed or awarded	Not more than £3,000	More than £3,000 but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial Advocacy Fee	£500	£710	£1,070	£1,705

2.8.5 Fixed Road Traffic Accident Costs

Often called ‘predictable costs’ the fixed RTA costs regime came into force on 6th October 2003. They applied to RTA claims where the damages claimed included personal injury, damage to

property (or both), the value of the damages was between £1,000 and £10,000 and where proceedings were not issued.

The introduction of the MOJ portals mean that this fixed costs regime will rarely be used. They are still relevant to those RTA claims which may not be issued within the portal.

2.8.6 Fixed Success Fees

The regime which fixes success fees in personal injury claims is still relevant because there are a great many claims in existence where CFA retainers were signed prior to 1/04/13.

The fixed success fee rules are absent from the updated CPR but can be found in previous versions at Part 45.

The fixed success fee regime is as follows:

RTA

Solicitor's Fees:

Where claim settles prior to trial	12.5%
Where the claim settles at trial	100%

Counsel's Fees:

	In any Case which concludes at trial	100%
Fast Track	If Claim concludes 14 days or less before trial	50%
	If Claim concludes more than 14 days before trial	12.5%
Multi Track	If Claim concludes 21 days or less before trial	75%
	If Claim concludes more than 21 days before trial	12.5%
	Where Claim issued but not allocated	12.5%

In the above box 'at trial' means the date fixed for the commencement of the trial.⁵⁵

EL

An EL claim is defined as where the claim involves a dispute between the employer and his employee arising from a bodily injury. The fixed uplifts are:

Solicitor's Fees:

Where Claim settles Prior to Trial	25%
Where Claim funded by a CCFA	27.5%
Where Claim settles at Trial	100%

⁵⁵ CPR 45.17 (pre 1/04/13)

Counsel's Fees:

Counsel's uplifts mirror the RTA fixed uplifts save that 25%/27.5% is substituted for 12.5%.

EL Disease Claims

The fixed uplift for disease claims depends upon the type of disease, the track that the claim is allocated to and the time at which the claim settles.

The three types of disease claim are:

A- Disease or injury caused by exposure to asbestos

B- A psychiatric injury caused by work related psychological stress or a work related upper limb disorder caused by physical stress or strain excluding hand/ arm vibration injuries

C- Any claim not falling within the above two types

The fixed success fees are as follows:

If claim allocated to the Fast Track:

	If claim concludes 14 days or less before the date fixed for commencement of the trial	If the claim concludes more than 14 days before the date fixed for the commencement of the trial or before any such date has been fixed
Type A Claim	50%	27.5%
Type B Claim	100%	100%
Type C Claim	62.5%	62.5%

If allocated to the Multi Track:

	If the Claim concludes 21 days or less before the date fixed for the commencement of the trial	If the Claim concludes more than 21 days before the date fixed for commencement of the trial or before any such date has been fixed
Type A Claim	75%	27.5%
Type B Claim	100%	100%
Type C Claim	75%	62.5%

Application for an Alternative Amount

Where a fixed success fee is set at 12.5% (RTA) or 25/27.5% (EL) a party may apply for a higher percentage if:

- (a) the damages agreed or awarded by the court are greater than £500,000
- (b) The damages are less than £500,000 but would have been greater than this amount but for a finding of contributory negligence
- (c) The parties agree damages of less than £500,000 but it is reasonable to expect that had the court made an award of damages it would have awarded more than £500,000⁵⁶
- (D) In disease cases the relevant trigger point for damages is £250,000

If the criteria is met then the success fee will be assessed on the usual basis.

Meaning of Trial

As can be seen; the implications of a claim settling at trial are significant; a success fee of 100% will be applied to all costs (even if the Claimant fails to beat the Defendant's offer at the trial.)⁵⁷

For the purposes of the fixed success fee regime a claim settles 'at trial' when the claim concludes after the commencement of the contested hearing of the claim. This means that the parties may agree at the court door, or appear before the judge to ask for more time to negotiate and avoid the imposition of a 100% uplift.⁵⁸

An assessment of costs is not considered a trial under the rules but a hearing concerned with the award of costs in principle may well be.⁵⁹

2.9 Small Claims Costs

The small claim limit in non personal injury claims is now £10,000. In personal injury claims it remains at £1,000.

It should be noted that financial value is but one of the criteria for allocation to a track.⁶⁰ Small claims are those cases designed to be dealt with without the assistance of lawyers⁶¹ and there will be circumstances where, notwithstanding the value of the claim, the issues are such that it should be allocated to the fast track.

It is for the court, rather than a party, to assess the financial value of a claim for the purposes of allocation. In doing so it will disregard:

⁵⁶ The rules are contained in the previous version of the CPR at r. 45.18

⁵⁷ *Lamont v Burton* [2007] EWCA Civ 429

⁵⁸ *Amin & Anor v Mullings & Anor* [2011] EWHC 278 (QB)

⁵⁹ See *Kingdom Thenga v Elsa Louise Quinn* [2009] EWCA Civ 151 (which was a permission hearing only rather than a full decision of the court of appeal.)

⁶⁰ CPR 26.8 (1)

⁶¹ See *O'Beirne v Hudson* [2010] EWCA Civ 52

- (a) any amount not in dispute;
- (b) any claim for interest;
- (c) costs; and
- (d) any contributory negligence.⁶²

Costs on the Small Claims Track

The court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except –

- (a) the fixed costs attributable to issuing the claim which –
 - (i) are payable under Part 45; or
 - (ii) would be payable under Part 45 if that Part applied to the claim;
- (b) in proceedings which included a claim for an injunction or an order for specific performance a sum not exceeding the amount specified in Practice Direction 27 for legal advice and assistance relating to that claim;
- (c) any court fees paid by that other party;
- (d) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;
- (e) a sum not exceeding the amount specified in Practice Direction 27 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purposes of attending a hearing;
- (f) a sum not exceeding the amount specified in Practice Direction 27 for an expert's fees;
- (g) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably; and
- (h) the Stage 1 and, where relevant, the Stage 2 fixed costs in rule 45.18 where –
 - (i) the claim was within the scope of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol') or the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ('the EL/PL Protocol');
 - (ii) the claimant reasonably believed that the claim was valued at more than the small claims track limit in accordance with paragraph 4.1(4) of the relevant Protocol; and
 - (iii) the defendant admitted liability under the process set out in the relevant Protocol; but
 - (iv) the defendant did not pay those Stage 1 and, where relevant, Stage 2 fixed costs; and
 - (i) in an appeal, the cost of any approved transcript reasonably incurred.

⁶² CPR 26.8 (2)

(3) A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under paragraph (2)(g) but the court may take it into consideration when it is applying the unreasonableness test.⁶³

⁶³ CPR 27.14(2)

Part 3 : Assessment Between the Parties

3.1 The Detailed Assessment Process

- (1) The order for costs is created by an order of the court, a consent order sealed by the court or by a deemed order.
- (2) Notice of commencement of bill of costs is served under Form N252. This begins the assessment process. The bill of costs must be served within 3 months of the order for costs.
- (3) Points of Dispute must be served within 21 days of receipt of the N252.
- (4) The receiving party may serve replies to the points of dispute within 14 days
- (5) The receiving party must request a detailed assessment hearing within 3 months of service of the bill of costs
- (6) The hearing will be listed as either a provisional assessment or an oral hearing depending on the total claimed within the bill of costs.
- (7) Court assesses costs within the bill and the costs of the assessment.
- (8) Order for those costs to be paid within 14 days made.

3.2 The Notice of Commencement

Assessment proceedings are commenced by the receiving party serving their bill of costs under Form N252 ('the notice of commencement.') The bill must be signed and the mandatory certificates of accuracy must be included.

The documents to be served with the N252 are:

- (a) A copy of the notice of commencement in Form N252
- (b) a copy of the bill of costs
- (c) copies of the fee notes of counsel and any other expert in respect of fees claimed within the bill
- (d) written evidence as to any other disbursement which is claimed and which exceeds £500
- (e) a statement giving the name and address for service of any person upon whom the receiving party intends to serve the notice of commencement ⁶⁴

A further mandatory provision is that the N252 must show the total of the bill of costs and the extra sum which will be payable by way of fixed costs and court fees if a default costs certificate is obtained.⁶⁵

⁶⁴ PD 47 - 5.2

⁶⁵ PD 47 -5.3

3.3 *The Bill of Costs*

A model form bill of costs is contained at Precedent A of the CPD.

The receiving party must provide an electronic version of the bill (if one is available) in its native format (Excel for example) free of charge and not more than 7 days after the paying party makes a request.⁶⁶ It is well worth the receiving party doing so as a bill in Excel format is a useful tool when considering different offer permutations. It can also be taken to the hearing; making totalling the bill at the close of the assessment a far simpler task.

Almost all the provisions of the CPD at 5.7 – 5.22 relating to the form of a bill of costs are not mandatory. However, a costs judge is likely to take a dim view of a bill that does not comply with the rules, without a reasonable excuse.

The exceptions are the rules relating to the title page, the certificates of accuracy, the fact that assessment costs should not be included and the guidance in respect of the summary of the totals claimed.

A bill of costs should include:

- The title page (PD 47- 5.10)
- The order for costs giving rise to the costs proceedings
- A narrative which briefly describes the proceedings up to the point of service (CPD 5.11 (1))
- A statement which sets out the fee earners with conduct, their status, qualifications and the hourly rate claimed (PD 47 -5.11 (2))
- The funding arrangements which cover the period claimed for (PD 47- 5.11 (3))
- The profit costs claimed, consecutively numbered, which will usually be broken down into: attendances on the various parties (Claimant / Defendant, Experts, Court and Counsel), routine correspondence, timed attendances, attendances at hearing and conferences with counsel / experts, document time, time spent in respect of the bill. (PD 47- 5.12)
- The disbursements claimed; including experts and counsel's fees.

Where the receiving party claims a success fee, the bill should include the mandatory information at CPD 32.5⁶⁷ and should include the certificate of insurance if an ATE premium is claimed.

The N252 should be served within 3 months of the right to assessment.⁶⁸ If the receiving party delays then the paying party may apply for an unless order that compels that party to commence assessment proceedings within a specified time, failing which the costs will be

⁶⁶ PD 47- 5.6

⁶⁷ This is absent from the updated rules because of the new rule regarding the non recoverability of success fees and ATE premiums inter-partes, however, there is no reason to think that a bill served after 1/4/13 but where the CFA was signed prior to this point should not follow the rules as they were pre 1/4/13.

⁶⁸ CPR 47.7

disallowed.⁶⁹ If the paying party does not make such an application the court may disallow interest for any period of delay.⁷⁰

3.4 Points of Dispute

Points of dispute allow the paying party to set out in formal pleadings their objections to the bill as served. They must be served within 21 days of service of the N252⁷¹ and failure to do so will provide the receiving party with the opportunity of applying for a default costs certificate (see below.)

Points must be short and to the point and must follow the model points at Precedent G of the CPD.⁷² For paying parties this is a balancing act; the points need to be detailed enough to enable proper submissions to be made at the hearing (or for the judge to properly understand the objections made during a provisional assessment) but should not be so lengthy as to be disproportionate. Overly prolix points are likely to irk the assessing judge.

The fundamental rule is that the points should identify the items within the bill that are objected to, state the reason for the objection and if practicable, suggest an alternative figure. Points may (and should) be expanded upon in oral argument but the receiving party must be in a position to properly understand the nature and the reason for the objection made.

Only objections that are contained within the points may be raised at a detailed assessment without the permission of the court. In practice, the court will usually grant permission but are likely to adjourn the hearing at the paying party's expense.

