

# GENERAL RULES ABOUT COSTS

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## 44.1 Scope of this Part

This Part contains general rules about costs, entitlement to costs and orders in respect of pro bono representation.

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

#### **44.2 Solicitor's duty to notify client**

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.

#### **44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs**

- (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, 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 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.

#### **44.3A Costs orders relating to funding arrangements**

- (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)

#### **44.3B Limits on recovery under funding arrangements**

- (1) Unless the court orders otherwise, 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 during which that party failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order;
  - (d) any percentage increase where that 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;
  - (e) any insurance premium where that party has failed to provide information about the insurance policy in question by the time required by a rule, practice direction or court order.

(Paragraph 9.3 of the Practice Direction (Pre-Action Conduct) provides that a party must inform any other party as soon as possible about a funding arrangement entered into before the start of proceedings.)

- (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)

#### **44.3C Orders in respect of pro bono representation**

- (1) In this rule, 'the 2007 Act' means the Legal Services Act 2007.
- (2) Where the court makes an order under section 194(3) of the 2007 Act –
  - (a) the court may order the payment to the prescribed charity of a sum no greater than the costs specified in Part 45 to which the party with pro bono representation would have been entitled in accordance with that Part and in respect of that representation had it not been provided free of charge; or
  - (b) where Part 45 does not apply, the court may determine the amount of the payment (other than a sum equivalent to fixed costs) to be made by the paying party to the prescribed charity by –
    - (i) making a summary assessment; or
    - (ii) making an order for detailed assessment,of a sum equivalent to all or part of the costs the paying party would have been ordered to pay to the party with pro bono representation in respect of that representation had it not been provided free of charge.
- (3) Where the court makes an order under section 194(3) of the 2007 Act, the order must specify that the payment by the paying party must be made to the prescribed charity.
- (4) The receiving party must send a copy of the order to the prescribed charity within 7 days of receipt of the order.
- (5) Where the court considers making or makes an order under section 194(3) of the 2007 Act, Parts 43 to 48 apply, where appropriate, with the following modifications –
  - (a) references to 'costs orders', 'orders about costs' or 'orders for the payment of costs' are to be read, unless otherwise stated, as if they refer to an order under section 194(3);
  - (b) references to 'costs' are to be read, as if they referred to a sum equivalent to the costs that would have been claimed by, incurred by or awarded to the party with pro bono representation in respect of that representation had it not been provided free of charge; and
  - (c) references to 'receiving party' are to be read, as meaning a party who has pro bono representation and who would have been entitled to be paid costs in respect of that representation had it not been provided free of charge.

#### **44.4 Basis of assessment**

- (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.
- (5) Omitted
- (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>1</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.

#### **44.5 Factors to be taken into account in deciding the amount of costs**

- (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;
  - (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)

#### **44.6 Fixed costs**

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

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<sup>1</sup> 1974 c.47.

#### **44.7 Procedure for assessing costs**

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)

#### **44.8 Time for complying with an order for costs**

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)

#### **44.9 Costs on the small claims track and fast track**

- (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.

#### **44.10 Limitation on amount court may allow where a claim allocated to the fast track settles before trial**

- (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)

#### **44.11 Costs following allocation and re-allocation**

- (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 )

#### **44.12 Cases where costs orders deemed to have been made**

- (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 36.10(1) or (2) (claimant's entitlement to costs where a Part 36 offer is accepted);
  - (c) Omitted
  - (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.
- (1A) Where such an order is deemed to be made in favour of a party with pro bono representation, that party may apply for an order under section 194(3) of the Legal Services Act 2007.
- (2) Interest payable pursuant to section 17 of the Judgments Act 1838<sup>1</sup> or section 74 of the County Courts Act 1984<sup>2</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.

#### **44.12A Costs-only proceedings**

- (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) Except as provided in paragraph (4A) (and subject to rule 44.12B), in proceedings to which this rule applies the court –
  - (a) may
    - (i) make an order for costs to be determined by detailed assessment; or
    - (ii) dismiss the claim; and
  - (b) must dismiss the claim if it is opposed.
- (4A) In proceedings to which Section II of Part 45 applies, the court shall assess the costs in the manner set out in that Section.

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<sup>1</sup> 1838 c.110. Section 17 was amended by S.I. 1998/2940.

