

# PART 44

## GENERAL RULES ABOUT COSTS

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### SCOPE OF THIS PART

- 44.1 | This Part contains general rules about costs and entitlement to costs.  
(The definitions contained in Part 43 are relevant to this Part)

### SOLICITOR'S DUTY TO NOTIFY CLIENT

- 44.2 | Where –

- (a) the court makes a costs order against a legally represented party; and
  - (b) the party is not present when the order is made,
- the party's solicitor must notify his client in writing of the costs order no later than 7 days after the solicitor receives notice of the order.

## COURT'S DISCRETION AND CIRCUMSTANCES TO BE TAKEN INTO ACCOUNT WHEN EXERCISING ITS DISCRETION AS TO COSTS

### 44.3

- (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.
- (2) If the court decides to make an order about costs –
  - (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
  - (b) the court may make a different order.
- (3) The general rule does not apply to the following proceedings –
  - (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
  - (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.
- (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
  - (a) the conduct of all the parties;
  - (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
  - (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

(Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part)
- (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 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 his case or a particular allegation or issue; and
  - (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
- (6) The orders which the court may make under this rule include an order that a party must pay –
- (a) a proportion of another party's costs;
  - (b) a stated amount in respect of another party's costs;
  - (c) costs from or until a certain date only;
  - (d) costs incurred before proceedings have begun;
  - (e) costs relating to particular steps taken in the proceedings;
  - (f) costs relating only to a distinct part of the proceedings; and
  - (g) interest on costs from or until a certain date, including a date before judgment.
- (7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).
- (8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.
- (9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either –
- (a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or
  - (b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.

## COSTS ORDERS RELATING TO FUNDING ARRANGEMENTS

- 44.3A | (1) The court will not assess any additional liability until the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates.

("Funding arrangement" and "additional liability" are defined in rule 43.2)

- (2) At the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates the court may –
- (a) make a summary assessment of all the costs, including any additional liability;
  - (b) make an order for detailed assessment of the additional liability but make a summary assessment of the other costs; or
  - (c) make an order for detailed assessment of all the costs.

(Part 47 sets out the procedure for the detailed assessment of costs)

## LIMITS ON RECOVERY UNDER FUNDING ARRANGEMENTS

- 44.3B** | (1) A party may not recover as an additional liability –
- (a) any proportion of the percentage increase relating to the cost to the legal representative of the postponement of the payment of his fees and expenses;
  - (b) any provision made by a membership organisation which exceeds the likely cost to that party of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings;
  - (c) any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order;
  - (d) any percentage increase where a party has failed to comply with –
    - (i) a requirement in the costs practice direction; or
    - (ii) a court order,
 to disclose in any assessment proceedings the reasons for setting the percentage increase at the level stated in the conditional fee agreement.
- (2) This rule does not apply in an assessment under rule 48.9 (assessment of a solicitor's bill to his client).

(Rule 3.9 sets out the circumstances the court will consider on an application for relief from a sanction for failure to comply with any rule, practice direction or court order)

## BASIS OF ASSESSMENT

- 44.4** | (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
- (a) on the standard basis; or
  - (b) on the indemnity basis,
- but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
- (Rule 48.3 sets out how the court decides the amount of costs payable under a contract)
- (2) Where the amount of costs is to be assessed on the standard basis, the court will –
- (a) only allow costs which are proportionate to the matters in issue; and

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

(Factors which the court may take into account are set out in rule 44.5)

- (3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.
- (4) Where –
  - (a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
  - (b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis,
 the costs will be assessed on the standard basis.
- (6) Where the amount of a solicitor's remuneration in respect of non-contentious business is regulated by any general orders made under the Solicitors Act 1974<sup>(66)</sup>, the amount of the costs to be allowed in respect of any such business which falls to be assessed by the court will be decided in accordance with those general orders rather than this rule and rule 44.5.

## FACTORS TO BE TAKEN INTO ACCOUNT IN DECIDING THE AMOUNT OF COSTS

44.5

- (1) The court is to have regard to all the circumstances in deciding whether costs were –
  - (a) if it is assessing costs on the standard basis –
    - (i) proportionately and reasonably incurred; or
    - (ii) were proportionate and reasonable in amount, or
  - (b) if it is assessing costs on the indemnity basis –
    - (i) unreasonably incurred; or
    - (ii) unreasonable in amount.
- (2) In particular the court must give effect to any orders which have already been made.
- (3) The court must also have regard to –
  - (a) the conduct of all the parties, including in particular –
    - (i) conduct before, as well as during, the proceedings; and
    - (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
  - (b) the amount or value of any money or property involved;

(66) 1974 c.47.