Where very substantial bills are at issue the paying party will not usually serve an itemised document schedule. The costs judges of the SCCO will ordinarily be content for a point to be drafted which sets out groups of tasks and then makes offers for each group. However, paying parties should beware that many District Judges do not take kindly to points being served without a fully itemised document schedule (despite the precedent G not being drafted in this way) and paying parties should assess whether the document schedules are such that it would not be appropriate to do so. It will never be reasonable to simply make a blanket objection to the time and then state a single offer or to simply label numerous items 'excessive.' Such conduct could result in the court dismissing the objections.⁷³

3.5 Replies to the Points of Dispute

Replies are not mandatory but should in practice be drafted in almost every case; whether the bill will be provisionally assessed or not. If the receiving party wishes to serve replies then he should do so within 21 days of service of the points⁷⁴, however, it is common place for replies to be served later than this date (particularly in larger claims) and the courts have historically

⁶⁹ CPR 47.8

⁷⁰ CPR 47.8 (3)

⁷¹ CPR 47.9 (2)

⁷² PD 47- 8.2

⁷³ See, for example, *Mount Eden Land Limited v Speechly Bircham LLP* [2014] EWHC 169 (QB) for a cautionary tale in relation to unfocused points of dispute.

⁷⁴ CPR 47.13

been willing to take them into account unless served very close to the hearing date.⁷⁵ If they are to be served late then it is always advisable to obtain the paying party's agreement to an extension of time for service (failing which an application to strike out the replies may be made.)

The rules in relation to replies changed on 1/4/13. Before that date replies were often as long as the points and represented a cause of the very high costs of detailed assessment. There were no restrictions on what could be pleaded in the replies.

However, due to the concerns within the Jackson Report the rules now state that a reply must be limited to points of principle and concessions only and must not contain general denials, specific denials or standard form responses.⁷⁶ The consequence of this new rule is that replies should be briefer than those previously drafted.

3.6 Default Costs Certificates

If points of dispute are not served within the 21 day period the receiving party may request a default costs certificate (DCC.) A DCC is an enforceable order which compels payment of the full bill of costs as well as interest and costs relating to the obtaining of the order. It should be noted that enforcement proceedings may not be issued in the SCCO.⁷⁷

Paying parties are provided a short period wherein they may still avoid a DCC, notwithstanding that they have missed the deadline for service of the points. They can do this by serving points on the receiving party before the DCC is issued (note; the key is whether the DCC is *issued* by the court not whether it has been *requested*.)⁷⁸ In those circumstances the court may not issue a DCC. Where this applies it is often worth filing the points with the court and explaining that the court should not issue the DCC.

A request for a DCC should be made on Form N255⁷⁹

Since the DCC may be enforced at the end of the period for payment, the receiving party should quickly consider whether they wish to apply to stay enforcement. Such an application may be made to a Costs Judge or a District Judge.⁸⁰

3.7 Setting Aside a DCC

It was formerly the case that setting aside a DCC was relatively straightforward. Now, with the implementation of the new r. 3.9 (discussed below) it has become much less likely that the order will be set aside save for where it has not properly been obtained. An application to set aside the DCC should be made to the court where it was issued (including the SCCO.) The application must include:

- The bill of Costs

⁷⁵ Whether this practice will continue in light of the new rules on relief from sanctions is unclear; it is likely that the courts will take a much harsher stance in respect of late replies

⁷⁶ PD 47- 12.1

⁷⁷ PD 47 - 10.6

⁷⁸ CPR 47.9 (5)

⁷⁹ PD 47 - 10.2

⁸⁰ PD 47- 10.5

- The Order giving rise to the right to costs
- The DCC
- Evidence, in the form of a witness statement explaining the default
- Draft points of dispute to be served if the application succeeds⁸¹

The application must be made promptly and in practice should be made urgently as soon as party is made aware of the default. The court will take promptness into account when considering whether to set aside the DCC.⁸²

The Criteria for Setting Aside the DCC

The court will set aside a DCC if the party was not entitled to it. Circumstances could include where the N252 was served on the wrong party or where the DCC was obtained before points of dispute were due. In these instances the court will set aside the DCC 'as of right.'⁸³

In other circumstances the court may set aside or vary the DCC if there is a good reason for the detailed assessment to continue.⁸⁴ This is a discretionary power and this remedy is likely to be much harder to obtain under the new rules. There is very little guidance as to what constitutes a good reason and no cases have been determined in the new harsher landscape. As before, the judge will likely take into account the considerations set out in CPR 3.9.

3.8 Relief from Sanctions

From 1/4/13 a new rule at CPR 3.9 replaced the old wording. The new rule states:

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

- (a) for litigation to be conducted efficiently and at proportionate cost; and
- (b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.

This applies to all civil proceedings, including costs proceedings. The Court of Appeal, in a case concerning costs budgeting – *Mitchell v NGN*⁸⁵, have set out the following guidance in respect of relief from sanctions applications:

- The new rules are harsher and will result in fewer applications succeeding
- Applications made before the default occurs will be looked on more favourably
- The court will usually grant relief where the breach is trivial or insignificant and the application is made promptly

⁸¹ PD 47 -11.2

⁸² PD 47- 11.2 (2)

⁸³ CPR 47- 12 (1)

⁸⁴ CPR 47- 12 (2)

⁸⁵ *Mitchell MP v News Group Newspapers* [2013] EWCA Civ 1537

- Where the breach is not trivial or insignificant the burden is on the party in breach to show 'good reason' why relief should be granted
- Good reasons are likely to include matters outside of the solicitor's control. Overwork or simply missing a deadline is not a good reason.

Clearly there will be much argument about what constitutes a trivial breach and whether a particular set of circumstances constitutes a good reason.

The SCCO have already applied the harsher Mitchell criteria in refusing an application for relief from sanctions for failure to serve notice of funding and for failing to serve a statement of reasons.⁸⁶ The Court of Appeal, in their first post Mitchell judgment have rigorously applied the new test, overturning the granting of relief in the court below.⁸⁷

Defaulters beware.

3.9 Offers

Pre-1/04/13⁸⁸

Prior to the amendment to the CPR parties were able to make the following types of offer in costs proceedings:

- Open Offers
- Without Prejudice Offers
- 'Calderbank Offers'
- Part 47.19 offers

Open Offers

Open offers are rarely made in assessments covered by the old regime.

Calderbank Offers

Prior to the use of Part 36 in costs proceedings there was little incentive to make Calderbank offers as Part 47.19 offers could be made 'on terms' as to costs.

Without Prejudice Offers

Without Prejudice offers are used where a party wishes to invite a compromise but, if that offer is rejected, does not wish the contents to be made available to the judge. As a result of their status, they provide no costs protection at all and are a little used tactic.

Part 47.19 offers

An offer headed 'without prejudice save as to the costs of the detailed assessment' is considered to be a Part 47.19 offer. They may only be made in claims where the N252 was served prior to 1/04/13

⁸⁶ Master Gordon Saker in *Harrison v Black Horse Limited* [2013] EWHC B28 (Costs) and Master Rowley in *Norah Christine Long v (1) Value Properties Limited (2) Ocean Trade Limited* (unreported) 13.10.13

⁸⁷ *Durrant v Avon & Somerset Constabulary* [2013] EWCA Civ 1624

⁸⁸ This applies to cases where the N252 was served before 1/04/13

Part 47 offers must be in writing and be headed as above.

There is no time limit for making a Part 47 offer; although a late offer will be given less weight by the court. An offer may be made prior to service of the N252.

One advantage of the old regime is that Part 47 offers may be made on a conditional basis (as opposed to Part 36) and do not attract the automatic costs provisions of a Part 36 offer (see below.)

A Part 47 offer will be deemed to include VAT, the cost of preparing the bill and interest, unless stated otherwise. Where Part 8 proceedings have been commenced the offer will not be deemed to include the costs of those proceedings, unless it states otherwise.⁸⁹

Post 1/04/13

Where the N252 is served after this date the parties range of offer changes. It is no longer possible to make a Part 47.19 offer. Rather; the following options apply:

- Mandatory Open Offer
- Without Prejudice offer
- Calderbank Offer
- Part 36 Offer

Mandatory Offer

As seen above, the paying party must make a mandatory open offer when serving their points of dispute.⁹⁰ This will ordinarily be the figure that the bill will be reduced to if all points were upheld at the assessment but there may be tactical reasons for offering a higher amount. It is important to note that the costs judge will consider this offer before assessing the bill and therefore a degree of tactical awareness is required when making this offer.

If the paying party fails to make such an offer the receiving party may apply for an unless order which compels them to do so and which seeks an order that the points be struck out in default of compliance.

Without Prejudice Offers

The parties may still make without prejudice offers and the considerations above still apply.

Calderbank Offers

Calderbank offers become much more attractive under the new regime, principally because of the restrictions associated with making a Part 36 offer.

A Calderbank offer is simply one that is headed 'Without Prejudice Save as to Costs.' It will not be shown to the judge until the issues of costs arises, post judgment. Such an offer can be taken into account by the court (and in practice will be) under Part 44.2 (4) (c). As with Part 47.19 offers, the nearer to trial or assessment the offer is made, the less weight it is likely to be given.

⁸⁹ *Crosbie v Munroe* [2003] EWCA Civ 350

⁹⁰ PD 47- 8.3

These offers may be made on terms as to costs, may be made conditionally, at any time and may be open for any length of time (although the usual practice is to make them open for 21 days.) It is this flexibility which makes them attractive in the post Jackson landscape.

3.10 Part 36 Offers

A Part 36 offer may now be made within detailed assessment proceedings where the N252 is served after 1/4/13. A new part of CPR 47 integrates Part 36 offers within detailed assessment proceedings providing that, for example, 'Claimant' and 'Defendant' within Part 36 are to be read as 'Receiving Party' and 'Paying Party.'⁹¹ This section is only concerned with Part 36 offers made within assessment proceedings.

Part 36 offers are attractive because the rules provide for firm consequences when the offer is accepted or not beaten at a hearing. The key points to note are:

- A Part 36 offer must be drafted carefully; a mistake in the drafting can be fatal
- Practitioners should note that the usual contractual rules do not apply to Part 36; it is a self contained code
- When making an offer under Part 36 Paying Parties should recognise that they are also making an offer to pay costs on the standard basis up to the point stated within the offer. There will be times when the party does not wish to do so; in those circumstances a Calderbank offer is preferable.

Format

A Part 36 offer must:

- (a) be in writing;
- (b) state on its face that it is intended to have the consequences of Section I of Part 36;
- (c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted;
- (d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and
- (e) state whether it takes into account any counterclaim.

It is important to note that (b) does not allow a Part 36 offer to be 'open' for 21 days or any other period of time. The wording is important and should be followed to the letter.⁹²

Where an offer falls short of the strict rules of Part 36 the court may still take the offer into account under Part 44.2; although the strict costs consequences of Part 36 will be lost.

⁹¹ Part 47.20 (4)

⁹² One way to lessen the risk of incorrect wording is to use the Part 36 form (N242A) on the HMCTS web site

A Part 36 offer is not extinguished by a counter offer and can only be extinguished by serving written notice on the offeree.⁹³ The consequence of this is that a party may at any time have a number of Part 36 offers on the table, all capable of acceptance.

The offeree may request clarification as to the offer within 7 days of receipt. If they do not do so then, provided the assessment has not begun, they may apply for an order that the offeror serve the appropriate clarification.⁹⁴

Costs Consequences of a Part 36 Offer

A Part 36 offer will carry with it a deemed order that costs be payable up to the 21 day period for acceptance. This means that a paying party making such an offer should be aware that the receiving party, if it accepts that offer in time, will have their standard basis costs as of right.⁹⁵

What if the offer is accepted after the 21 day period? In these circumstances the court will make an order for costs in the absence of agreement as to which party should pay. This is also the situation where the offer is made less than 21 days before the detailed assessment.

Acceptance of a Part 36 offer stays the claim⁹⁶ and where the claim is issued, the deemed order that it creates can be used to begin assessment proceedings without the need to trouble the court further.

