

# PART 48

## COSTS – SPECIAL CASES

### CONTENTS OF THIS PART

#### I COSTS PAYABLE BY OR TO PARTICULAR PERSONS

Pre-commencement disclosure and orders for disclosure against a person who is not a party	48.1
Costs orders in favour of or against non-parties	48.2
Amount of costs where costs are payable pursuant to a contract	48.3
Limitations on court's power to award costs in favour of trustee or personal representative	48.4
Costs where money is payable by or to a child or patient	48.5
Litigants in person	48.6

#### II COSTS RELATING TO SOLICITORS AND OTHER LEGAL REPRESENTATIVES

Personal liability of legal representative for costs – wasted costs orders	48.7
Basis of detailed assessment of solicitor and client costs	48.8
Conditional fees	48.9
Assessment procedure	48.10

(The definitions contained in Part 43 are relevant to this Part)

### 1 COSTS PAYABLE BY OR TO PARTICULAR PERSONS

#### PRE-COMMENCEMENT DISCLOSURE AND ORDERS FOR DISCLOSURE AGAINST A PERSON WHO IS NOT A PARTY

- 48.1 | (1) This paragraph applies where a person applies –
- (a) for an order under –
    - (i) section 33 of the Supreme Court Act 1981<sup>(77)</sup>; or
    - (ii) section 52 of the County Courts Act 1984<sup>(78)</sup>,
 (which give the court powers exercisable before commencement of proceedings); or
  - (b) for an order under –

(77) 1981 c.54. Section 33 was amended by S.I. 1998/2940.

(78) 1984 c.28. Section 52 was amended by the Courts and Legal Services Act 1990 (c.41), Schedule 18, paragraph 43 and by S.I. 1998/2940.

- (i) section 34 of the Supreme Court Act 1981<sup>(79)</sup>; or
  - (ii) section 53 of the County Courts Act 1984<sup>(80)</sup>,  
(which give the court power to make an order against a non-party for disclosure of documents, inspection of property etc.).
- (2) The general rule is that the court will award the person against whom the order is sought his costs –
- (a) of the application; and
  - (b) of complying with any order made on the application.
- (3) The court may however make a different order, having regard to all the circumstances, including –
- (a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and
  - (b) whether the parties to the application have complied with any relevant pre-action protocol.

## COSTS ORDERS IN FAVOUR OF OR AGAINST NON-PARTIES

- 48.2 | (1) Where the court is considering whether to exercise its power under section 51 of the Supreme Court Act 1981<sup>(81)</sup> (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings –
- (a) that person must be added as a party to the proceedings for the purposes of costs only; and
  - (b) he must be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.
- (2) This rule does not apply –
- (a) where the court is considering whether to –
    - (i) make an order against the Legal Aid Board;
    - (ii) make a wasted costs order (as defined in 48.7); and
  - (b) in proceedings to which rule 48.1 applies (pre-commencement disclosure and orders for disclosure against a person who is not a party).

## AMOUNT OF COSTS WHERE COSTS ARE PAYABLE PURSUANT TO A CONTRACT

- 48.3 | (1) Where the court assesses (whether by the summary or detailed procedure) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –

(79) 1981 c.54. Section 34 was amended by S.I. 1998/2940.

(80) 1984 c.28. Section 53 was amended by the Courts and Legal Services Act 1990 (c.41), Schedule 18, paragraph 44 and by S.I. 1998/2940.

(81) 1981 c.54. Section 51 was substituted by section 4(1) of the Courts and Legal Services Act 1990 (c.41).

- (a) have been reasonably incurred; and
  - (b) are reasonable in amount,
- and the court will assess them accordingly.

(The costs practice direction sets out circumstances where the court may order otherwise)

- (2) This rule does not apply where the contract is between a solicitor and his client.

## **LIMITATIONS ON COURT'S POWER TO AWARD COSTS IN FAVOUR OF TRUSTEE OR PERSONAL REPRESENTATIVE**

- 48.4** |
- (1) This rule applies where –
    - (a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
    - (b) rule 48.3 does not apply.
  - (2) The general rule is that where he is entitled to be paid his costs of the proceedings out of any fund held by him as trustee or personal representative, those costs shall be assessed on the indemnity basis.
  - (3) The court may order otherwise if a trustee or personal representative has acted for a benefit other than that of the fund.

## **COSTS WHERE MONEY IS PAYABLE BY OR TO A CHILD OR PATIENT**

- 48.5** |
- (1) This rule applies to any proceedings where a party is a child or patient and –
    - (a) money is ordered or agreed to be paid to, or for the benefit of, that party; or
    - (b) money is ordered to be paid by him or on his behalf.

(‘Child’ and ‘patient’ are defined in rule 2.3)
  - (2) The general rule is that –
    - (a) the court must order a detailed assessment of the costs payable by any party who is a child or patient to his solicitor; and
    - (b) on an assessment under paragraph (a), the court must also assess any costs payable to that party in the proceedings, unless the court has issued a default costs certificate in relation to those costs under rule 47.11.
  - (3) The court need not order detailed assessment of costs in the circumstances set out in the costs practice direction.
  - (4) Where –
    - (a) a claimant is a child or patient; and

- (b) a detailed assessment has taken place under paragraph (2)(a), the only amount payable by the child or patient to his solicitor is the amount which the court certifies as payable.

(This rule applies to a counterclaim by or on behalf of a child or patient by virtue of rule 20.3)

## LITIGANTS IN PERSON

- 48.6
- (1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that the costs of a litigant in person are to be paid by any other person.
  - (2) The costs allowed under this rule must not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.
  - (3) Costs allowed to the litigant in person shall be –
    - (a) such costs which would have been allowed if the work had been done or the disbursements made by a legal representative on the litigant in person's behalf;
    - (b) the payments reasonably made by him for legal services relating to the conduct of the proceedings; and
    - (c) the costs of obtaining expert assistance in connection with assessing the claim for costs.