- (c) the importance of the matter to all the parties;
- (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
- (e) the skill, effort, specialised knowledge and responsibility involved;
- (f) the time spent on the case; and
- (g) the place where and the circumstances in which work or any part of it was done.

(Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert)

## FIXED COSTS

- 44.6 | A party may recover the fixed costs specified in Part 45 in accordance with that Part.

## PROCEDURE FOR ASSESSING COSTS

- 44.7 | Where the court orders a party to pay costs to another party (other than fixed costs) it may either –
- (a) make a summary assessment of the costs; or
  - (b) order detailed assessment of the costs by a costs officer,
- unless any rule, practice direction or other enactment provides otherwise.
- (The costs practice direction sets out the factors which will affect the court's decision under this rule)

## TIME FOR COMPLYING WITH AN ORDER FOR COSTS

- 44.8 | A party must comply with an order for the payment of costs within 14 days of –
- (a) the date of the judgment or order if it states the amount of those costs;
  - (b) if the amount of those costs (or part of them) is decided later in accordance with Part 47, the date of the certificate which states the amount; or
  - (c) in either case, such later date as the court may specify.

(Part 47 sets out the procedure for detailed assessment of costs)

## COSTS ON THE SMALL CLAIMS TRACK AND FAST TRACK

- 44.9 | (1) Part 27 (small claims) and Part 46 (fast track trial costs) contain special rules about –
- (a) liability for costs;

- (b) the amount of costs which the court may award; and
  - (c) the procedure for assessing costs.
- (2) Once a claim is allocated to a particular track, those special rules shall apply to the period before, as well as after, allocation except where the court or a practice direction provides otherwise.

### **LIMITATION ON AMOUNT COURT MAY ALLOW WHERE A CLAIM ALLOCATED TO THE FAST TRACK SETTLES BEFORE TRIAL**

- 44.10** | (1) Where the court –
- (a) assesses costs in relation to a claim which –
    - (i) has been allocated to the fast track; and
    - (ii) settles before the start of the trial; and
  - (b) is considering the amount of costs to be allowed in respect of a party's advocate for preparing for the trial,
- it may not allow, in respect of those advocate's costs, an amount that exceeds the amount of fast track trial costs which would have been payable in relation to the claim had the trial taken place.
- (2) When deciding the amount to be allowed in respect of the advocate's costs, the court shall have regard to –
- (a) when the claim was settled; and
  - (b) when the court was notified that the claim had settled.
- (3) In this rule, 'advocate' and 'fast track trial costs' have the meanings given to them by Part 46.
- (Part 46 sets out the amount of fast track trial costs which may be awarded)

### **COSTS FOLLOWING ALLOCATION AND RE-ALLOCATION**

- 44.11** | (1) Any costs orders made before a claim is allocated will not be affected by allocation.
- (2) Where –
- (a) a claim is allocated to a track; and
  - (b) the court subsequently re-allocates that claim to a different track,
- then unless the court orders otherwise, any special rules about costs applying –
- (i) to the first track, will apply to the claim up to the date of re-allocation; and
  - (ii) to the second track, will apply from the date of re-allocation.
- (Part 26 deals with the allocation and re-allocation of claims between tracks )

## CASES WHERE COSTS ORDERS DEEMED TO HAVE BEEN MADE

- 44.12 | (1) Where a right to costs arises under –
- (a) rule 3.7 (defendant's right to costs where claim struck out for non-payment of fees);
  - (b) rule 36.13(1) (claimant's right to costs where he accepts defendant's Part 36 offer or Part 36 payment);
  - (c) rule 36.14 (claimant's right to costs where defendant accepts the claimant's Part 36 offer); or
  - (d) rule 38.6 (defendant's right to costs where claimant discontinues),
- a costs order will be deemed to have been made on the standard basis.
- (2) Interest payable pursuant to section 17 of the Judgments Act 1838<sup>(67)</sup> or section 74 of the County Courts Act 1984<sup>(68)</sup> on the costs deemed to have been ordered under paragraph (1) shall begin to run from the date on which the event which gave rise to the entitlement to costs occurred.