Beating the Offer at the Assessment

The consequences of beating an offer following judgment depend on whether one is a paying or receiving party. It should be noted that the consequences as set out below do not apply to offers that have been withdrawn, where the terms have been changed so as to make them less advantageous to the other party and that offer is beaten or where the offer is made less than 21 days before the hearing.⁹⁷

There is no longer any uncertainty about what constitutes beating an offer, winning by a single pound in monetary claims is now good enough.⁹⁸

For Receiving Parties

Where judgment against the paying party is at least as advantageous to the receiving party as the proposals contained in their Part 36 offer, unless the court considers it unjust to do so, it will order⁹⁹:

(a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

⁹³ Susan Gibbon v Manchester City Council [2010] EWCA Civ 726

⁹⁴ CPR 36.8

⁹⁵ CPR 36.10

⁹⁶ CPR 36.11

⁹⁷ CPR 36.14 (6)- these offers may still be taken into account as admissible offers under rules 44.3

⁹⁸ Where there is more than money at stake the considerations may be more involved; see for example Smith v Trafford Housing Trust (2012) EWHC 3320 where C 'lost' to a monetary offer but the Judge held that the case was more about reputation than the amount of compensation on offer, and found that the correct order should be no order for costs.

⁹⁹ CPR 36.14 (3)

- (b) his costs on the indemnity basis from the date on which the relevant period expired;
- (c) interest on those costs at a rate not exceeding 10% above base rate and
- (d) an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is –
 - (i) where the claim is or includes a money claim, the sum awarded to the claimant by the court; or
 - (ii) where the claim is only a non-monetary claim, the sum awarded to the claimant by the court in respect of costs –

Amount Awarded by the Court	Prescribed Percentage
Up to £500,000 Above £500,000 and up to £1,000,000	10% of the amount awarded 10% of the first £500,000 and 5% of any amount above that figure

It will be noted that, where a Part 36 offer is made in assessment proceedings and where a bill suffers a small reduction, the additional amounts allowed above may well mean that the receiving party recovers more in costs than they claim. The indemnity principle is clearly not applied in this situation. Whether the additional sums are kept by the solicitor or the client will depend on the wording of the retainer.

For Paying Parties

The rules are rather less generous to paying parties where the receiving party fails to obtain a judgment more advantageous than the paying parties offer. In that circumstance the court, unless it is unjust to do so, will order:

- (a) his costs from the date on which the relevant period expired; and
- (b) interest on those costs¹⁰⁰

When will it be 'Unjust' to make these orders?

The court will take into account all the circumstances of the case and particularly:

- (a) the terms of any Part 36 offer;
- (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
- (c) the information available to the parties at the time when the Part 36 offer was made; and
- (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.¹⁰¹

¹⁰⁰ CPR 36.14 (2)

3.11 Variation of Costs Pleadings

The bill of costs, points and replies may be amended at any time before the hearing. If a party wishes to serve amended or supplemental documents then they must file these with the court as well as serving them on their opponent.¹⁰²

The court may disallow the variation or may permit it only on certain conditions, usually involving costs.¹⁰³ If an amendment is required then it will obviously be beneficial to serve and file the document as early as possible and avoid very late amendments. Amendments close to the hearing will likely result in the court adjourning the hearing at that party's expense.

3.12 Requesting a Hearing

A detailed assessment is requested using Form N258. The following documents must be filed with the request include:

- (a) a copy of the notice of commencement of detailed assessment proceedings;
- (b) a copy of the bill of costs,
- (c) the document giving the right to detailed assessment
- (d) a copy of the points of dispute, annotated as necessary in order to show which items have been agreed and their value and to show which items remain in dispute and their value;
- (e) as many copies of the points of dispute so annotated as there are persons who have served points of dispute;
- (f) a copy of any replies served;
- (g) copies of all orders made by the court relating to the costs which are to be assessed;
- (h) copies of the fee notes and other written evidence as served on the paying party¹⁰⁴

Lodging the Files

Unless the court has ordered otherwise the receiving party's files must be lodged with the court no later than 7 days before the hearing (and no earlier than 14 days.)¹⁰⁵

The rules appear not to make it mandatory to lodge the files in provisional assessments however; it would be prudent to do so.¹⁰⁶ The court has a general power to direct the receiving party to file any document which would be necessary to enable the court to assess the bill and it is likely that a judge would use this rule to require the files to be lodged if they were needed to complete this task.¹⁰⁷

¹⁰¹ CPR 36.14 (4)

¹⁰² PD -47 13.10 (1)

¹⁰³ PD -47 13.10 (2)

¹⁰⁴ PD 47 – 13.2

¹⁰⁵ PD 47 – 13.11

¹⁰⁶ PD 47 – 13.11 does not apply to provisional assessments- see PD 47 – 14.2

¹⁰⁷ PD 47 – 13.13 – which does apply to provisional assessments

3.13 The Hearing

A request for a detailed assessment hearing should be made within 3 months of the service of the N252. Where the receiving party delays the paying party may apply for an 'unless order' which compels them to request the hearing, failing which the costs will be disallowed. If no application is made then, mirroring the timescales regarding serving the bill, the court may disallow interest for any period of delay.¹⁰⁸

Bills totalling up to £75,000 will be provisionally assessed, while those with a value above that amount will be subject to a detailed assessment.

Which Court?

A request for a DA hearing should be filed in the county court or district registry which made the costs order. Where the county court is based in London or where the court order was made by the High Court in London or the Court of Appeal, the request must be made to the SCCO.¹⁰⁹

3.14 Provisional Assessment

Where a bill is to be provisionally assessed the judge will consider the documents, including the bill, points and replies, without hearing oral argument and note his decision in respect of each item on the bill by writing the allowed figure on the combined points / replies. This is then returned to the parties who can then either settle on that basis or apply for an oral hearing.¹¹⁰

This process only applies to assessments commenced after 1/04/13.¹¹¹ The court may order that the case is not suitable for provisional assessment, notwithstanding the value of the bill; in those circumstances the matter will proceed as a 'normal' assessment.¹¹²

A provisional assessment is requested using Form N258.

The court will endeavour to undertake a provisional assessment within 6 weeks of receipt of the request. Once the assessment has taken place and the court has returned the assessed points / replies the parties must agree the total amount of the bill within 14 days. If they cannot agree then they must return the documents to the court, with written submissions so that the judge can undertake the calculations.

Should the parties not be able to agree which side should pay the assessment costs the court will make a decision on the basis of written submissions only.¹¹³

Oral Hearing

A party may request an oral hearing in respect of any part of the assessed bill by writing to the court and serving that letter upon their opponent. Save in exceptional circumstances, this must

¹⁰⁸ CPR 47.14 (2)

¹⁰⁹ CPD 4.1 – The London County Courts where the DA will be heard in the SCCO are: Barnet, Bow, Brentford, Bromley, Central London, Clerkenwell and Shoreditch, Croydon, Edmonton, Ilford, Kingston, Lambeth, Mayors and City of London, Romford, Uxbridge, Wandsworth, West London, Willesden and Woolwich.

¹¹⁰ CPD 47- 14.4 (1)

¹¹¹ CPR 47.15 (1)

¹¹² CPR 47.15 (6)

¹¹³ CPD 47-14.6

be done within 21 days of receipt of the provisionally assessed bill. The request must set out which decisions are challenged and provide a time estimate for the hearing.¹¹⁴

The party who requested the oral hearing will pay the costs of that hearing unless:

- (a) it achieves an adjustment in its own favour by 20% or more of the sum provisionally assessed; or
- (b) the court otherwise orders.¹¹⁵

As can be seen, the party making a request for an oral hearing will have to achieve a far better result than on the provisional assessment (and one should not forget that the same judge will hear the oral hearing.) As a result, applications for oral hearings are made infrequently.

Costs of the Provisional Assessment Process

The costs of a provisional assessment are fixed at a maximum of £1,500 plus Vat and court fees.¹¹⁶

3.15 Detailed Assessment

3.15.1 The Hearing

Hearings will be before a District Judge in the County Court or before a Costs Officer or Master in the SCCO.

The usual procedure is for the points of dispute to be taken in turn, with points of principle dealt with first and then the item by item objections taken in turn. The paying party states their objection with the receiving party providing a reply. The paying party then has the last word.

The judge will usually give a short ex tempore judgment at the close of submissions and it is essential that advocates mark the bill with the decisions and reductions as the assessment progresses.

At the end of the assessment the advocates will ordinarily retire to agree the total of the bill. They then go before the judge to make submissions in respect of the costs of the detailed assessment.

Rights of Audience

The following are considered authorised persons under the Legal Services Act and have rights of audience in detailed assessments¹¹⁷:

- Barristers
- Solicitors
- Chartered Legal Executives

¹¹⁴ CPR 47.15 (7)

¹¹⁵ CPR 47.10

¹¹⁶ CPR 47.15 (5)

¹¹⁷ For the purposes of this list it is assumed that the lawyers listed are all in possession of a practising certificate. A lawyer who is not practising (a non-practising barrister for example) would be classed as an unauthorised person.

- Costs Lawyers

Unauthorised persons include costs draftsmen, solicitor's clerks and paralegals. Where the person is an employee of the instructed solicitor they may be heard by virtue of their instruction and supervision by an authorised person. External costs draftsmen are usually regarded as temporary employees of the solicitor's firm when exercising a right of audience.

A Mackenzie Friend may attend a hearing to assist a litigant but has no right to be heard.¹¹⁸

A counsel's clerk may be heard in a detailed assessment in exceptional cases (see Part Four.)

The right of audience of unauthorised persons is limited to hearings in chambers.

3.15.2 Costs of the Detailed Assessment

The starting point is that the receiving party is entitled to the costs of the detailed assessment process.¹¹⁹ However, the court may (and in practice often do) award costs to the paying party or, where appropriate, make no order for costs.

If they are to depart from the general rule above, the court must take into account the following factors:¹²⁰

- (a) the conduct of all the parties;
- (b) the amount, if any, by which the bill of costs has been reduced; and
- (c) whether it was reasonable for a party to claim the costs of a particular item or to dispute that item.

The court will also take into account admissible offers, including, where appropriate, Part 36 offers.

Parties must file and serve their costs of the assessment, using Form N260, at least 24 hours before the hearing.¹²¹ Failure to do so may result in the costs being disallowed in their entirety.¹²²

The costs of assessment will ordinarily be summarily assessed.

3.16 Appeals

There are two sets of rules in respect of appeals in detailed assessment proceedings. The first applies to appeal from decisions of Costs Officers (or authorised court officers) whereas the second relates to appeals from judges (including costs judges.)

Appeals from Costs Officers /Authorised Court Officers

¹¹⁸ A 'Mackenzie Friend' is someone who assists a litigant in person in court.

¹¹⁹ CPR 47.20 (1)

¹²⁰ CPR 47.20 (3)

¹²¹ CPD -44 9.5

¹²² For example, *Williams & Georgiou -v- Wayne Hardy t/a Hardy Builders* (2014) (unreported) where the Senior Costs Judge disallowed all costs for failure to serve an N260.

An appeal from a court officer is not governed by CPR 52. A party may appeal an order as of right and there is no requirement to seek permission to appeal.¹²³

The appeal will be heard by a Costs Judge (in the SCCO) or a district judge of the High Court.¹²⁴

The hearing proceeds as a re-hearing rather than a review. While the judge will likely consider the findings of the court officer there is no requirement to find that any part of the decision below was wrong in order to grant the appeal.

The appellant notice must be filed within 21 days of the date of the decision being appealed.¹²⁵

Appeals from a Judge

An appeal from the decision of a judge in assessment proceedings will follow the usual process set out in CPR 52.

The appeal will be by way of a review rather than a re-hearing. The time limit for service of the appellant's notice, as with other appeals, is 21 days.¹²⁶ If an assessment is carried out at more than one hearing the time limit does not start to run until the conclusion of the final hearing (unless the court orders otherwise.)¹²⁷

The court should grant permission to appeal if it considers that the appeal would have a real prospect of success or where there is some other compelling reason why the appeal should be heard.

An appeal does not automatically stay the order of the lower court. If the party is concerned about the prospect of enforcement then a request for stay should be formally made.

The appeal court will allow an appeal where the decision below was 'wrong' or 'unjust because of a serious procedural or other irregularity.' In costs appeals, the first criteria is usually the basis for appeal.

Practitioners should note that the courts are very reluctant to allow appeals which relate to the quantum of costs allowed rather than a point of law. The awarding of costs is discretionary and the appellant will be required to show that the decision being appealed was so unreasonable as to be outwith the generous ambit of the judge's discretion.