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

- (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 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)

#### **44.12B Costs-only proceedings – costs in respect of insurance premium in publication cases**

- (1) If in proceedings to which rule 44.12A applies it appears to the court that –
- (a) if proceedings had been started, they would have been publication proceedings;
  - (b) one party admitted liability and made an offer of settlement on the basis of that admission;
  - (c) agreement was reached after that admission of liability and offer of settlement; and
  - (d) either –
    - (i) the party making the admission of liability and offer of settlement was not provided by the other party with the information about an insurance policy as required by the Practice Direction (Pre-Action Conduct); or
    - (ii) that party made the admission of liability and offer of settlement before, or within 42 days of, being provided by the other party with that information,
- no costs may be recovered by the other party in respect of the insurance premium.
- (2) In this rule, ‘publication proceedings’ means proceedings for –
- (a) defamation;
  - (b) malicious falsehood; or
  - (c) breach of confidence involving publication to the public at large.

#### **44.13 Special situations**

- (1) Where the court makes an order which does not mention costs –
- (a) subject to paragraphs (1A) and (1B), the general rule is that no party is entitled –
    - (i) to costs; or
    - (ii) to seek an order under section 194(3) of the Legal Services Act 2007, in relation to that order; but
  - (b) this does not affect any entitlement of a party to recover costs out of a fund held by that party as trustee or personal representative, or pursuant to any lease, mortgage or other security.
- (1A) 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 its order does not mention costs, it will be deemed to include an order for applicant’s costs in the case.
- (1B) Any party affected by a deemed order for costs under paragraph (1A) may apply at any time to vary the 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.



#### **44.14 Court's powers in relation to misconduct**

- (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.

#### **44.15 Providing information about funding arrangements**

- (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 pre-trial check list (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 pre-trial check list, 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)

#### **44.16 Adjournment where legal representative seeks to challenge disallowance of any amount of percentage increase**

- (1)** This rule applies where the Conditional Fee Agreements Regulations 2000 or the Collective Conditional Fee Agreements Regulations 2000 continues to apply to an agreement which provides for a success fee.
- (2)** 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 client to be –
  - (i) notified of the order sought; and
  - (ii) separately represented.

(Regulation 3(2)(b) of the Conditional Fee Agreements Regulations 2000, which applies to Conditional Fee Agreements entered into before 1st November 2005, 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. Regulation 5(2)(b) of the Collective Conditional Fee Agreements Regulations 2000, which applies to Collective Conditional Fee Agreements entered into before 1st November 2005, makes similar provision in relation to collective conditional fee agreements.)

#### **44.17 Application of costs rules**

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>1</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).

#### **44.18 Costs capping orders – General**

- (1) A costs capping order is an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made.
- (2) In this rule, ‘future costs’ means costs incurred in respect of work done after the date of the costs capping order but excluding the amount of any additional liability.
- (3) This rule does not apply to protective costs orders.
- (4) A costs capping order may be in respect of –
  - (a) the whole litigation; or
  - (b) any issues which are ordered to be tried separately.
- (5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –
  - (a) it is in the interests of justice to do so;
  - (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and
  - (c) it is not satisfied that the risk in sub-paragraph (b) can be adequately controlled by –
    - (i) case management directions or orders made under Part 3; and
    - (ii) detailed assessment of costs.
- (6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including –
  - (a) whether there is a substantial imbalance between the financial position of the parties;

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<sup>1</sup> 1998 c. 34.

- (b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;
  - (c) the stage which the proceedings have reached; and
  - (d) the costs which have been incurred to date and the future costs.
- (7) A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless a party successfully applies to vary the order. No such variation will be made unless –
- (a) there has been a material and substantial change of circumstances since the date when the order was made; or
  - (b) there is some other compelling reason why a variation should be made.

#### **44.19 Application for a costs capping order**

- (1) An application for a costs capping order must be made on notice in accordance with Part 23.
- (2) The application notice must –
  - (a) set out –
    - (i) whether the costs capping order is in respect of the whole of the litigation or a particular issue which is ordered to be tried separately; and
    - (ii) why a costs capping order should be made; and
  - (b) be accompanied by an estimate of costs setting out –
    - (i) the costs (and disbursements) incurred by the applicant to date; and
    - (ii) the costs (and disbursements) which the applicant is likely to incur in the future conduct of the proceedings.
- (3) The court may give directions for the determination of the application and such directions may –
  - (a) direct any party to the proceedings –
    - (i) to file a schedule of costs in the form set out in the Costs Practice Direction;
    - (ii) to file written submissions on all or any part of the issues arising;
  - (b) fix the date and time estimate of the hearing of the application;
  - (c) indicate whether the judge hearing the application will sit with an assessor at the hearing of the application; and
  - (d) include any further directions as the court sees fit.

#### **44.20 Application to vary a costs capping order**

An application to vary a costs capping order must be made by application notice pursuant to Part 23.