## COSTS-ONLY PROCEEDINGS

- 44.12A | (1) This rule sets out a procedure which may be followed where –
- (a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but
  - (b) they have failed to agree the amount of those costs; and
  - (c) no proceedings have been started.
- (2) Either party to the agreement may start proceedings under this rule by issuing a claim form in accordance with Part 8.
- (3) The claim form must contain or be accompanied by the agreement or confirmation.
- (4) In proceedings to which this rule applies the court –
- (a) may
    - (i) make an order for costs; or
    - (ii) dismiss the claim;
 and
  - (b) must dismiss the claim if it is opposed.
- (5) Rule 48.3 (amount of costs where costs are payable pursuant to a contract) does not apply to claims started under the procedure in this

(67) 1838 c.110. Section 17 was amended by S.I. 1998/2940.

(68) 1984 c.28. Section 74 was amended by section 2 of the Private International Law (Miscellaneous Provisions) Act 1995 (c.42).



rule. (Rule 7.2 provides that proceedings are started when the court issues a claim form at the request of the claimant)

(Rule 8.1(6) provides that a practice direction may modify the Part 8 procedure)

## SPECIAL SITUATIONS

- 44.13 |
- (1) Where the court makes an order which does not mention costs no party is entitled to costs in relation to that order.
  - (2) The court hearing an appeal may, unless it dismisses the appeal, make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal.
  - (3) Where proceedings are transferred from one court to another, the court to which they are transferred may deal with all the costs, including the costs before the transfer.
  - (4) Paragraph (3) is subject to any order of the court which ordered the transfer.

## COURT'S POWERS IN RELATION TO MISCONDUCT

- 44.14 |
- (1) The court may make an order under this rule where –
    - (a) a party or his legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or
    - (b) it appears to the court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper.
  - (2) Where paragraph (1) applies, the court may –
    - (a) disallow all or part of the costs which are being assessed; or
    - (b) order the party at fault or his legal representative to pay costs which he has caused any other party to incur.
  - (3) Where –
    - (a) the court makes an order under paragraph (2) against a legally represented party; and
    - (b) the party is not present when the order is made,
 the party's solicitor must notify his client in writing of the order no later than 7 days after the solicitor receives notice of the order.
- (Other rules about costs can be found –
- (a) in Schedule 1, in the following RSC – O.45 (court may order act to be done at the expense of disobedient party); O.47 (writ of fieri facias to enforce payment of costs); and

- (b) in Schedule 2, in the following CCR – O.27 (attachment of earnings – judgment creditor’s entitlement to costs); O.28 (costs on judgment summons); O.30 (garnishee proceedings – judgment creditor’s entitlement to costs); O.49 (costs incurred in making a payment in under section 63 of the Trustee Act 1925 to be assessed by the detailed procedure)).

## PROVIDING INFORMATION ABOUT FUNDING ARRANGEMENTS

- 44.15 | (1) A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order.
- (2) Where the funding arrangement has changed, and the information a party has previously provided in accordance with paragraph (1) is no longer accurate, that party must file notice of the change and serve it on all other parties within 7 days.
- (3) Where paragraph (2) applies, and a party has already filed –
- (a) an allocation questionnaire; or
  - (b) a listing questionnaire,
- he must file and serve a new estimate of costs with the notice.
- (The costs practice direction sets out –
- the information to be provided when a party issues or responds to a claim form, files an allocation questionnaire, a listing questionnaire, and a claim for costs;
  - the meaning of estimate of costs and the information required in it) (Rule 44.3B sets out situations where a party will not recover a sum representing any additional liability)

## ADJOURNMENT WHERE LEGAL REPRESENTATIVE SEEKS TO CHALLENGE DISALLOWANCE OF ANY AMOUNT OF PERCENTAGE INCREASE

- 44.16 | Where–
- (a) the court disallows any amount of a legal representative’s percentage increase in summary or detailed assessment proceedings; and
  - (b) the legal representative applies for an order that the disallowed amount should continue to be payable by his client,

the court may adjourn the hearing to allow the legally represented party to be notified of the order sought.

(Regulation 3(2)(b) of the Conditional Fee Agreements Regulations 2000 provides that a conditional fee agreement which provides for a success fee must state that any amount of a percentage increase disallowed on assessment ceases to be payable unless the court is satisfied that it should continue to be so payable)

## APPLICATION OF COSTS RULES

- 44.17 | This Part and Part 45 (fixed costs), Part 46 (fast track trial costs), Part 47 (procedure for detailed assessment of costs and default provisions) and Part 48 (special cases), do not apply to the assessment of costs in proceedings to the extent that –
- (a) section 11 of the Access to Justice Act 1999, and provisions made under that Act, or
  - (b) regulations made under the Legal Aid Act 1988<sup>[9]</sup>,
- make different provision. (The costs practice direction sets out the procedure to be followed where a party was wholly or partially funded by the Legal Services Commission).

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[9] 1998 c. 34.