Buckley J put it thus:

"Broadly speaking a Judge will allow an appeal such as this if satisfied that the decision of the Costs Judge was wrong...This is easy to apply to matters of principle or construction. However, where the appeal includes challenges to the details of the assessment, such as hours allowed in respect of a particular item, the task in hand is one of assessment or judgment rather than principle...But since the appeal is not a re-hearing, I would regard it as inappropriate for the

¹²³ CPR 47.21

¹²⁴ CPR 47.22

¹²⁵ CPR 47.23- It should be noted that the date runs from the date of the decision, not the conclusion of the assessment (which may well be later)

¹²⁶ CPR 52.4

¹²⁷ CPR 47.14(7) This only applies where the final hearing was concluded after 1/04/13

Judge on appeal to be drawn into an exercise calculated to add a little here or knock off a little there...Permission to appeal should not be granted simply to allow yet another trawl through the Bill, in the absence of some sensible and significant complaint.”¹²⁸

The destination of an appeal is set out in the PD to Part 52.

Second Appeal

Where there is a second appeal to the Court of Appeal, only that court may give permission to appeal.

Permission will not be given unless:

- (a) the appeal would raise an important point of principle or practice; or
- (b) there is some other compelling reason for the Court of Appeal to hear it.¹²⁹

Thus, when contemplating a second appeal, practitioners must firstly consider the merits of the appeal itself and then go on to consider the criteria above. If they are not met then the appeal will not proceed, notwithstanding the merits.

¹²⁸ Mealing McLeod v Common Professional Examination Board [2002] 2 Costs LR 223

¹²⁹ CPR 52.13

Part 4: Costs Budgeting

4.1 The Costs Budgeting Process

- (1) Order that Parties prepare, serve and file budgets
- (2) Budgets considered at the CMC
- (3) The Judge either approves or reduces budget. The Judge may also comment on the pre budget costs
- (4) Either party may apply to review the approved budget
- (5) Once the claim settles the receiving party drafts their bill and commences assessment
- (6) The costs are assessed with reference to the approved budget

4.2 Background

The principle of parties exchanging estimates of costs is not new; costs estimates at AQ and LQ stage have been required for many years. However, the exchange of estimates did little to control the cost of civil litigation, partly because judges were reluctant to use their case management powers to actively manage costs.

The purpose of the new costs budgeting rules is to provide steps in multi track claims where the court can actively manage the costs *within the litigation process* and keep those costs proportionate. In theory this moves the court's oversight of costs from a retrospective review during the assessment process to a prospective consideration at various points while the litigation is on-going. In short, costs budgeting is designed to stop disproportionate costs being incurred in the first place; leading to no nasty surprises for paying parties and fewer detailed assessments overall.

Sir Rupert Jackson explained the essential elements of costs budgeting as follows:

- (i) The parties prepare and exchange litigation budgets or (as the case proceeds) amended budgets. (ii) The court states the extent to which those budgets are approved. - (iii) So far as possible, the court manages the case so that it proceeds within the approved budgets. (iv) At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget.

4.3 When do the rules apply?

Unless the court otherwise orders budgets must be prepared by all parties (save litigants in person) in most multi track claims where proceedings are issued on or after 1/4/13.¹³⁰

They do not apply to:

- (a) cases in the Admiralty and Commercial Courts;

¹³⁰ CPR 3.12 & 3.13

(b) such cases in the Chancery Division as the Chancellor of the High Court may direct; and

(c) such cases in the Technology and Construction Court and the Mercantile Court as the President of the Queen's Bench Division may direct¹³¹

Where the rules do not apply the court may order that a party file and exchange costs budgets in any claim using their general case management powers.¹³²

4.4 Time Scales

The budget must be filed and served by the date specified within the notice of proposed allocation¹³³ which in practice will order that the budget be filed and served with the Directions Questionnaire.

If no date is specified then the budgets must be filed and served seven days before the CMC.¹³⁴

4.5 Default

The effect of default is severe; unless the court orders otherwise a party failing to file a budget when required to do so will be treated as having filed a budget comprising court fees only. Since the court will take into account the approved budget at any later assessment (see below) this effectively means that the defaulting party will not recover any other costs from their opponent, save for any pre budget costs.¹³⁵

The courts have been more forgiving in respect of minor defaults, for example refusing to find that a budget which did not contain the full statement of truth was filed late¹³⁶ and finding that where a claimant filed one budget instead of three there was no default.¹³⁷

4.6 Format

The budget must be in Form H¹³⁸ (an excel version is available online.)

If the budgeted costs do not exceed £25,000 the party is not required to complete more than the first page of the form. ¹³⁹

The budget must be dated and verified by a statement of truth signed by a senior legal representative of the party. ¹⁴⁰

It is important to note that the budget must reflect the costs that will be claimed between the parties, not just the solicitor and own client charges. This is relevant where a party is retained under a discounted conditional fee agreement which provides for basic rates where the claim is

¹³¹ CPR 3.12

¹³² CPR 3.1 (2) (II)

¹³³ CPR 3.13 – see also r. 26.3(1)

¹³⁴ Ibid.

¹³⁵ See *Mitchell v NGN* (Supra.) and *Burt v Linford Christie* (2014) (unreported)

¹³⁶ *The Governor & Company of The Bank of Ireland v Philip Pank Partnership* [2014] EWHC 284 (TCC)

¹³⁷ *Lotus Cars v Mecanica Solutions* [2014] EWHC 76 (QB)

¹³⁸ PD 3E 1

¹³⁹ Ibid.

¹⁴⁰ Ibid.

'lost' and higher rates where the claim is 'won.' In these circumstances the party should be careful to ensure that the higher rates are used within the budget.

4.7 Contingencies

The budget should allow the judge or one's opponent to properly appreciate the assumptions being made regarding the litigation. Examples would be:

- (1) Whether a liability trial will take place
- (2) The number of experts required and whether it is considered that they will be required to attend the trial
- (3) The duration of the trial
- (4) Whether a JSM will take place
- (5) Whether there is likely to be interim applications

If the form itself does not have sufficient space to properly explain these assumptions then additional pages can be attached to the budget. Where the costs appear, at first glance, to be excessive or disproportionate, it is advisable to include as much information as possible.

4.8 The CMC

The budget will be considered at the CMC.¹⁴¹

The parties are at liberty to agree the budgets prior to the CMC. If so, the court will record the agreed figures.

Where there is not agreement the Judge will consider each budget, hear submissions and record the court's approval after making appropriate revisions.¹⁴²

The CMC should not be a mini-assessment; the judge is likely to look at each phase of the budget and thereafter reduce the overall figure if appropriate. Individual reductions in terms of hourly rates etc are unlikely, however, they are a factor to be taken into account when the overall figures are reviewed.

Pre-budget costs will not be budgeted but the court may make observations as to the amount claimed (which are likely to be of relevance at any subsequent assessment.)¹⁴³

Parties should try to attend the CMC with laptops and the Excel versions of their budgets so that the phases can be altered as the judge makes his decisions. Where large budgets are being considered it can be helpful to draft a Scott Schedule which sets out the claimant's / defendant's budget in phases, and then any offers for each phase.

4.9 Managing the Costs and revising the budgets

Parties will be expected to keep the budgets under review. If the litigation develops and the budgets need to be revised the party must submit their revised figures to their opponent for

¹⁴¹ If all directions are agreed and the only issue remaining is the costs budgets then the court will list a 'costs management conference' rather than a 'case management conference.'

¹⁴² CPR 3.15

¹⁴³ PD 3E 2.4

potential agreement. If agreement cannot be reached the court will consider the revised budgets and either approve, vary or disapprove the figures.¹⁴⁴

4.10 Tactical Considerations

Budgets should always be a fair reflection of the work that a party considers will be needed to take the matter to conclusion. That said, there are tactical considerations to bear in mind and these differ depending on whether one is a Claimant or Defendant.

The assumptions made will have a significant effect on the budget. It may be that parties will wish to assume that the litigation will run smoothly and produce a reasonable looking budget which is likely to be approved. If the litigation turns out to be more complex or one's opponent's tactics cause costs to rise then the budget can be revised. It is always easier to convince a judge to revise a budget upwards on the basis of the actual litigation than it is to obtain approval for a budget which could appear excessive.

Defendants should bear in mind that they rarely recover costs in PI actions and QOWCS is likely to make this an even rarer occurrence. A high budget from a Defendant will enable the Claimant to argue that their figures are reasonable by way of comparison. However, Defendants should ensure that their budgets are credible; if they appear to be unreasonably low then the judge is not likely to take them into account when considering the Claimant's figures.

Defendants will also need to consider whether to include all costs. Surveillance costs may have been incurred at the time that the budgets are prepared but for obvious reasons the Defendant may not wish to put the Claimant on notice of this fact. If the costs of surveillance are to be claimed between the parties then they should technically be in the budget; Defendants may wish to leave such costs out in the understanding that, should they obtain a costs order they will not seek those costs from their opponent.

Since pre budget costs will not be dealt with as part of the process there may be a tendency to front load costs.

4.11 The Cost of Preparing Budgets

Save in exceptional circumstances –

(1) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved budget;

(2) All other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved budget.¹⁴⁵

Parties should note that the costs allowed are with reference to the *approved* budgets, rather than the budgets as presented. Exceptional circumstances is not defined but the criteria is likely to be met where one's opponent's conduct is such that it causes the party to spend a great deal of time and money on amending budgets or where the litigation takes an unforeseen turn which adds cost to the process.

¹⁴⁴ PD 3E 2.6

¹⁴⁵ PD 3E 2.2

4.12 *Assessing the Costs*

Once the litigation has settled the receiving party will prepare their bill of costs in the usual manner and assessment proceedings can commence. Pre budget costs, as has been seen, will be dealt with at the assessment with no reference to the budgeting process (save that the costs judge will take any observations made by the judge at the CMC into account.)

The budgeted costs will be assessed with reference to the decisions made at the budget hearings. The rules provide that:

“In any case where a costs management order has been made, when assessing costs on the standard basis the court will- (a) have regard to the...last approved or agreed budget...(b) not depart from such approved or agreed budget unless there is good reason to do so.”¹⁴⁶

The court will also have regard to the parties last approved budget as part of the factors to be taken into account when deciding the amount of costs under r.44.¹⁴⁷

What will be a good reason? Part of the problem here is that the process encourages parties to revise the budgets as the litigation proceeds. As a result, the litigation simply turning out to be more complex is unlikely to be a good reason; in those circumstances a revised budget should have been prepared.

4.13 *Departing from the Budget*

The issue of what constitutes a good reason to depart from a budget was considered by the Court of Appeal in *Henry v NGN*.¹⁴⁸ The court in that case overturned the Senior Costs Judges ruling that there was no good reason to depart from the budget (the costs claimed at assessment were over £268,000 higher than the last approved budget.) Moore-Bick LJ held that the Claimant’s failure did not put D at a significant disadvantage nor did it lead to the costs being incurred unreasonably or disproportionately.

The *Henry* case should be read in context; it was a case decided under the pilot scheme concerning budgets in defamation claims rather than the new rules in CPR Part 3. In that case the Claimant had told the Defendant of the full amount of costs prior to the claim settling and the court found that the costs as presented within the bill were not disproportionate. Moore-Bick’s judgment ended with a warning that parties conducting litigation under the new rules would find it difficult to recover costs at assessment that were higher than those approved by the court as part of the budgeting process.

It is equally true that the mere fact that a budget has been approved does not make the costs claimed at assessment, if lower than that figure, automatically recoverable.

Moore-Bick gave the following guidance in *Troy Foods v Manton*¹⁴⁹:

¹⁴⁶ CPR 3.18

¹⁴⁷ CPR 44.4 (3) (h)

¹⁴⁸ *Henry v NGN* [2013] EWCA Civ 19

¹⁴⁹ *Troy Foods v Manton* [2013] EWCA Civ 615- it should be noted that this was a permission to appeal hearing rather than a full appeal. The claim settled by consent shortly after permission was granted.