(The costs practice direction deals with who may be an expert for the purpose of paragraph (2)(c))

- (4) Subject to paragraph (2), the amount of costs to be allowed to the litigant in person for any item of work to which the costs relate shall, if he fails to prove financial loss, be an amount in respect of the time spent reasonably doing the work at the rate specified in the costs practice direction.
- (5) A litigant who is allowed costs for attending at court to conduct his case is not entitled to a witness allowance in respect of such attendance in addition to those costs.
- (6) For the purposes of this rule, a litigant in person includes –
  - (a) a company or other corporation which is acting without a legal representative; and
  - (b) a barrister, solicitor, solicitor's employee or other authorised litigator (as defined in the Courts and Legal Services Act 1990<sup>(82)</sup>) who is acting for himself.

(82) 1990 c.41.

## II COSTS RELATING TO SOLICITORS AND OTHER LEGAL REPRESENTATIVES

### PERSONAL LIABILITY OF LEGAL REPRESENTATIVE FOR COSTS – WASTED COSTS ORDERS

- 48.7 |
- (1) This rule applies where the court is considering whether to make an order under section 51(6) of the Supreme Court Act 1981<sup>(83)</sup> (court's power to disallow or (as the case may be) order a legal representative to meet, 'wasted costs').
  - (2) The court must give the legal representative a reasonable opportunity to attend a hearing to give reasons why it should not make such an order.
  - (3) For the purposes of this rule, the court may direct that privileged<sup>(GL)</sup> documents are to be disclosed to the court and, if the court so directs, to the other party to the application for an order.
  - (4) When the court makes a wasted costs order, it must specify the amount to be disallowed or paid.
  - (5) The court may direct that notice must be given to the legal representative's client, in such manner as the court may direct –
    - (a) of any proceedings under this rule; or
    - (b) of any order made under it against his legal representative.
  - (6) Before making a wasted costs order, the court may direct a costs judge or a district judge to inquire into the matter and report to the court.
  - (7) The court may refer the question of wasted costs to a costs judge or a district judge, instead of making a wasted costs order.

### BASIS OF DETAILED ASSESSMENT OF SOLICITOR AND CLIENT COSTS

- 48.8 |
- (1) This rule applies to every assessment of a solicitor's bill to his client except –
    - (a) a bill which is to be paid out of the legal aid fund under the Legal Aid Act 1988<sup>(84)</sup>; or
    - (b) where the solicitor and his client have entered into a conditional fee agreement as defined by section 58 of the Courts and Legal Services Act 1990<sup>(85)</sup>.
  - (1A) Section 74(3) of the Solicitors Act 1974(a) applies 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

(83) 1981 c.54. Section 51 was substituted by section 4(1) of the Courts and Legal Services Act 1990 (c.41).

(84) 1988 c.34.

(85) 1990 c.41. Section 58 was amended by the Family Law Act 1996 (c.27), Schedule 8, Part III, paragraph 61.

that which the client could have recovered from another party to the proceedings.

- (2) Subject to paragraph (1A), costs are to be assessed on the indemnity basis but are to be presumed –
  - (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
  - (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
  - (c) to have been unreasonably incurred if –
    - (i) they are of an unusual nature or amount; and
    - (ii) the solicitor did not tell his client that as a result he might not recover all of them from the other party.

## CONDITIONAL FEES

48.9

- (1) This rule applies to every assessment (whether by the summary or detailed procedure) of a solicitor's bill to his client where the solicitor and the client have entered into a conditional fee agreement as defined in section 58 of the Courts and Legal Services Act 1990.
- (2) In this rule –
 

‘the base costs’ means the costs other than a percentage increase;

‘percentage increase’ means a percentage increase pursuant to a conditional fee agreement entered into between the solicitor and his client or between counsel and the solicitor, or counsel and the client; and

‘costs’ includes all fees, charges, disbursements and other expenses charged by the solicitor or counsel under the conditional fee agreement in question.
- (3) On an assessment to which this rule applies, the client may apply for assessment of the base costs or of a percentage increase or of both.
- (4) Where the client applies for assessment of the base costs, the base costs are to be assessed in accordance with rule 48.8(2) as if the solicitor and his client had not entered into a conditional fee agreement.
- (5) Where the client applies for assessment of a percentage increase, the court may reduce the percentage increase where it considers it to be disproportionate having regard to all relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into.
- (6) The court will not vary a percentage increase where the client is a child or patient, except in accordance with paragraph (5).

(The costs practice direction specifies some of the relevant factors)

## ASSESSMENT PROCEDURE

- 48.10 |
- (1) This rule sets out the procedure to be followed where the court has made an order under Part III of the Solicitors Act 1974<sup>(86)</sup> for the assessment of costs payable to a solicitor by his client.
  - (2) The solicitor must serve a breakdown of costs within 28 days of the order for costs to be assessed.
  - (3) The client must serve points of dispute within 14 days after service on him of the breakdown of costs.
  - (4) If the solicitor wishes to serve a reply, he must do so within 14 days of service on him of the points of dispute.
  - (5) Either party may file a request for a hearing date –
    - (a) after points of dispute have been served; but
    - (b) no later than 3 months after the date of the order for the costs to be assessed.
  - (6) This procedure applies subject to any contrary order made by the court.

(Other rules about costs payable in special cases can be found in Schedule 1, in the following RSC – O.30 (remuneration of receivers); O.49 (costs of garnishee))

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(86) 1974 c.47.