“I do not accept that costs judges should or will treat the court’s approval of a budget as demonstrating, without further consideration, that the costs incurred by the receiving party are reasonable or proportionate simply because they fall within the scope of the approved budget.”

While there has been a few cases where the costs have simply been allowed in full at the end of proceedings, on the basis that they were below budget, these cases tend to be quite fact specific and this is unlikely to be the widespread practice going forward.¹⁵⁰

It seems clear then that detailed assessments will continue.

4.14 Appeals

Appealing costs and case management decisions are difficult; in both cases judges retain a wide discretion. Parties will find it easier where there is an alleged error in terms of law or where they can show that the judge took into account irrelevant factors or failed to take relevant matters into account.

Simply arguing that the amounts allowed were too high or low will not be enough to convince an appellant court to re-visit the budgets.

¹⁵⁰ See for example the judgement of HHJ Simon Brown QC in *Slick Seating Systems v Adams & Ors* [2013] EWHC TCC where the budget was approved at £359,710.35 and the judge summarily assessed the claim costs in full at £351,267.35. However, indemnity costs were awarded and the Defendant did not attend trial.

Part Five : Key Costs Disputes

This part deals with the key costs disputes that parties are likely to encounter in between the party detailed assessment proceedings.

5.1 Proportionality

There are two proportionality tests which may be applied by the courts at assessment. The following table sets out when each of the tests will apply¹⁵¹:

Where the bill only includes work completed prior to 1/4/13	Old test applies
Where the bill only includes work completed post 1/4/13	New test applies
Where the bill claims for work completed pre and post 1/4/13 and proceedings are not issued	Old test applies to work completed pre 1/4/13 and new test applies to work completed on or after 1/4/13
Where the bill claims for work completed pre and post 1/4/13 and proceedings were issued prior to 1/4/13	Old test applies
Where the bill claims for work completed pre and post 1/4/13 and the proceedings were issued on or after 1/4/13	Old test applies to work completed pre 1/4/13 and new test applies to work completed on or after 1/4/13

If the paying party considers the costs to be disproportionate they must raise this as a preliminary issue within their points of dispute.

The Old Test

Where the old test applies the court should conduct a two stage test as per *Lownds v Home Office*¹⁵²- a global and an item by item approach.

The judge will firstly consider the total sum claimed and whether this sum is disproportionate having regards to the seven pillars of wisdom. If the global sum is not disproportionate then the enquiry ends there.

¹⁵¹ Civil Procedure (Amendment No.2) Rules 2013

¹⁵² *Lownds v Home Office* [2002] EWCA Civ 365

If, however, the judge find the total of the costs claimed to be disproportionate he will then go on to consider each item and will only allow disproportionate costs if they were 'necessary.'

Once an item is found to be necessary it will then be subject to the usual test of reasonableness.

Any doubt as to whether the costs are disproportionate will be resolved in favour of the paying party.

Thus, under the old rule, disproportionate costs could still be recovered, subject to the necessity test.

The New Test

The new rule removes the ability of a receiving party to recover disproportionate costs, even in the event that they were necessary.

The rules state that, on the standard basis, the court will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.¹⁵³

Costs will be considered proportionate if they bear a reasonable relationship to:

- The sums in issue in the proceedings;
- The value of any non-monetary relief in issue in the proceedings;
- The complexity of the litigation;
- Any additional work generated by the conduct of the paying party; and
- Any wider factors involved in the proceedings, such as reputation or public importance.¹⁵⁴

The Master of the Rolls, in a speech to the Law Society has suggested that the courts are likely to follow a new two stage approach. It is envisaged that judges will assess the bill on the usual basis of reasonableness and then consider whether the assessed total is proportionate (having regard to the above factors.) If the sum is disproportionate the judge will then reduce the assessed total to a proportionate figure.¹⁵⁵ As can be seen, this is almost the Lownds test in reverse.

As the Master of the Rolls stated plainly in that speech, this is a recipe for satellite litigation. The issue for practitioners is that different judges will have different views on what constitutes disproportionate costs and advising clients will prove difficult.

Of course, the point of the new costs budgeting rules is to ensure that costs remain proportionate as the litigation proceeds. If dealt with correctly this should reduce the amount of arguments in respect of the new proportionality rules however simply because a case has been subject to costs budgeting does not mean that these issues will not apply at detailed assessment.

¹⁵³ CPR 44.3 (2)

¹⁵⁴ CPR 44.3 (5)

¹⁵⁵ Fifteenth Lecture in the Implementation Programme, 29/5/12

5.2 Additional Liabilities¹⁵⁶

There are still a great many CFAs in existence which were signed prior to 1/4/13. The first question to be asked when considering the reasonableness or otherwise of a success fee or ATE premium is when the agreements were signed. If they were signed after 1/4/13 then the sums are not recoverable between the parties, no matter how reasonable.¹⁵⁷

The rules require a party to give notice of an additional liability and in default the court will disallow the success fee / ATE, save where the defaulting party makes a successful application for relief from sanctions.

CFAs Signed Prior to 1st November 2005

CFAs signed before this date are governed by the CFA Regulations 2000. The paying party may raise a number of technical challenges to these retainers and the discussion of these challenges and the relevant case law is beyond the scope of this ebook. Specialist advice should be sought if there are any concerns regarding such a CFA.

CFAs signed on or after 1st November 2005

In order to be lawful a CFA must:

- Be in writing
- Be in relation to proceedings which allow a CFA to be used¹⁵⁸
- State the percentage increase where it provides for a success fee
- Not include provision for a success fee of above 100%¹⁵⁹

5.2.1 Success Fees

Key questions:

Whether acting for the receiving or paying party the following questions must be asked:

- Was the CFA signed prior to 1/4/13
- Does the CFA comply with the regulations?
- Was notice of funding given?
- Is the success fee fixed per Part 45? If not then the court should assess the uplift
- If so, did the matter go to trial?
- Is the Claimant entitled to apply to have the success fee assessed? If so then the success fee risk must be assessed

What will the Court take into account when assessing the Success Fee?

The court will take the following factors into account when deciding whether the percentage increase is reasonable:

¹⁵⁶ This section only applies to CFAs / ATEs signed or purchased prior to 1/04/13

¹⁵⁷ A surprising number of receiving parties are still serving bills of costs which claim a SF or ATE despite the agreements being signed after this date.

¹⁵⁸ CFAs may not be used in Criminal and Family proceedings

¹⁵⁹ The Courts and Legal Services Act 1990

(a) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur

(b) the legal representatives liability for any disbursements

(c) what other methods of financing the costs were available¹⁶⁰

The court will not use hindsight when assessing the reasonableness of the success fee; it must be assessed with regard to the facts and circumstances as they reasonably appeared to the solicitor at the time the agreement was signed.¹⁶¹

Calculation

A basic success fee calculation is as follows:

Chances of Failure / Chances of success x 100 = the success fee

The elements of a Success Fee

Broadly speaking, a success fee can be broken down into the following constitutive elements:

- Generic risks
- Specific risks
- Part 36 risks
- Funding Element

Generic Risks

The generic risks encompass all the risks which face every solicitor when acting under a CFA. Examples include the risk that the Claimant will abandon the claim or limitation issues.

Specific Risks

The key question here is what the likelihood of the Claimant 'winning' as defined by the CFA. Numerous factors must be taken into account but a key issue is the point at which the CFA is signed. If a CFA is signed before a liability decision is made by the Defendant the solicitor should use their experience of claims of this type and ask himself what the risk of the Claimant losing is?

A CFA signed after a liability denial will obviously attract a far higher success fee, although the court should be careful not to assume that an initial denial will automatically mean that the claim will proceed to trial. In practice very few claims do.

If liability has been admitted in full the liability risk should be discounted completely. The risk of the Defendant resiling from that admission should be taken into account as part of the generic risks.

¹⁶⁰ CPD 11.8 (now revoked)

¹⁶¹ CPD 11.7 (now revoked)

Part 36 Risks

CFAs ordinarily have a clause which explains the position in respect to the solicitors risks if a Part 36 offer is made and not beaten. If the solicitor is at risk then the court will allow an element to reflect this.

The usual wording where the solicitor is at risk is as follows:

“It may be that your opponent makes a Part 36 offer which you reject on our advice, and your claim for damages goes ahead to trial where you recover damages that are less than that offer or payment. We will not claim any costs for the work done after we received notice of the offer.”

The wording where the solicitor is not at risk is:

“It may be that your opponent makes a Part 36 offer which you reject on our advice, and your claim for damages goes ahead to trial where you recover damages that are less than that offer or payment. We will not add our success fee to the basic charges for the work done after we received notice of the offer.”

As can be seen, in the example above, the solicitor will still receive their costs from the client, even if a Part 36 offer is not beaten.

Liability Admitted and a Part 36 Risk

The Court of Appeal have held that, in a complex RTA claim involving significant causation issues and where there has been an admission of liability prior to signing the CFA but where there are still Part 36 risks, a 20% success fee would be reasonable.¹⁶²

Liability Admitted and No Part 36 Risk

The Senior Costs Judge has held that where there are no liability or Part 36 risks, a 5% success fee is reasonable for a success fee in a high value PI claim.¹⁶³

Funding Element

This element is not recoverable between the parties.

Retrospective CFAs and Success Fees

A CFA can be retrospective.¹⁶⁴ The question is whether the success fee should be payable between the parties for the period prior to the CFA being signed.

There are a number of objections to the recovery of a success fee for the retrospective period; not least that the paying party was not in possession of the notice of funding and therefore could not take the success fee into account when conducting the litigation at that stage.

¹⁶² C v W [2008] EWCA Civ 1459

¹⁶³ Beal v Russell (2011) LTL

¹⁶⁴ Forde v Birmingham City Council [2009] EWHC 12 (QB)

There is nothing inherently wrong with claiming a success fee for that period however, the court will take into account the reasonableness of the uplift and reduce or disallow it at assessment. In practice, the retrospective success fee will almost always be held to be unreasonable and be disallowed.¹⁶⁵ This does not affect the recoverability of the success fee claimed from the point that the CFA is signed.

Discounted Conditional Fee Agreements

A DCFA is an agreement between solicitor and client which provides for a lower hourly rate should the claim be lost and a higher hourly rate (payable between the parties) should the claim be won.

A success fee may be charged in addition to the higher hourly rate.¹⁶⁶

5.2.2 After The Event Insurance Premiums

There are a number of different types of ATE policy. Paying parties should ensure that they are fully aware of what is covered before assessing the reasonableness of the premium amount.

The following is a non exhaustive list:

- Single sided- the policy covers the opponent's costs
- Double sided- the policy covers the opponent's costs and the client's own costs
- Disbursements only- the policy covers disbursements but not the solicitor's costs
- Staged premiums- the premium rises in amount at different stages of the claim, for example- pre-issue, issue, 28 days before trial. The party is required to set out the stages within the notice of funding.
- Block rated policies- where the policy can be purchased for any particular class of case
- Bespoke policies- where the insurer will consider the specific risk (see below) before setting the premium
- Notional Premiums- this is the amount paid to a membership organisation (a trade union for example) in return for the organisation agreeing to pay adverse costs incurred by its members

It is reasonable for a party to take out ATE at the beginning of proceedings, not least because the costs of insurance will rise dramatically in those cases where, for example, liability is denied. In a non binding decision, the Court has held that policies can be reasonably purchased at the outset of MOJ portal claims, notwithstanding that stages one and two do not carry a costs risk for the Claimant.¹⁶⁷

ATE policies are usually self insured and payment is not made until the proceedings are finalised.

Pre Existing funding

¹⁶⁵ See, for example, the SCCO case of JN Dairies Ltd v (1) Johal Dairies Ltd (2) Gurbir Singh [2011] EWHC 90211 (Costs)

¹⁶⁶ Gloucestershire City Council v Evans [2008] EWCA Civ 21

¹⁶⁷ DJ Smedley, sitting as Regional Costs Judge, in the Liverpool ATE Test Cases, May 2012.

An ATE premium may be disallowed if the Client had access to pre existing funding (for example, pre existing BTE insurance.)The mere fact that such funding exists does not automatically render the premium irrecoverable. The cover must have been suitable and reasonably discoverable; solicitors are not under a duty to conduct a ‘treasure hunt’.¹⁶⁸

Challenging a Premium

Where there is a dispute regarding the size of the premium it will usually be sufficient for the receiving party to serve a statement which details how the policy was chosen and whether it is block rated or individually rated.¹⁶⁹

The Court of Appeal have warned that “District judges and costs judges do not...have the expertise to judge the reasonableness of a premium except in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces.”¹⁷⁰

Estimated Maximum Loss (EML)

When considering the reasonableness of the premium parties should look at the EML. This comprises:

- Amount that the insurer would have to pay if a claim was made (including own costs, disbursement’s and opponents costs depending on the policy terms)
- An amount for overheads and profits

Once this figure has been calculated the party can then consider the risk of the insurer having to make payment. The final figure can be compared to the premium claimed.

5.3 Hourly Rates

In assessments between the parties the question of the reasonableness of the hourly rate charged is a key issue. Whether an hourly rate is reasonable will depend on a number of factors:

When and Where the work was done

The location of the solicitor and the time that the work was undertaken will be a key factor in considering the reasonableness of the rate claimed.

Where the location of the Claimant and his solicitor differ and that instruction has led to higher hourly rates, the receiving party often submits that a local solicitor should have been instructed.

In *Wraith v Sheffield Forgemasters*¹⁷¹ Kennedy LJ set out the following factors which should be taken into account when considering whether a non-local solicitor was reasonably instructed:

¹⁶⁸ For guidance see *Sawar v Alam* [2001] EWCA Civ 1401.

¹⁶⁹ *Jonathan Luke Rogers v Merthyr Tydfil Borough Council* [2006] Civ 1134

¹⁷⁰ *Ibid.*

¹⁷¹ [1997] EWCA Civ 2285

- (1) The importance of the matter to the Claimant.
- (2) The legal and factual complexities, in so far as he might reasonably be expected to understand them.
- (3) The location of his home, his place of work and the location of the court in which the relevant proceedings had been commenced.
- (4) The Claimant's possibly well-founded dissatisfaction with the solicitors he had originally instructed, which may well have resulted in a natural desire to instruct solicitors further afield, who would not be inhibited in representing his interests.
- (5) The fact that he had sought advice as to who to consult, and had been recommended to consult a particular solicitor.
- (6) The location of the non local solicitor, including their accessibility to the claimant, and their readiness to attend at the relevant court.
- (7) What, if anything, he might reasonably be expected to know of the fees likely to be charged by the non local solicitor as compared with the fees of other solicitors whom he might reasonably be expected to have considered.

The Facts of the Case

As a rule of thumb, the more complex the claim the more likely it is that a higher hourly rate will be allowed. Value can be deceptive; some lower value claims can be very complex whereas a high value claim may be relatively straightforward. The court will take into account all the facts of the case when considering the appropriate hourly rate.

The relationship to the Guideline Hourly Rates

The guideline rates published from time to time (the last rates were published in 2010) set out the hourly rates for different levels of fee earners in various locations. The latest guideline rates are set out in the appendix.

It would be fair to say that paying parties usually seek to place too much reliance on the guideline rates whereas receiving parties often unfairly argue that they are of no relevance. In fact, they are a useful guide on assessment, but their relevance should not be put more forcefully than that.

They are designed for use in summary assessment rather than detailed assessment. Receiving parties will often argue that they are only for use in fast track trials (which is not the case.)¹⁷²

The argument over whether the guideline rates are relevant will usually focus on the consideration of the facts of the case with reference to the eight pillars of wisdom. Where the case is unusually complex, important or of very high value the court is likely to allow hourly rates over and above the guidelines.

Who did the Work?

The person undertaking the work is a key factor. If a Grade D paralegal conducts a case that a Grade A would ordinarily deal with it does not follow that a Grade A rate should apply. Nevertheless, parties should be careful not to blindly follow the guideline grades of fee earners; a paralegal with 20 years experience dealing with a complex case may well justify a rate equivalent to a grade A fee earner.

¹⁷² They may be used in any summary assessment.

The Use of Counsel

Counsel and solicitor have different roles but where there has been over reliance on counsel it can be argued that this should be taken into account when the hourly rates are assessed.

Administrative Work

Work which can properly be described as clerical or administrative should not be allowed between the parties, primarily because the solicitor's hourly rate will include an element relating to overheads (of which secretarial work is one.)¹⁷³

Higher Overheads

It is usual for solicitors dealing with catastrophic injury claims (and those dealing with specialist litigation) to seek higher hourly rates on the basis that their overheads are higher than comparable firms in their location by virtue of their specialism. If such an argument is made the solicitors must provide evidence to justify this assertion, in the absence of which it is likely to be disregarded.¹⁷⁴

5.4 VAT

The CPD provides that VAT should not be included in a claim for costs if the receiving party is able to recover the VAT as input tax. Where the receiving party is able to obtain credit from HMRC for a proportion of the VAT as input tax, only that proportion which is not eligible for credit should be included in the claim for costs.¹⁷⁵

Where there is a dispute as to whether any service in respect of which a charge is proposed to be made in the bill is zero rated or exempt from VAT, the receiving party should refer the matter to HMRC. Their reply should then be served upon the paying party and filed with the court so that the Judge can consider it at the detailed assessment.¹⁷⁶

In RTA claims the claim may be taken by the insurance company in the name of the insured. The key consideration in terms of whether VAT should be included is the status of the insured not the insurer.

5.5 Counsel's Fees

The basis of charging

Hourly Rate

The basis of charging (and the basis upon which a fee can be challenged) differs depending on the nature of the instruction.

Written work and time spent in conference is usually calculated with reference to an hourly rate, determined by seniority and the nature of the case. While there is nothing wrong in

¹⁷³ See for example *Brush v Bower Cotton and Bower* [1993] 1WLR 1328

¹⁷⁴ *Jones v Secretary of State for Wales* [1997] 1 WLR 1008

¹⁷⁵ CPD- 44 2.3

¹⁷⁶ CPD – 44 2.6

principle for counsel's fees to be determined in a different way, in practice the court will likely take the hourly rate and time spent into account when considering such a fee. Such consideration will take the reasonableness of the rate charged into account as well as the reasonableness of the time taken to complete the task.

It is important for paying parties to clarify whether written work or conferences are not also taken into account within the brief fee. Ordinarily skeleton arguments for trial will be subsumed within the agreed brief fee.

Brief Fee

A brief fee will usually include the following:

- Preparing for the hearing
- Drafting a skeleton argument
- Advocacy at the hearing
- Recording a note of the judgment
- Reporting back to instructing solicitors
- Conference at court / taking instructions

When assessing a reasonable brief fee the judge will consider what work was completed and then, using his experience, arrive at a reasonable figure. The final figure will not simply involve an hourly rate / time calculation. That is not to say that an hourly rate calculation cannot be informative but it will not be the sole basis on which the fee is judged.

The fee that the paying party agreed with their counsel is persuasive but not conclusive.

Late Settlement

A fee will not be reasonable or payable simply because the brief has been delivered. Where a claim settles late counsel will be entitled to an abated brief fee. Each case will be decided on the facts but as a general rule of thumb one could say that the later the compromise, the higher percentage of the brief fee will be reasonable.

Evidence at the Detailed Assessment

Where a number of counsel's fees are contested the receiving party should consider asking counsel to draft a short note for the assessment, dealing with the issues in the case, time spent on tasks etc.

In exceptional cases counsel's clerk may be permitted to appear at the hearing. If counsel wishes his clerk to appear he should seek permission from the judge in writing.¹⁷⁷

Leading Counsel

Whether it is reasonable for a solicitor to instruct leading counsel will be fact specific. Generally, the court is likely to allow the recovery of leading counsel's fees in the following circumstances:

¹⁷⁷ See the SCCO Guide 2013 page 24

- High Value claims
- Claims involving a complex point of law
- Test cases or cases of general importance
- Cases involving a great deal of expert evidence, particularly if the amount or nature of the evidence is unusual for a claim of that type
- Claims involving a specialist area of the law

It is obviously easier to object to the instruction of leading counsel if the paying party has instructed a junior; however, this is a persuasive point only.

Where it is reasonable to use a leader it may also be reasonable to instruct a junior. Again, the court will look at the nature of the case itself when considering whether a junior was required. It may be that two counsel can be justified at trial but not during other stages of the claim (interlocutory hearings or at a Joint settlement meeting for example.) Where a junior is used in addition to a leader the junior's fees are usually at least half that of the silk. In exceptional cases, more than two counsel could be justified, although this would be very rare.

5.6 Disbursements

5.6.1 Medical Agencies

The fees charged by medical agencies are recoverable in principle but can be challenged on the basis of reasonableness.¹⁷⁸ Many agencies and insurers have signed an agreement which sets out the agreed fees of various expert reports.¹⁷⁹

Organisations which are not signatories are not bound by these figures (although the court may find them persuasive.)

5.6.2 Experts Fees

Paying parties may challenge expert fees on the following basis:

- *The fees are unreasonably high*

The receiving party may object to the quantum of an expert's fees. Comparisons with their own expert's fees will be persuasive.

Experts will ordinarily charge an hourly rate (if their fee does not include such a breakdown then one should be requested.) The court will consider the status of the expert and any overheads associated with their profession and will allow such a rate as is reasonable. Reading in time will be allowed as will reasonable travelling time.

- *The Expert's Report was not reasonably incurred*

Each case will turn on its facts. Whether the party had permission to rely on that particular expert is highly relevant but permission does not, in and of itself, mean that the fees will be recoverable in full or at all.

¹⁷⁸ Stringer v Copley (2002) Unreported

¹⁷⁹ The MRO agreement which is available online at www.amro-uk.co.uk

Looking at the opposite example, where the court has not given permission for an expert's report to be incurred it is entitled to disallow the associated costs. Once again, there will be examples where this would not be the case; particularly in cases where the parties are not yet at the stage when the court may grant permission.

Whether a report has been relied on is a persuasive factor but is not the only criteria to consider (in practice such costs are very likely to be disallowed.) Parties should be cautious not to use hindsight when considering whether it was reasonable to instruct an expert; the proper test is whether the instruction was reasonable at the time.¹⁸⁰ The receiving party may also argue that, but for the settlement, the report would have been disclosed.

Where a party loses confidence in his expert he may be entitled to change expert, albeit at his own expense. Factors to take into account are whether the instruction of a new expert would cause delay to the court timetable or prejudice the opponent.¹⁸¹

5.7 Conduct

Conduct issues are easiest dealt with at the point when the order for costs is made.

Nevertheless, where an order simply award costs in full the paying party may still raise issues at the detailed assessment but the court should ensure that the receiving party is not punished twice.¹⁸²

In common with other costs arguments, hindsight is not permitted.

Exaggerated / Inflated Claims

The issue of claims which have been inflated or exaggerated will continue despite the costs budgeting rules. There will be cases where the paying party will argue that the costs budgets were set at too high a level on the basis of unreasonable assumptions made by the receiving party. These issues therefore apply to pre and post 1/4/13 cases.

Where the conduct has led to a claim being misallocated so as to avoid a track which would impose fixed costs, the court may assess the bill with those fixed costs in mind. It would be wrong however, to simply apply the fixed costs.¹⁸³

Conscious exaggeration

Where the Claimant pursues a claim for injuries he knows or should be taken to have known had not been suffered it will not be reasonable to simply allow the Claimant a percentage of her costs. The proper approach is set out by Kennedy LJ:

“...the district judge should have started by going through the bill of costs and ruling out all of those items she considered to be unjustified (for example, almost all of the medical fees, cost of retaining leading counsel, etc.). That would, no doubt, have left some items which were plainly reasonable as items, even if questionable in amount, and other items where it would be difficult

¹⁸⁰ See *Francis v Francis and Dickerson* [1956]

¹⁸¹ *Hort v Charles Trent* [2012] EWHC 3966

¹⁸² *Northstar Systems v Fielding* [2006] EWCA Civ 1660

¹⁸³ *O'Beirne v Hudson* [2010] EWCA Civ 52

if not impossible to disentangle what was reasonable from what was unreasonable even having regard to the way in which rule 12 (1) required that doubts be resolved. At that stage, but not at any earlier stage, it would, in my judgment, be appropriate for the district judge to consider awarding a percentage of the sum claimed, but the percentage awarded would have to be such that at the end of the exercise the total sum awarded by way of costs could be regarded as reasonable having regard to the amount of damages obtained. In other words, the district judge must give herself an opportunity to look at the result in the round before concluding her arithmetic.”¹⁸⁴

Inflated Claims

A judge should not restrict costs simply because the amount recovered is less than the amount claimed. The question of what it was reasonable to claim at the time will determine whether the paying party suffers in costs. In many cases this will be a consideration for the assessment and the paying party will argue that while the costs are *prima facie* recoverable, they should be disallowed on the basis of reasonableness (or because they are disproportionate.)

Failed or Abandoned Issues

The rules provide that the court must take the following into account when making an order for costs:

- the conduct of all the parties
- whether a party has succeeded on part of its case, even if that party has not been wholly successful
- whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue¹⁸⁵

Where the court has made a full costs order the paying party may still argue, at the assessment stage (although with more difficulty) that such costs are unreasonable.

Chadwick LJ put it thus:

“The costs of issues abandoned, or not pursued at trial, ought, *prima facie*, to be disallowed against the party incurring them on an assessment of the costs of that party by the costs judge - because, again *prima facie*, they are costs which have been unnecessarily incurred in the litigation.”¹⁸⁶

The Court of Appeal, albeit on usual facts, in a more recent case held that where the Claimant “bona fide and reasonably believed, that he or she had suffered a certain type of damage as a result of the injury, then it would be right to recover the necessary, reasonable and proportionate cost of making the claim to recover for that damage.”¹⁸⁷

5.8 Funding

¹⁸⁴ Booth v Britannia Hotel Ltd [2002] EWCA Civ 579

¹⁸⁵ CPR 44.2

¹⁸⁶ Shirley v Caswell [2001] 1 Costs LR 1

¹⁸⁷ Motto & Ors v Trafigura Ltd [2011] EWCA Civ 1150

Costs related to funding the claim are not recoverable.¹⁸⁸

¹⁸⁸ Ibid.

Part Six : Solicitor and Client Costs

Statute Bills

Both a solicitor and his client will need to know when a demand for payment amounts to a request for a mere payment on account of costs and when it amounts to a formal demand which may be acted upon in the event of non payment. The latter is called a statute bill because to be valid it must comply with s.69 of the Solicitors Act 1974 (as amended) – ‘SA’.

If a demand for payment does not comply with these requirements then it cannot form the basis of an action to recover costs (in other words the solicitor may not sue the client because of non payment and the client may not seek an assessment of the costs.)

An interim statute bill is a bill served during the proceedings. It must be provided for by the retainer or where there has been a ‘natural break’¹⁸⁹ in the work of the solicitor. The requirements of an interim statute bill are the same as for a statute bill.

There is nothing to stop a solicitor serving an interim invoice in respect of costs, subject to the terms of the retainer. Such an invoice need not comply with the requirements of s.69 SA.

The Requirements of a Statute Bill

s.69 SA states that a solicitor may not take action to recover any costs due before the expiration of one month of the bill being delivered in accordance with s. (2.)

s.(2) SA states that the bill must be—

- signed in accordance with subsection (2A), and
- delivered in accordance with subsection (2C).

s. 2(c) SA states:

A bill is signed in accordance with this subsection if it is—

(a) signed by the solicitor or on his behalf by an employee of the solicitor authorised by him to sign, or

(b) enclosed in, or accompanied by, a letter which is signed as mentioned in paragraph (a) and refers to the bill.

(2B) For the purposes of subsection (2A) the signature may be an electronic signature.

(2C) A bill is delivered in accordance with this subsection if—

(a) it is delivered to the party to be charged with the bill personally,

(b) it is delivered to that party by being sent to him by post to, or left for him at, his place of business, dwelling-house or last known place of abode, or

(c) it is delivered to that party—

¹⁸⁹ Hall v Barker (1839) 9 Ch D 538

(i) by means of an electronic communications network, or

(ii) by other means but in a form that nevertheless requires the use of apparatus by the recipient to render it intelligible, and that party has indicated to the person making the delivery his willingness to accept delivery of a bill sent in the form and manner used.

The Format of a Statute Bill

The following (non exhaustive list) deals with the format of a statute bill:

- The bill must contain enough detail to enable the client to properly assess the reasonableness of the fees charged.
- It may contain unpaid disbursements but the bill should clearly list them as such¹⁹⁰
- It must contain a narrative, save where the client has agreed that one is not necessary or where the detail of the bill make a narrative unnecessary

Gross Sum Bill

Where a solicitor acts in a contentious matter and there is no contentious business agreement he may elect to deliver a gross sum bill (which includes a brief summary of costs) as opposed to a bill detailing all the items incurred.

The party chargeable with the bill may require the solicitor to deliver a detailed bill providing that:

- The solicitor has not formally sought to recover the cost and
- He does so within 3 months of receipt of the gross sum bill¹⁹¹

Where a gross sum bill is assessed, the solicitor is required to provide such further information as the assessing judge may require.

The Finality of a Bill

Save where the client requests a detailed bill where a gross sum bill has been delivered, the solicitor is bound by the bill. It may only be withdrawn by order of the court or where the client consents. The Court will allow the withdrawal or variance in very limited circumstances (usually involving a mistake or, in exceptional cases, an omission.)

Assessing the Bill

The party chargeable may make an application to have the Bill assessed. Their right to do so diminishes with time as follows¹⁹²:

¹⁹⁰ Solicitors should note that unpaid disbursements will not be allowed at any subsequent assessment, save for where they are paid before the assessment is completed- Solicitors Act 1974 s. 67

¹⁹¹ Solicitors Act 1974 s.64

¹⁹² Ibid. s.70

One Month after delivery of the Bill	The party chargeable may make an application and the High Court will order that the bill be assessed and no action be taken on the bill until the assessment is completed.
After one month but before twelve months after delivery	The Court may order an assessment and that no action be taken on the bill until the assessment is completed.
<ul style="list-style-type: none">- After twelve months from the delivery of the Bill- After a judgment has been obtained for the recovery of costs covered by the bill- After the Bill has been paid but before the expiration of twelve months from the payment of the Bill	No order shall be made except in special circumstances
More than twelve months after the Bill has been paid	The Court cannot make an order for assessment

Special Circumstances

Each case will turn on its facts. The relevant factors the court may take into account will include:

- Whether the Bill contains errors
- Where there has been an agreement between solicitor and client that the costs would be assessed
- Where the delay has been caused or contributed to by the Solicitors
- Factors which explain the delay (such as the personal circumstances of the Client)

Third Parties

A party other than the client of the solicitor may make an application to have a bill assessed under SA s.71. The wording is as follows:

“Where a person other than the party chargeable with the bill for the purposes of section 70 has paid, or is or was liable to pay, a bill either to the solicitor or to the party chargeable with the bill, that person, or his executors, administrators or assignees may apply to the High Court for an order for the assessment of the bill as if he were the party chargeable with it, and the court may make the same order (if any) as it might have made if the application had been made by the party chargeable with the bill.”

However, it has been found that on such an assessment the costs judge’s powers are limited as follows:

“He can eliminate (a) items which ought not to be laid at the door of the third party at all because they are outwith the scope of his liability... (b) items which are only allowable as between client and solicitor on a special arrangement basis, within the terms of CPR rule 48.8(2)(c). He cannot either eliminate any other item or reduce the quantum of any item which is properly included in itself, but for which he considers that the charge made is excessive, unless he could have done so as between client and solicitor on an assessment under section 70.”¹⁹³

This severely restricts the ability of the third party to properly challenge the costs and this procedure will now be rarely used. It would be far more advantageous for the party to bring a claim in the Chancery Division for an account. The claim can then be sent to a costs judge to assess on the basis of a s.70 hearing as between the third party and the solicitor and the usual points can be taken.

The Assessment Process

The application should be made within the proceedings or, where no proceedings exist, via Part 8 proceedings.

The procedure is then as follows:¹⁹⁴

- The solicitor must serve a breakdown of costs within 28 days of the order for costs to be assessed.
- The client must serve points of dispute within 14 days after service on the client of the breakdown of costs.
- The solicitor must serve any reply within 14 days of service on the solicitor of the points of dispute.
- Either party may file a request for a hearing date –
 - after points of dispute have been served; but
 - no later than 3 months after the date of the order for the costs to be assessed.
- This procedure applies subject to any contrary order made by the court.

The format of points and replies will be the same as in between the parties assessments. The Default Costs Certificate provisions do not apply to solicitor and client assessments.¹⁹⁵

The solicitor must file the papers in support of the Bill (unless the court orders otherwise) not less than 7 days before and not more than 14 days before the hearing date.¹⁹⁶

After the detailed assessment hearing is concluded the court will –

(a) complete the court copy of the bill so as to show the amount allowed;

(b) determine the result of the cash account;

¹⁹³ Tim Martin Interiors Limited v Akin Gump LLP [2011] EWCA Civ 1574

¹⁹⁴ CPR 46.10

¹⁹⁵ PD - 46 – 6.8

¹⁹⁶ PD – 46 -6.16

(c) award the costs of the detailed assessment hearing in accordance with Section 70(8) of the Solicitors Act 1974; and

(d) issue a final costs certificate.¹⁹⁷

The Basis of Assessment

Costs will be assessed on the indemnity basis.¹⁹⁸

Non-contentious costs will be allowed if they are fair and reasonable having regard to all the circumstances of the case.¹⁹⁹

For contentious business the costs are presumed:

- to have been reasonably incurred if they were incurred with the express or implied approval of the client;
- to be reasonable in amount if their amount was expressly or impliedly approved by the client;
- to have been unreasonably incurred if –
- they are of an unusual nature or amount; and
- the solicitor did not tell the client that as a result the costs might not be recovered from the other party.²⁰⁰

Limit on the Recoverable Costs

S.74(3) SA states:

“The amount which may be allowed on the assessment of any costs or bill of costs in respect of any item relating to proceedings in a county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and of any counterclaim.”

This rule will apply unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings.²⁰¹ This rule is obviously important with the extension of fixed costs.

Costs of the Assessment

The general rule is that if the bill is reduced by one fifth the solicitor will pay the costs, if reduced by less than that amount the client will pay. The Court is at liberty to make a different order where special circumstances apply.²⁰²

¹⁹⁷ PD – 46 – 6.19

¹⁹⁸ PD -46 -6.2

¹⁹⁹ The factors to take into account when considering this question are set out in the Solicitors' (Non-Contentious Business) Remuneration Order 2009

²⁰⁰ CPR 46.9 (3)

²⁰¹ CPR 46.9 (2)

²⁰² Solicitors Act 1974- s. 70

Vat is not usually taken into account when considering the 'one fifth rule.'

If a Gross Sum Bill is assessed with reference to a detailed breakdown of charges the key figure is the amount of the Gross Sum Bill

Part Seven: Litigation Funding

7.1 Background

The abolition of the recovery of success fees and ATEs will have a profound impact for solicitors and their clients alike. As part of the reforms new methods of litigation funding were made lawful and new rules in respect of success fees payable between solicitor and client came into force.

7.2 Conditional Fee Agreements and Success Fees

CFAs and CCFA²⁰³ remain lawful. The success fee element is now payable between solicitor and client and is calculated with reference to the damages recovered.²⁰⁴ LASPO provides that the following conditions apply to a CFA which includes a success fee (failure to comply with these requirements will render the CFA unenforceable):

- (a) the agreement must provide that the success fee is subject to a maximum limit,
- (b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,
- (c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and
- (d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings.²⁰⁵

A success fee may not be greater than 100%.²⁰⁶

Personal Injury

In personal injury claims the maximum success fee is 25% of damages in all first instance claims and 100% of damages in any appeal proceedings.²⁰⁷

‘Damages’ means:

- general damages for pain, suffering, and loss of amenity; and
- damages for pecuniary loss, other than future pecuniary loss
- net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions²⁰⁸

The cap must include VAT and whilst the legislation is not explicit, appears to include any success fee payable to counsel.²⁰⁹

²⁰³ CCFA – Collective Conditional Fee Agreement (see glossary for a definition)

²⁰⁴ Insolvency, Diffuse Mesothelioma and Defamation and Privacy proceedings are all not covered by these changes at present.

²⁰⁵ LASPO s. 44 (2)

²⁰⁶ The Conditional Fee Agreements Order 2013 s.3

²⁰⁷ Ibid s.5

²⁰⁸ Ibid.

7.3 Damages Based Agreements

DBA's are contingency fees by another name. Where a DBA is signed the solicitor receives payment of a specified percentage of the damages received.

A DBA must specify:

- the claim or proceedings or parts of them to which the agreement relates;
- the circumstances in which the representative's payment, expenses and costs, or part of them, are payable; and
- the reason for setting the amount of the payment at the level agreed, which, in an employment matter, shall include having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings.²¹⁰

In employment claims the following additional information must be given:

- the circumstances in which the client may seek a review of costs and expenses of the representative and the procedure for doing so;
- the dispute resolution service provided by the Advisory, Conciliation and Arbitration Service (ACAS) in regard to actual and potential claims;
- whether other methods of pursuing the claim or financing the proceedings, including—
- (i) advice under the Community Legal Service,
- (ii) legal expenses insurance,
- (iii) pro bono representation, or
- (iv) trade union representation, are available, and, if so, how they apply to the client and the claim or proceedings in question; and
- the point at which expenses become payable; and
- a reasonable estimate of the amount that is likely to be spent upon expenses, inclusive of VAT.²¹¹

For receiving parties these provisions appear ominous and echo some of the provisions in the CFA Regulations 2000. There are likely to be technical challenges in respect of the wording of DBAs.

The cap on the percentage allowed is as follows:

Personal Injury Claims	25%
Employment ²¹² Claims	35%

²⁰⁹ See the Law Society Conditional Fee Agreements Guidance 2013

²¹⁰ The Damages Based Agreements Regulations 2013 s.3

²¹¹ Ibid. s. 5

²¹² Defined in the regulations as "a matter that is, or could become, the subject of proceedings before an employment tribunal."

All Other Claims	50%
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The definition of damages for personal injury claims is:

- general damages for pain, suffering and loss of amenity; and
- damages for pecuniary loss other than future pecuniary loss
- net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions;²¹³

Recovering Costs

DBA's have not proved popular because the rules have limited the amount recoverable by way of costs to the amount specified under the agreement.

The rules provide that:

Where costs are to be assessed in favour of a party who has entered into a damages-based agreement –

- (a) the party's recoverable costs will be assessed in accordance with rule 44.3; and
- (b) the party may not recover by way of costs more than the total amount payable by that party under the damages-based agreement for legal services provided under that agreement.²¹⁴

Thus the receiving party will obtain a standard costs order but at assessment will not be able to recover from his opponent any more than is allowed for within the agreement. That percentage includes Vat and counsel's fees and in some case counsel's fee alone could amount to more than the percentage recovered.

²¹³ The Damages Based Agreements Regulations 2013 s.4

²¹⁴ CPR 44.18 (2)

Part 8 : Appendix

8.1 Types of orders for Costs²¹⁵

Costs Costs in any event	The party in whose favour the order is made is entitled to that party's costs in respect of the part of the proceedings to which the order relates, whatever other costs orders are made in the proceedings.
Costs in the case Costs in the application	The party in whose favour the court makes an order for costs at the end of the proceedings is entitled to that party's costs of the part of the proceedings to which the order relates.
Costs reserved	The decision about costs is deferred to a later occasion, but if no later order is made the costs will be costs in the case.
Claimant's/Defendant's costs in case/application	If the party in whose favour the costs order is made is awarded costs at the end the proceedings, that party is entitled to that party's costs of the part of the proceedings to which the order relates. If any other party is awarded costs at the end of the proceedings, the party in whose favour the final costs order is made is not liable to pay the costs of any other party in respect of the part of the proceedings to which the order relates.
Costs thrown away	Where, for example, a judgment or order is set aside, the party in whose favour the costs order is made is entitled to the costs which have been incurred as a consequence. This includes the costs of – preparing for and attending any hearing at which the judgment or order which has been set aside was made; preparing for and attending any hearing to set aside the judgment or order in question; preparing for and attending any hearing at which the court orders the proceedings or the part in question to be adjourned; any steps taken to enforce a judgment or order which has subsequently been set aside
Costs of and caused by	Where, for example, the court makes this order on an application to amend a statement of case, the party in whose favour the costs order is made is entitled to the costs of preparing for and attending the application and the costs of any consequential amendment to his own statement of case.
Costs here and below	The party in whose favour the costs order is made is entitled not only to that party's costs in respect of the proceedings in which the

²¹⁵ PD – 44 4.2

	court makes the order but also to that party's costs of the proceedings in any lower court. In the case of an appeal from a Divisional Court the party is not entitled to any costs incurred in any court below the Divisional Court.
No order as to costs Each party to pay own costs	Each party is to bear that party's own costs of the part of the proceedings to which the order relates whatever costs order the court makes at the end of the proceedings.

8.2 Solicitors' Guideline Hourly Rates 2010

Key to costing grades

A Solicitors, over 8 years qualified experience.

B Solicitors or Legal Executives (FILEX) over 4 years qualified experience.

C Other qualified Solicitors or Legal Executives.

D Trainee solicitors, paralegals or equivalent

National 1

Grades

A £217

B £192

C £161

D £118

Aldershot, Farnham, Bournemouth (including Poole)

Birmingham Inner

Bristol

Cambridge City, Harlow

Canterbury, Maidstone, Medway & Tunbridge Wells

Cardiff (Inner)

Chelmsford South, Essex & East Suffolk

Chester

Fareham, Winchester

Hampshire, Dorset, Wiltshire & Isle of Wight

Kingston, Guildford, Reigate & Epsom

Leeds Inner (within 2 kilometres radius of City Art Gallery)

Lewes

Liverpool, Birkenhead

Manchester Central

Newcastle City Centre (within 2 mile radius of St Nicholas Cathedral)

Norwich City

Nottingham City

Oxford, Thames Valley

Southampton, Portsmouth

Swindon, Basingstoke
Watford

National 2

Grades

A £201

B £177

C £146

D £111

Bath, Cheltenham & Gloucester, Taunton, Yeovil
Bury
Chelmsford North, Cambridge County, Peterborough,
Bury St Edmunds, Norfolk & Lowestoft
Cheshire & North Wales
Coventry, Rugby, Nuneaton, Stratford & Warwick
Exeter, Plymouth
Hull (City)
Leeds Outer, Wakefield & Pontefract
Leigh
Lincoln
Luton, Bedford, St Albans, Hitchin & Hertford
Manchester Outer, Oldham, Bolton, Tameside
Newcastle (other than City Centre)
Nottingham & Derbyshire
Sheffield, Doncaster & South Yorkshire
Southport
St Helens & Wigan
Stockport, Altrincham, Salford
Swansea, Newport, Cardiff (Outer)
Wolverhampton, Walsall, Dudley & Stourbridge
York, Harrogate

National 3

Grades

A £201

B £177

C £146

D £111

Birmingham Outer
Bradford (Dewsbury, Halifax, Huddersfield, Keighley, Skipton)
Cumbria
Devon, Cornwall
Hull Outer, Grimsby, Skegness
Kidderminster

Northampton & Leicester
 Preston, Lancaster, Blackpool, Chorley, Accrington, Burnley,
 Blackburn, Rawenstall & Nelson
 Scarborough & Ripon
 Stafford, Stoke on Trent & Tamworth
 Teesside
 Worcester, Hereford, Evesham & Redditch
 Shrewsbury, Telford, Ludlow, Oswestry
 South & West Wales

London 1 (EC1, EC2, EC3, EC4)

Grades

A £409

B £296

C £226

D £138

London 2 (W1, WC1, WC2, SW1)

Grades

A £317

B £242

C £196

D £126

London 3 (W, NW, N, E, SE, SW and Bromley, Croydon, Dartford, Gravesend & Uxbridge)

Grades

A £229-267

B £172-229

C £165

D £121

8.3 Court Fees

On filing a request for detailed assessment where the party filing the request is legally aided or is funded by the Legal Services Commission and no other party is ordered to pay the costs of the proceedings

£145

<p>On filing a request for a detailed assessment in any case where the above fee does not apply; or on filing a request for a hearing date for the assessment of costs payable to a solicitor by a client pursuant to an order under Part 3 of the Solicitor's Act 1974 where the amount of costs claimed-</p> <p>(a) Does not exceed £15,000 £325</p> <p>(b) Exceeds £15,000 but does not exceed £50,000 £655</p> <p>(c) Exceeds £50,000 but does not exceed £100,000 £980</p> <p>(d) Exceeds £100,000 but does not exceed £150,000 £1,310</p> <p>(e) Exceeds £150,000 but does not exceed £200,000 £1,635</p> <p>(f) Exceeds £200,000 but does not exceed £300,000 £2,455</p> <p>(g) Exceeds £300,000 but does not exceed £500,000 £4,090</p> <p>(h) Exceeds £500,000 £5,455</p>	
Request for a Default Costs Certificate	£60
Application to set aside Default Costs Certificate	£105
General Application (where no other fee is specified)	£80
Consent Order Fee	£45
<p>Determination in the Senior Court of costs incurred in the court of protection.</p> <p>On the filing of a request for detailed assessment:</p> <p>(a) Where the amount of costs to be assessed (excluding VAT and disbursements) does not exceed £3,000 £110</p> <p>(b) In all other cases £220</p>	

On commencing an appeal against a decision made in detailed assessment proceedings	£205
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8.4 Fixed Costs on Entry of Judgment in a claim for the recovery of money or goods

	Where the amount of the judgment exceeds £25 but does not exceed £5,000	Where the amount of the judgment exceeds £5,000
Where judgment in default of an acknowledgment of service is entered under rule 12.4(1) (entry of judgment by request on claim for money only)	£22.00	£30.00
Where judgment in default of a defence is entered under rule 12.4(1) (entry of judgment by request on claim for money only)	£25.00	£35.00
Where judgment is entered under rule 14.4 (judgment on admission), or rule 14.5 (judgment on admission of part of claim) and claimant accepts the defendant's proposal as to the manner of payment	£40.00	£55.00
Where judgment is entered under rule 14.4 (judgment on admission), or rule 14.5 (judgment on admission of part of claim) and court decides the date or time of payment	£55.00	£70.00
Where summary judgment is given under Part 24 or the court strikes out a defence under rule 3.4(2)(a), in either case, on application by a party	£175.00	£210.00
Where judgment is given on a claim for delivery of goods under a regulated agreement within the meaning of the Consumer Credit Act 1974 and no other entry in this table applies	£60.00	£85.00

8.5 Selected Fixed Enforcement Costs

For an application under rule 70.5(4) that an award may be enforced as if payable under a court order, where the amount outstanding under the award:

exceeds £25 but does not exceed £250	£30.75
exceeds £250 but does not exceed £600	£41.00

exceeds £600 but does not exceed £2,000 £69.50

exceeds £2,000 £75.50

On attendance to question a judgment debtor (or officer of a company or other corporation) who has been ordered to attend court under rule 71.2 where the questioning takes place before a court officer, including attendance by a responsible representative of the legal representative for each half hour or part £15.00

On the making of a final third party debt order under rule 72.8(6)(a) or an order for the payment to the judgment creditor of money in court under rule 72.10(1)(b):

If the amount recovered is less than £150: one-half of the amount recovered otherwise £98.50

On the making of a final charging order under rule 73.8(2)(a): £110.00

The court may also allow reasonable disbursements in respect of search fees and the registration of the order.

Where an application for an attachment of earnings order is made and costs are allowed under CCR Order 27, rule 9 or CCR Order 28, rule 10, for each attendance on the hearing of the application £8.50

